ETHICAL RISKS ARISING FROM LAWYERS' USE OF (AND REFUSAL TO USE) SOCIAL MEDIA

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I. SOCIAL MEDIA IN THE LEGAL PROFESSION

The number of lawyers and law firms participating in social media is, and has been, on the rise.[1] According to the American Bar Association ("ABA"), in 2010, 56 percent of lawyers surveyed reported that they maintain a presence in an online community or social network, such as Facebook, LinkedIn, LawLink, or Legal OnRamp.[2] This is a 30 percent increase from the number of legal professionals who participated in social networking in 2009 and a 250 percent increase from 2008.[3] As the number of legal professionals using social media continues to increase, so, too, does the number of stories of lawyers' misuse of social media.

In August 2010, the Conference of Court Public Information Officers published the results of its year-long study on the impact of new technology, including social media, on the courts and legal system (the "CCPIO Report").[4] The CCPIO Report defines social media as "highly interactive, multimedia, websites and programs that allow individuals to form into communities and share information, knowledge and experiences more quickly and effectively than ever before."[5] The universe of social-media tools can be classified into several types, three of which (social-networking sites, blogs, and microblogs) are relevant to the topics discussed in this article.

The first type of social media relevant to this discussion, online social networking, is also the most popular.[6] As described by one court, social-networking sites "serve as an online newsletter or as a personal journal — where an

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1. *See, e.g.,* Posting of Kevin O'Keefe, *State of the AmLaw 200 Blogosphere: March, 2010*, Real Lawyers Have Blogs, (Mar. 11, 2010), *available at* http://kevin.lexblog.com/2010/03/articles/large-law/state-of-the-amlaw-200-blogosphere-march-2010/ (reporting that the number of AmLaw-ranked law firms with blogs increased by 147 percent — from 39 to 297 — between 2007 and 2010).

2. ABA, 2010 Legal Technology Survey Report, Vol. IV, Web & Commc'n Tech., at 23-24 (2010).

3. *Id.*

4. Conference of Court Public Info. Officers, New Media Comm., *New Media and the Courts: The Current Status & a Look at the Future* (Aug. 26, 2010) *at* http://www.ccpio.org (hereinafter, the "CCPIO Report").

5. *Id.*

6. In June 2010, the Nielsen Company reported that social networking was the most popular online activity. *See* Nielsen Company, *What Americans Do Online*: *Social Media & Games Dominate*, NielsenWire.com, (Aug. 2, 2010), *at* http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/. In March 2010, Facebook was ranked as the most-often visited website, beating out Google, for an entire week. *See, e.g.,* Ian Paul, *It's Official: Facebook Rules the Web*, PC World, (Mar. 16, 2010), *at* http://www.pcworld.com/article/191635/its_official_facebook_rules_the_web.html.

individual can post concerns, ideas, opinions, etc. — and it can contain links to web sites or can use images or video."[7] Content uploaded by a user is stored in the user's "profile."[8] The user designates other users as "friends," who are able to then view the user's profile and leave comments.[9] Various levels of privacy settings can be applied to a user's profile.[10] One state law defines a social-networking site as having three unique characteristics:

> Social networking web site means a web page … (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users … with or without the creator's permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile, and users who have viewed or accessed the creator's profile.[11]

Currently, the most popular social-networking site for personal use is Facebook.[12] MySpace was once the most popular site and still is a powerful player.[13] LinkedIn is the most popular online social network for professional use, linking more than seventy million professionals to develop business opportunities, collaborate, and share job opportunities.[14] Compared to Facebook, a user's LinkedIn profile is more like an online resume and less like a high school yearbook.[15]

Blogs are the third type of social media discussed in this article. Blogs have become so pervasive in the legal profession that they have been awarded their own name: blawgs.[16] There are blawgs on practically every legal topic

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7. Ind. Newspapers, Inc. v. Brodie, 966 A.2d 432, 434 (Md. 2009).

8. *See Set Up a Profile,* Facebook.com, *at* http://www.facebook.com/help/?guide=set_up_profile.

9. *See Find Your Friends*, Facebook.com, *at* http://www.facebook.com/help/?guide=find_friends.

10. *See Privacy Help Center*, Facebook.com, *at* http://www.facebook.com/help/?topic=privacy.

11. Neb. Rev. Stat. § 29– 40001.01(9) (2010). *See also* Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845-46 (W.D. Tex. 2007) ("The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests.").

12. http://www.facebook.com. As of July 2010, there were 500 million Facebook users. *See* Posting of Adam Ostrow, *It's Official: Facebook Passes 500 Million Users*, Mashable.com, (July 21, 2010), *at* http://mashable.com/2010/07/21/facebook-500-million-2/.

13. http://www.myspace.com. *See also* Brian Kane, *Balancing Anonymity, Popularity, & Micro-Celebrity: The Crossroads of Social Networking & Privacy*, 20 Alb. L.J. Sci. & Tech. 327, 334-35 (2010) (describing the shift in popularity between the two sites).

14. *See* Posting of Leena Rao, *LinkedIn Tops 70 Million Users; Includes Over One Million Company Profiles*, Techcrunch.com, (June 20, 2010), *at* http://techcrunch.com/2010/06/20/linkedin-tops-70-million-users-includes-over-one-million-company-profiles/.

15. http://www.linkedin.com; http://press.linkedin.com/about.

16. Brian A. Craddock, *A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How Blogs Are Changing the Legal Community*, 60 Mercer L. Rev. 1353, 1355 (2009). Delaware lawyers have been slower to embrace blawgs. In January 2010, there were fewer than ten Delaware legal blogs written by Delaware lawyers. *See* Margaret M. DiBianca, *Del. Lawyers Who Blog*, Del. Lawyer, Winter 2009/2010, at 24.

imaginable.[17] Even AmLaw-ranked law firms have joined the online discussion.[18] Blogs are updated frequently with narrative posts and commentary displayed in reverse-chronological order.[19]

Microblogs are the final type of social media discussed in this article. Microblogging is "a form of multimedia blogging that allows users to send and follow brief text updates."[20] Twitter is the leading microblogging platform.[21] Users send messages ("tweets") consisting of up to 140 characters.[22] Almost all messages on Twitter are public but users limit whose posts they see by "following" only the users who they find interesting.[23] Thus, when a user signs in to his Twitter account, he sees only the tweets of those users that he has chosen to follow.[24]

All types of social media share a common, defining characteristic — user-generated content.[25] Blogs, Facebook profiles, and tweets are all created by individual users and published to a potentially unlimited number of other users. With a simple click of the computer mouse, users can share information that, perhaps, ought not to be shared. As one court explained, "the act of posting information on a social networking site, without the poster limiting access to that information, makes whatever is posted available to the world at large."[26] The "user-to-user" nature of social media[27] has transformed the way the internet is used, resulting in "a migration from the static, unidirectional, mass communication tools of the 1990s to a concept of the Web as highly interactive, dynamic and community-oriented — a migration from Web 1.0 to Web 2.0."[28]

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17. *See Blawg Directory*, ABA J., *at* http://www.abajournal.com/blawgs ("A comprehensive directory of continually updated law blogs.").

18. *See, e.g.,* O'Keefe, *supra*, note 1.

19. *See* Aaron Blank, Comment, *On the Precipe of E-Discovery: Can Litigants Obtain Employee Social Networking Web Site Information Through Employers?*, 18 CommLaw Conspectus 487, 489 (2010); Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 Rich. J.L. & Tech. 5 (2007).

20. CCPIO Report, *supra*, note 4, at 38.

21. Michelle McGiboney, *Twitter's Tweet Smell of Success*, Nielsen Wire, (Mar. 18, 2009), *at* http://blog.nielsen.com/nielsenwire/online_mobile/twitters-tweet-smell-of-success.

22. Daniel Havivi, *Metered-Usage Billing & the Broadband Internet Fairness Act*, 11 N.C. J.L. & Tech. On. 214, 229 n.100 (2010).

23. Tim O'Reilly & Sarah Milstein, The Twitter Book 25 (2009).

24. *Id. See* Posting by Chloe Albanesius, *Mobile Apps Helps Boost Twitter Membership to 145M*, PC Mag.com, (Sept. 3, 2010), *at* http://www.pcmag.com/article2/0,2817,2368704,00.asp.

25. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, & Scholarship*, J. Computer-Mediated Commc'n, at 5 (2007), *available at* http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html.

26. *Ind. Newspapers,* 966 A.2d at 438 n.3.

27. Evan E. North, Comment & Note, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 Kan. L. Rev. 1279, 1288 (2010).

28. *Id.*

This transformation has attracted the attention of a significant number of legal professionals, who have embraced social media for personal and professional purposes. It has also caused many legal professionals to become warier than ever of the potential dangers of the Internet, resulting, in part, from a fear of the unknown.[29] As discussed in part II of this article, though, ignorance is not bliss when it comes to attorneys' familiarity with — and even use of — social media. Instead, a lawyer's ethical duties may actually require him to become familiar with, if not make use of, social media. Part III addresses some of the risks facing lawyers who do engage in social media. Thus, the purpose of this article is to encourage lawyers to take an active interest in social media and to understand its potential effect on their practices, while not losing sight of the potential ethical risks.

II. THE ETHICAL RISKS OF SOCIAL-MEDIA IGNORANCE

Although social media is being used by more lawyers than ever before,[30] many legal professionals refuse to engage in social media at all.[31] Some believe that social media offers no benefit to their particular practice.[32] Others are wary of the risks associated with any new technology.[33] Naysayers and late adopters alike may be equally surprised to learn that ignoring social media altogether may constitute a violation of their ethical obligations.

A The Duty of Competence

Rule 1.1 of the Delaware Rules of Professional Conduct (the "Rules") requires lawyers to be competent in their representation of clients.[34] Ethical competence requires a lawyer to possess the "legal knowledge, skill and preparedness reasonably necessary for the representation."[35] Comment 6 to Rule 1.1 instructs that lawyers "should keep abreast of changes in the law and its practice."[36] Thus, the duty of competence includes a duty to stay current in not only the substantive area of law in which one practices, but in the procedural and technical aspects as well.[37]

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29. *See* CCPIO Report, *supra*, note 4, at 70 (reporting that privacy was reason most often cited (75 percent) by respondents who do not use social-networking sites; ethical concerns was the second most cited reason (47 percent)).

30. *See, e.g.,* O'Keefe, *supra*, note 1.

31. *See* In re: B. Carlton Terry, Jr., No. 08-234, at ¶ 3 (N.C. Judicial Standards Comm'n, Apr. 1, 2009), *available at* http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf (during a conversation with the defendant's attorney and the presiding judge about Facebook, the plaintiff's lawyer stated that she did not know what "Facebook" was, and did not have time for it).

32. *See* CCPIO Report, *supra*, note 4, at 70 ("limited usefulness" was the most often cited reason for not using a new technology).

33. *See* Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril & the Promise*, 49 Duke L.J. 147, 150 (1998) (discussing lawyers' aversion to new technology).

34. Del. Prof. Cond. R. 1.1.

35. *Id.*

36. *Id.* at cmt. 6.

37. ABA Comm. on Ethics & Prof'l Responsibility, *Ethical Issues in Lawyer-to-Lawyer Consultation*, Formal Op. 98-411, n.1 (1998) (noting that the ethical issues are the same in the substantive and procedural contexts).

On the most basic level, the duty of competence requires a lawyer to be knowledgeable about the substantive law in the area in which he practices.[38] At least one court has found that the issuance of a friend request via a social-networking site constituted a "contact" in violation of a temporary restraining order.[39] Thus, for family-law practitioners and criminal-defense attorneys who represent clients subject to no-contact orders, the duty of competency may require them to warn their clients of the potential dangers of social-networking sites.[40]

There are other scenarios that would similarly require a basic understanding of social media. For example, the American Academy of Matrimonial Lawyers reports that 66 percent of divorce attorneys use Facebook as their primary source for online evidence.[41] Based on this statistic, can a family-law practitioner be truly competent if he ignores social media and lacks even a basic understanding of what Facebook actually is? Perhaps the competency standard is not yet this high. But, if the use of social media continues to increase as predicted, it may be possible that, soon, a basic awareness of social media will be necessary for the competent practice of law.

B The Duty of Diligence

If the competency standard requires attorneys to be at least familiar with social media, the duty of diligence may require a more hands-on understanding of the specific social-media applications. Comment 1 to Rule 1.3 provides that a lawyer should act "with zeal in advocacy upon the client's behalf."[42] If the diligent attorney must be zealous in pursuing a matter on his client's behalf, it seems possible that more than familiarity may be required — actual *use* of social media may be necessary.

Take, for example, the divorce scenario discussed above. In this example, the duty of diligence as applied to social media may trigger several obligations. Initially, during the lawyer's intake interview of the potential client, the duty of diligence may require him to ask her about her social-networking activities. Does she, for example, have a Facebook profile? If so, does it contain any disparaging comments about her spouse?

Best business practices, as well as the duty of diligence, may require the lawyer to at least view the potential client's Facebook profile if she has one. Or, if the profile has been restricted with optional privacy settings, the duty of diligence may require the lawyer to send the client a friend request that, once accepted, will give the lawyer access to the client's profile. The lawyer may be able to use Facebook to effectively screen clients — declining to represent any individual who is less than forthcoming with facts or who tells a story in person different than the one she tells online.[43]

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38. *See, e.g.,* Burton v. Mottolese, 835 A.2d 998 (Conn. 2003) (affirming disbarment where attorney demonstrated lack of competence with respect to substantive and procedural issues).

39. *See* People v. Fernino*,* 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008).

40. *See* In re Goldstein, 990 A.2d 404, 408 (Del. 2010) (finding that lawyer failed to "provide competent representation because he failed to discover or explain to his client" that the client's conduct was unlawful).

41. Am. Acad. of Matrimonial Lawyers, *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, (Feb. 10, 2010), *at* http://www.aaml.org/go/about-the-academy/press/press-releases/big-surge-in-social-networking-evidence-says-survey-of-nations-top-divorce-lawyers/.

42. Del. Prof. Cond. R. 1.3, cmt. 1.

43. *See* Mann v. Dep't of Family & Protective Servs., No. 01-08-01004, 2009 Tex. App. LEXIS 7326, at *4 (Tex. Ct. App. Sept. 17, 2009) (concluding that petitioner-mother had endangered her child based, in part, on photos from her MySpace profile, which showed her drinking; the mother was not of legal drinking age).

The duty of diligence extends far beyond the initial intake interview. If more than half of divorce attorneys say that Facebook is their best source for online evidence, then failure to utilize the site as part of informal discovery may constitute a failure to perform due diligence. A divorce attorney who ignores Facebook and other social-networking sites as a source of possible evidence could be compared to a prosecutor who fails to conduct a criminal background check on a defendant's key alibi witness.[44] Both may be in violation of Rule 1.3.[45]

Once the lawyer confirms that the client's profile does not contain any potentially harmful content and agrees to take on the representation, additional steps may be required to fulfill the duty of diligence. For example, does the duty of diligence require the lawyer to warn his client against posting potentially damaging content for the duration of the litigation? If it is assumed that the diligent opposing counsel is almost certain to search online for information about his adversary's client, it seems to follow that the lawyer should advise his client not to post information or pictures that could negatively impact her case. And, taking the idea a step further, it could be argued that the duty of diligence also requires a lawyer to monitor the Internet for information that is potentially adverse to his client's position throughout the course of the litigation.[46]

C. The Duty to Preserve Evidence

But the ethical quandaries do not stop there. Suppose the lawyer discovers that his client's Facebook page does, in fact, contain several unsavory images or comments that would likely decrease the value of her claims. The lawyer's reaction may be to instruct the client to remove the offensive or harmful content or, even, to delete her Facebook account. Rule 3.4(a), however, prohibits the lawyer from making this recommendation.

Rule 3.4(a) prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so.[47] Lawyers have an ethical duty to preserve electronically stored information, which includes social-networking profiles. In Delaware, an "affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would

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44. *See generally* Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir. 1990) ("Trial counsel's admitted failure to attempt to find and interview [potential alibi witnesses] falls short of the diligence that a reasonably competent attorney would exercise under similar circumstances.").

45. *See*, *e.g.,* Partee v. United Recovery Group, No. CV 09-9180, 2010 U.S. Dist. LEXIS 54025, at *6 (C.D. Cal. May 3, 2010) (granting motion to dismiss based, in part, on evidence submitted by the defendant from the plaintiff's MySpace page, which stated that she worked in Utah, as evidence that she also lived in Utah); Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., No. 07-C-1586, 2010 U.S. Dist. LEXIS 42748, at *17 (N.D. Ill. Apr. 29, 2010) (noting the number of persons joining a Facebook page as evidence); United States v. Gagnon, No. 10-52-B-W, 2010 U.S. Dist. LEXIS 40392, at *9 (D. Me. Apr. 23, 2010) (noting that the defendant's son "as evidenced by the Facebook page submitted into evidence, apparently harbors considerable animus toward [a witness]")).

46. Such a scenario is not difficult to imagine. *See, e.g.,* Vesna Jaksic, *Litigation Clues Are Found on Facebook*, Nat'l L.J., Oct. 15, 2007, at 1 (describing divorce case that was negatively impacted when it was revealed that petitioning husband had described himself as "single and looking" on his MySpace page). Similar outcomes have been reported in the custody context, as well. *See, e.g.,* J.N. v. D.R., No. CN07-01654, 2008 Del. Fam. Ct. LEXIS 62, at *17 (Del. Fam. Ct. Jan. 29, 2008) (considering as evidence pictures introduced by father of mother with alcohol, which mother acknowledged, had been obtained from either her or her friend's MySpace profile); In re T.T., 228 S.W.3d 312, 322-23 (Tex. Ct. App. 2007) (in case involving termination of parental rights, the court considered the father's statement that he did not want children, posted on his MySpace profile).

47. Del. Prof. Cond. R. 3.4(a) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.").

lead to a conclusion that litigation is imminent or should otherwise be expected."[48] Thus, the duty to preserve evidence "may arise before any litigation has been commenced."[49]

Accordingly, a lawyer has an affirmative duty to ensure the preservation of a client's social-network profile if the profile contains information or content relevant to the dispute.[50] A lawyer who instructs a client to *delete* her social-networking account or to remove content from it is likely guilty of spoliation of evidence, which could result in significant sanctions.[51] In Delaware, an adverse inference may be drawn if the court determines that a party acted "intentionally or recklessly in failing to preserve the evidence."[52]

The better alternative is to have the client set her profile page as "private" using the various privacy settings provided by the application. The opposing party will not have direct access to the contents of her page but could request the evidence through formal discovery channels.[53] That is, of course, if the opposing counsel is diligent.

D. The Duty to Supervise

The duties of competence and diligence extend beyond a lawyer's own actions. Any lawyer with supervisory authority will be responsible for the unethical acts of the lawyers and nonlawyers he supervises. These duties are set forth in Rules 5.1 and 5.3.[54]

1. Other Lawyers

Rule 5.1(a) requires a firm's managing partners to make reasonable efforts to ensure that all lawyers comply with their ethical duties.[55] Rule 5.1(b) requires a lawyer with supervisory duties to make reasonable efforts to ensure that

48. Sears, Roebuck & Co. v. Midcap, 893 A.2d 542, 550 (Del. 2006).

49. Triton Construction Co., Inc. v. E. Shore Elec. Servs., Inc., C.A. No. 3290-VCP, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009), *aff'd,* 988 A.2d 938 (Del. 2010).

50. *See* EEOC v. Simply Storage Mgmt., LLC, No. 09-1223-WTL-DML, 2010 U.S. Dist. LEXIS 52766 (S.D. Ind. May 11, 2010) (granting the defendant's motion to compel production of claimants' social-networking profiles, and ordering EEOC to "err in favor of production.").

51. *See* Micron Tech., Inc. v. Rambus, Inc., 255 F.R.D. 135 (D. Del. Jan. 9, 2009) (imposing harsh penalties against a defendant, who destroyed relevant documents after litigation had become reasonably foreseeable but before litigation commenced); TR Investors, LLC v. Genger, C.A. No. 3994, 2009 Del. Ch. LEXIS 203 (Del. Ch. Dec. 9, 2009) (ordering sanctions where a party deleted ESI, which constituted spoliation and contempt), *clarified by* 2010 Del. Ch. LEXIS 19 (Del. Ch. Feb. 3, 2010).

52. *Id.*

53. *See, e.g., Simply Storage Mgmt.*, 2010 U.S. Dist. LEXIS 52766 (requiring claimants to produce their entire social-networking profiles in response to the defendant's discovery request). *See also* Ledbetter v. Wal-Mart Stores, Inc., No. 06-1958, 2009 U.S. Dist. LEXIS 126859 (D. Colo. Apr. 21, 2009) (denying the plaintiff's motion for a protective order with respect to discovery of information on her social-networking profiles marked as private); Mackelprang v. Fidelity Nat'l Title Agency of Nev., Inc., No. 06-00788-JCM-GWF, 2007 U.S. LEXIS 2379 (D. Nev. Jan. 9, 2007) (ordering the plaintiff to produce private Facebook messages if they related to her claims or damages); Beye v. Horizon Blue Cross Blue Shield, 568 F. Supp. 2d 556 (D.N.J. 2006) (ordering the plaintiffs to produce any writings that related to their eating disorders, including entries on Web sites, such as Facebook or MySpace).

54. Del. Prof. Cond. R. 5.1, 5.3.

55. *Id.* at 5.1(a).

any lawyer reporting to him similarly complies with all ethical duties.[56] Thus, the duty to supervise, as set forth in Rule 5.1, requires more than a "do-no-harm" approach. A lawyer with supervisory responsibilities must take affirmative steps to ensure that the lawyers and nonlawyers below him in the reporting structure are aware of and in compliance with the rules of professional conduct to the same extent the lawyer himself must comply.

Rule 5.1(a) has one particularly notable result when applied in the context of social media.[57] Specifically, Rule 5.1(a) seems to require that a law firm, through its managing partners, take affirmative steps to educate its lawyers about the ethical use of social media.[58] Additionally, the rule may require that a law firm take the affirmative step of adopting and implementing an effective policy or set of guidelines to address the use of social media by its lawyers.[59]

Comment 2 to the ABA Model Rule 5.1 supports this conclusion.[60] The comment states that Rule 5.1(a) "requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules[]."[61] Just as firms warn their lawyers about the latest fraud schemes being perpetrated via the Internet, so too should they educate their lawyers about the dangers of careless use of social media.

2. Nonlawyer Staff

Rule 5.3(b) holds a lawyer responsible for any unethical conduct of his nonlawyer staff.[62] Therefore, just as Rule 5.1 requires a firm to educate its lawyers about social media, so, too, would Rule 5.3 require a lawyer to educate his nonlawyer staff.[63] It may be difficult to imagine that lawyers have an ethical duty to provide social-media training to paraprofessional and administrative staff when so many lawyers have no knowledge in this area themselves. But this is no defense to a disciplinary action. So, it seems necessary for lawyers to get up to speed quickly, despite how daunting or unfamiliar social media may appear.

The Pennsylvania Ethics Committee addressed a lawyer's ethical obligations in the context of a nonlawyer staff member's use of social-networking sites for informal discovery.[64] The committee concluded that it would be unethical

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56. *Id.* at 5.1(b).

57. *Id.* at 5.1(a).

58. *Id.*

59. *Id.* at 5.3(b). *See* Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 Alb. L. Rev. 113, 117 (2009). According to one survey, approximately 25 percent of Delaware law firms have a written social-media policy in place. Margaret M. DiBianca, *By the Numbers*: *Tech. Use by Del. Lawyers*, Del. Lawyer, Winter 2009/2010, at 27.

60. Model Prof. Cond. R. 5.1, cmt. 2.

61. *Id.*

62. Del. Prof. Cond. R. 5.3(b).

63. *See id.*

64. Phila. Bar Ass'n. Op. 2009-02 (Mar. 2009) (construing Pa. Model Rules of Prof'l Conduct R. 4.1, 5.3, 8.4), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

for a lawyer to instruct (or permit) a non-attorney staff to send a friend request to a nonparty witness for the purpose of accessing information on the witness's Facebook profile.[65] Unless the staff member expressly disclosed his identity, his affiliation with the supervising attorney, and the purpose of his friend request, the staff member would be engaged in impermissible deception in violation of Rule 8.4.[66] In turn, pursuant to Rule 5.3, the supervising attorney would be responsible for the staff member's conduct.[67]

The committee's opinion is in accord with Delaware requirements for nonlawyer staff's contact with witnesses.[68] Delaware law requires that, when attempting to contact a witness, a lawyer's agent properly disclose the purpose of his contact and his affiliation with the lawyer.[69] Failure to comply with the "*Monsanto* requirements" of an interview by a lawyer's agent constitutes a violation of Rules 4.2 and 4.3 by the lawyer.[70] Thus, the committee's opinion merely extends the *Monsanto* duty of disclosure into the virtual world.

In addition to Rules 4.2 and 4.3, the committee's opinion implicates several other rules of professional conduct. For example, if the nonlawyer personnel had suggested the friend-request idea to the supervising attorney, Rule 1.1 seems to require that attorney have at least a basic understanding of the concept before responding to the suggestion.[71] Further, Rule 1.3 seems to suggest that the diligent attorney would ask the nonparty witness about her social-networking use during her deposition and issue additional information via formal discovery requests where appropriate.[72] Finally, Rule 5.3 seems to require that the attorney take affirmative steps to educate his nonlawyer staff about the committee's rulings and to ensure that they comply with the decision.[73]

III THE RISKS OF SOCIAL-MEDIA PARTICIPATION

A. Confidentiality-Related Risks

Preserving the confidentiality of attorney-client communications is at the very heart of our ethical duties;[74] yet, stories of breached confidences continue to make headlines.[75] Rule 1.6 requires lawyers to maintain the confidentiality of

65. *Id.*

66. *Id.*

67. Del. Prof. Cond. R. 5.3(b).

68. *See* Monsanto Co. v. Aetna Casualty & Surety Co., 593 A.2d 1013 (Del. Super. Ct. 1990).

69. *Id.* at 1016.

70. *Id.*

71. *See* Del. Prof. Cond. R. 1.1.

72. *See id.* at 1.3.

73. *See* In re Otlowski, 976 A.2d 172 (Del. 2009) (finding that the respondent violated Rule 5.3 by failing to have "reasonable safeguards in place" to prevent ethical violations and, by failing to "supervise his employee(s) generally with respect to compliance with the Rules").

74. *See, e.g.,* Daniel R. Fischel, *Lawyers & Confidentiality*, 65 U. Chi. L. Rev. 1, 3-9 (1998) (explaining the important role of confidentiality to the attorney-client relationship).

75. *See* Debra Cassens Weiss, *Ethics Officials Seeing More Cases from Lawyers' Online Foibles*, ABA J., (May 11, 2010), *at* http://www.abajournal.com/news/article/ethics_officials_seeing_more_cases_from_lawyers_online_foibles/.

information "relating to the representation of a client" unless the client authorizes the disclosure, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure would qualify for one of several exceptions.[76] Comment 16 provides that lawyers "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."[77]

1. By Blog Post

There are numerous stories of confidentiality breaches by way of attorney blog post. This is not surprising; blogging is, after all, a form of storytelling. The narrative style of a blog makes it very easy for the unwary attorney to share too much.

One of the most widely publicized stories involving a lawyer's disclosure of confidential client information via blog post is that of Kristine Ann Peshek.[78] Peshek, a former Illinois assistant public defender, was charged with violating several ethical rules, including Rule 1.6, for information she posted on her blog.[79] In her posts, she regularly referred to clients by first name, nickname, or jail identification number, and described in detail the clients' cases, personal lives, and drug use, among other private and potentially detrimental or embarrassing information.[80] Although she made some meager attempts to cloak the identity of her clients, other information in the posts made the clients easily identifiable.[81]

2. By Less Innocuous Acts

Some might say that Ms. Peshek exercised poor judgment when she chose to write and publish such seemingly obvious confidential information about her clients. But what about confidentiality issues in other, nonnarrative forms of social media where disclosure seems more like an inadvertent oversight and less like a conscious decision? There are several scenarios wherein conduct far less offensive than Ms. Peshek's could result in the inadvertent disclosure of confidential client information.

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76. DEL. PROF. COND. R. 1.6(a). Exceptions are set forth in Rule 1.6(b):

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

DEL. PROF. COND. R. 1.6(b).

77. *Id.* at cmt. 16.

78. *See, e.g.*, Debra Cassens Weiss, *Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients*, ABA J. (Sept. 10, 2009), at http://www.abajournal.com/news/article/blogging_assistant_pd_accused_of_revealing_secrets_of_little-disguised_clie/.

79. In re Peshek, Comm'n No. 09 CH 89 (Aug. 25, 2009), *available at* https://www.iardc.org/09CH0089CM.html.

80. *Id.*

81. *Id.*

Take, for example, the social-networking site, LinkedIn, which is geared towards professionals, including attorneys.[82] Users "connect" with other users, who are then added to each other's "network." Once connected, users can view all of the connections in each other's networks. For example, if Lawyer X connects with Client A, Client A will be able to view all of the users in Lawyer X's network. Thus, every connection in a user's network will be able to view who is in the user's online Rolodex, which could lead to the inadvertent disclosure of an attorney-client relationship.[83] The same risk exists in the context of friend lists in a user's Facebook profile.[84]

A similar risk arises from social-networking applications that utilize geotagging. Geotagging "tags" information and pictures with GPS coordinates.[85] Foursquare is a popular location-based, social-networking service that utilizes geotagging.[86] As explained on its website, "Foursquare lets users 'check in' to a place when they're there, tell friends where they are and track the history of where they've been and who they've been there with."[87]

Each time a user announces his location, he is awarded points.[88] Businesses register with Foursquare and award promotional discounts and prizes to the users with the most visits.[89] For example, a user can announce to his friends that he is currently at the local coffee shop by accessing the Foursquare application through his mobile phone.

Foursquare is not the only social-networking application that utilizes geotagging.[90] Twitter users can include their location when they post a tweet using the "Tweet Your Location" feature.[91] And Facebook announced Facebook Places in August 2010.[92]

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82. *See* http://www.LinkedIn.com; LinkIn.com *What Is Linked In?, at* http://learn.linkedin.com/what-is-linkedin/ (describing the site as the "world's largest professional network"); LinkedIn.com, *User Guide for Attorneys, at* http://learn.linkedin.com/attorneys/ (one of nine user guides in LinkedIn's Learning Center).

83. *See* DEL. PROF. COND. R. 1.6, cmt. 4 (prohibiting a lawyer from revealing information if there is a "reasonable likelihood that the listener will be able to ascertain the identity of the client").

84. *See* Bennett, *supra*, note 59, at 119 ("Simply making a list of contacts public on a networking site, for example, could disclose a confidential relationship.").

85. *See* Josh Blackman, *Omniveillance, Google, Privacy In Public, & the Right to Your Digital Identity: A Tort for Recording & Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 332 (2009) (describing the geotagging feature on the Apple iPhone 3G, which "automatically records the latitude and longitude coordinates where a photograph is taken").

86. *See* http://foursquare.com.

87. *See* http://foursquare.com/about.

88. *See* Posting of Jason Kincaid, *Foursquare Starts to Enforce the Rules, Cracks Down on Fake Check-Ins*, TECHCRUNCH, (Apr. 7, 2010), *at* http://techcrunch.com/2010/04/07/foursquare-starts-to-enforce-the-rules-cracks-down-on-fake-check-ins/.

89. *See Foursquare for Your Business*, *at* http://foursquare.com/businesses/.

90. For a detailed discussion of the ways in which geotagging and related technologies are being used see Mark Burdon, *Privacy Invasive Geo-Mashups: Privacy 2.0 & the Limits of First Generation Info. Privacy Laws*, 2010 U. ILL. J.L. TECH. & POL'Y 1 (2010).

91. *See* Twitter Help Center, *Twitter Places and How to Use Them*, *at* http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/194473-twitter-places-and-how-to-use-them.

92. *See* Posting of Jolie O'Dell, *A Field Guide to Using Facebook Places*, MASHABLE.COM, (Aug. 19, 2010), *at* http://mashable.com/2010/08/19/facebook-places-guide/.

An example may illustrate the potential ethical issues arising from a lawyer's use of location-based, social-media applications. Consider again the divorce attorney, who, coincidentally, is very successful and is well-known in the local community. He is contacted by a prominent politician, who tells him that she intends to file for divorce, which she expects will be a surprise to her spouse.

The lawyer agrees to meet with the politician to discuss her case. Because of her high-profile stature, she cautions the lawyer not to disclose their meeting, lest her plans be revealed. The lawyer suggests an out-of-the-way restaurant where they are not likely to be recognized. The meeting goes well and she retains the lawyer to represent her in the divorce.

On his walk back to his car, the lawyer tweets, "Had a great meeting with new client. Life is good." The lawyer has just recently started to use Twitter as a business-development tool and already has several hundred followers. Because he has enabled the "Tweet Your Location" feature in his Twitter account, his update includes his exact coordinates at the time of his post.[93]

As luck would have it, the waiter from the out-of-the-way restaurant takes a break after the lawyer and client leave and has logged into Twitter from his iPhone. The waiter, who makes it a point to follow local businesspeople, including the lawyer, on Twitter, sees the lawyer's tweet about meeting with his "new client." The tweet, which is geotagged, appears with an address one block away from the restaurant.

The waiter quickly figures out that the "new client" is the prominent politician, Mrs. Y, and posts to his several thousand Twitter followers: "Just waited on Lawyer X, who lunched with Mrs. Y — does this mean Mrs. Y is soon to be ex-Mrs. Y and back on the dating scene??" So much for not disclosing the attorney-client relationship.

A word of caution to those readers who are quick to blame the lawyer in the example above — similar disclosures can occur without any action by the lawyer at all. Facebook Places enables users to "check in" to a location (i.e., the out-of-the-way restaurant). It also enables users to "tag" their friends and check them in, as well. So, in the example above, assume that the lawyer got a call from his son, a college student, during lunch. The son had come home for a surprise visit but had forgotten his key. The lawyer tells his son to stop by the restaurant and pick up the lawyer's key.

The son is at the restaurant for just a moment but, being a devoted Facebook user, he "checks in" to the restaurant via Facebook Places, which he accesses via his mobile phone. He checks in his father, as well. All of the son's Facebook friends now know where the lawyer had lunch, thereby reducing, if not eliminating, the secrecy the lawyer took great pains to ensure.

B. Litigation-Related Risks

1. Improper Trial Publicity

Rule 3.6(a) prohibits attorneys from making extrajudicial statements that have a "substantial risk of materially prejudicing a legal proceeding."[94] Rule 3.6(c) provides an exception to the prohibition against trial publicity by permitting an attorney to "protect a client from the substantial undue prejudicial effect of recent publicity" initiated by a third party."[95] Thus, if a third party's blog post or comment is adversely prejudicial to the lawyer's client, the carve-out could

93. *See* Twitter Help Center, *About the Tweet Your Location Feature*, *at* http://support.twitter.com/forums/10711/entries/78525-geotagging-on-twitter.

94. DEL. PROF. COND. R. 3.6(a).

95. *Id.* at 3.6(c).

allow the attorney to respond defensively with a rebuttal post or comment of his own— but only if a reasonable lawyer would believe that a mitigating response is required.[96] Given the free market of ideas that the internet creates, it may be difficult to argue that a response by the lawyer is, in fact, "required."

The story of Florida Assistant State Prosecutor Brandon White serves as an example of how a lawyer may violate the prohibition against trial publicity.[97] At the end of a "trial from hell," in which he was second chair for the State, White posted about the case on his Facebook page.[98] His post was written as a parody of the theme song from *Gilligan's Island* and described his own performance during the trial as "totally awesome."[99]

At the time White posted the update, the jury had completed deliberations but had not returned its verdict, so the risk that the post would "materially prejudice" the outcome of the case was not significant.[100] But, unless White actually knew that deliberations had concluded, his post would seem to violate the prohibition against trial publicity.[101]

96. *See id.* at 3.6(a) (prohibiting a lawyer from making an extrajudicial statement that the lawyer knows or reasonably knows "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter").

97. *See* Posting of Kashmir Hill, *Lawyer of the Day: Brandon White Stranded in Gilligan's Trial*, ABOVE THE LAW, (Apr. 22, 2010), *at* http://abovethelaw.com/2010/04/lawyer-of-the-day-brandon-white/.

98. White's co-prosecutor, Robyn Stone, commented on White's Facebook update: "Hahahah – Brandon and I are in the trial from hell – it is just unbelievable – Brandon has been awesome – Brandon I love your poem…" TC PALM, Apr. 21, 2010, *at* http://www.tcpalm.com/news/2010/apr/21/read-assistant-state-attorney-brandon-whites-faceb/(re-posting White's Facebook post and Stone's comment thereto).

99. *Id*. The lyrical post in full:

> Just sit right back and you'll hear a tale, a tale of a fateful trial,
> That started from this court in St. Lucie County.
> The lead prosecutor was a good woman, the 2nd chair was totally awesome,
> Six jurors were ready for trial that day for a four hour trial, a *four hour trial*.
>
> The trial started easy enough but then became rough.
> The judge and jury confused,
> If not for the courage of the fearless prosecutors,
> The trial would be lost, *the trial would be lost*.
>
> The trial started Tuesday, continued til Wednesday
> And then Thursday, with Robyn and Brandon too,
> The weasel face
> The gang banger defendant
> The Judge, clerk, and Ritzline
> Here in St. Lucie.
>
> So this is the tale of the trial
> it's going on here for a long, long time,
> The prosecutors will have to make the best of things,
> It's an uphill climb.
>
> The New Guy and Robyn
> Will do their very best,
> To make sure justice is served
> In the hornets nest.
>
> No rules of evidence or professionalism,
> Not a single ounce of integrity
> Like My Cousin Vinny,
> No ethics involved, no ethics involved.

100. *See* Melissa E. Holsman, *Facebook Poem Gets Prosecutor in Hot Water*, SUN SENTINEL, Apr. 22, 2010, *available at* http://articles.sun-sentinel.com/2010-04-22/news/fl-facebook-poem-ada-20100422_1_jurors-trial-facebook.

101. The judge in the case declared a mistrial for reasons unrelated to White's post. *See id.*

White's boss, Chief Assistant State Attorney Tom Bakkedahl, was not troubled by the post, and described it as "harmless joking among family and friends who believed it would remain private."[102] Bakkedahl did emphasize that the conduct was not a behavior that his office would encourage and afforded a social-media "training moment" for lawyers in the state's attorney's office.[103]

Rule 5.1 supports the need to educate other lawyers about the hasty nature of White's post.[104] But a paralegal could publish information about the case on his or her Facebook profile just as easily as a lawyer.[105] Thus, Rule 5.3 suggests that the training should be extended to the office's nonlawyer staff, as well.[106]

The story of attorney Frank R. Wilson demonstrates that trial-publicity concerns are not limited to the parties' lawyers.[107] Wilson was impaneled on a jury in a criminal burglary trial.[108] Despite the court's instruction not to discuss the case in writing or orally, Wilson posted an entry on his blog that identified the crimes, the first name of the defendant, and the name of the judge, whom he described as "a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn't want snapped at you."[109] As a result of his posts, the judgment was vacated and remanded for a new trial.[110]

Judges, too, have fallen prey to the lure of social media as a medium for discussing the matters pending before them.[111] In Pennsylvania, for example, a special-education hearing officer who posted about the matters before her was removed from her position.[112] And a criminal-court judge in New York was transferred allegedly in part because of his

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102. *Id.*

103. *Id.*

104. *See* Douglas R. Richmond, *Prof'l Responsibilities of Law Firm Assocs.*, 45 Brandeis L.J. 199, 204 (2007) (contending that firms should provide form in-house training for associates on professional-responsibility issues, particularly on "ethical problems that associates are likely to encounter").

105. *See*, *e.g., Ex-paralegal: Heiress gave a lot to lawyer*, UPI, Aug. 28, 2010, *at* http://www.upi.com/Top_News/US/2010/08/28/Ex-paralegal-Heiress-gave-a-lot-to-lawyer/UPI-65821283011861/ (former paralegal revealed confidential information about her former employer-lawyer and his clients to the New York Post).

106. *See* In re Otlowski, 976 A.2d 172 (Del. 2009).

107. *See* Posting of Mike Frisch, *Lawyer-Juror-Blogger Sanctioned in Cal.*, Legal Professors Blog, (Aug. 3, 2009), *at* http://lawprofessors.typepad.com/legal_profession/2009/08/lawyerjurorblogger-sanctioned-in-california.html.

108. *See* Discipline Summary, Cal. B.J., *at* http://members.calbar.ca.gov/search/member_detail.aspx?x=185591.

109. *See* Cal. B. J., (Aug. 2009), *available at* http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=96182&categoryId=96044&month=8&year=009#s10. His post also stated, "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial. (Ha. Sorry, will do.) So, being careful to not prejudice the rights of the defendant — a stout, unhappy man by the first name of Donald …." *Id.*

110. *See* Disciplinary Summary, *supra*, note 108.

111. Del. Judges' Code of Judicial Conduct 2.10(a) (2008), *Judicial Statements on Pending and Impending Cases,* provides that a judge "should abstain from public comment on the merits of a pending or impending proceeding in any court" and, as stated in the comment to the rule, "particular care should be taken" where the public comment involves a case from the judge's own court.

112. Stengle v. Office of Dispute Resolution, 631 F. Supp. 2d 564 (M.D. Pa. 2009).

social-networking activities.[113] He was reported to have updated his Facebook status while on the bench and to have posted a picture he took of his crowded courtroom.[114]

In one particularly troubling case, an Ohio common pleas judge was alleged to have posted more than eighty comments on a local newspaper's website using a pseudonym.[115] The pseudonym was created using the judge's name and e-mail address and the comments were posted from a computer in the judge's chambers.[116] Many of the comments discussed cases that were being tried before her. And, many of the comments were about a high-profile murder trial over which she was presiding.[117] The Ohio Supreme Court removed her from the case after she refused to recuse herself.[118]

2. Improper *Ex Parte* Communications

Rule 3.5 prohibits a lawyer from seeking to "influence a judge, juror, or prospective juror or other official" by unlawful means.[119] The inferences that others may draw from online connections led the Florida Judicial Ethics Advisory Committee to issue an opinion banning state judges from becoming "friends" (as in "Facebook friend"), with lawyers who may appear before them.[120] According to the Committee, by extending or accepting friend requests with lawyers, judges would be conveying or permitting others to convey the impression that the lawyer holds a position of special influence.[121]

South Carolina, on the other hand, has taken an opposite position, permitting judges to participate in social networking and recognizing such participation as a way to promote the public's understanding of the judiciary.[122] New York takes a middle-of-the-road approach, giving judges the option to participate in social networks, provided the judge

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113. John M. Annese, *Staten Island Criminal Court Judge to Be Transferred to Manhattan After Facebook Postings, Sources Say,* Staten Island Advance, Oct. 15, 2009, *available at* http://www.silive.com/news/index.ssf/2009/10/criminal_court_judge_to_be_tra.html.

114. *Id.*

115. In re Peshek, Comm'n No. 09 CH 89, (Aug. 25, 2009), *available at* https://www.iardc.org/09CH0089CM.html.

116. *Id.*

117. Pam Smith, *Judge Reprimands Temp Prosecutor for Personal Blog*, Law.com (Apr. 28, 2006), *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1146139204085.

118. *Judge removed from Ohio serial killing cases*, CNN.com, (Apr. 23, 2010), *at* http://www.cnn.com/2010/CRIME/04/23/ohio.bodies/?hpt=Sbin.

119. Del. Prof. Cond. R. 3.5.

120. *See* Fla. JAEC Op. 2009-20 (Nov. 17, 2009).

121. *Id.*

122. *See* S.C. Judicial Dep't, Op. 08-176 (Jan. 29, 2009).

exercises "an appropriate degree of discretion" and stays current on the technology.[123] And Kentucky permits judges to participate in online social networking but offers strong words of caution about the potential dangers of such participation.[124]

There are several stories that demonstrate the ethical issues relating to judges' participation in social media.[125] For example, a Texas judge reportedly requires every juvenile who appears before her to friend her on Facebook or MySpace.[126] If the minor's status updates reveal involvement in illegal activities, he is summoned to court for a compliance hearing.[127] This "extra-courtroom monitoring" was lauded by some and questioned by others as possibly unconstitutional.[128]

Although the judge has not been subjected to disciplinary charges for her unusual use of social media, other judges have faced serious consequences for their online activities. One North Carolina judge was issued a public reprimand for engaging in *ex parte* communications, through Facebook, with one of the attorneys in a case pending before him.[129] And a superior court judge in Georgia resigned just days after his relationship with a woman who was a defendant in a matter pending before his court became public.[130] The relationship had developed and was documented via Facebook.[131]

123. *See* N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (Jan. 29, 2009). *See also* Am. to Code of Ethics for Members of the Judiciary (Malta) (Feb. 8, 2010) ("Since propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge, membership of 'social networking internet sites' is incompatible with judicial office."), *available at* http://judiciarymalta.gov.mt/code.

124. Ethics Comm'n of Ky. Judiciary, *Judges' Membership on Internet-Based Social Networking Sites*, Ky. Judicial Ethics Op. JE-119 (Jan. 20, 2010), *available at* http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf ("participation in social networking sites is permissible, but [] the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct") (emphasis in original).

125. *See* Ken Strutin, *Social Networking Pitfalls for Judges, Attorneys*, N.Y. L.J. (Mar. 17, 2010). Another, less common scenario occurred in August 2010, and involved North Carolina Judge Beth Dixon. Judge Dixon had created a "fan page" on Facebook as part of her re-election campaign. Residents of Salisbury, North Carolina protested the judge when she convicted a defendant who was arrested after she used her mobile phone to record video of a police offer as he arrested another citizen. *See* Shelley Smith, *Citizens Protest Against City, Hunter*, Salisbury Post, Aug. 25, 2010, *available at* http://www.salisburypost.com/News/082510-Protesting-Salisbury-qcd. A blogger picked up the story and encouraged his readers to "share [their] feelings" with the judge on her Facebook page, stating that the judge had "failed" and "must not be reelected." *See* Post of Carlos Miller, *N.C. judge who convicted woman for videotaping cop faces reelection*, Photography Is Not a Crime: It's a First Am. Right Blog, (Aug. 30, 2010), *at* http://carlosmiller.com/2010/08/30/n-c-judge-who-convicted-woman-for-videotaping-cops-faces-election/ (including an oversized headshot of the judge in his post). Apparently, the blogger's call to arms was effective. The judge's Facebook page was deluged with negative comments and, soon thereafter, deleted by the judge. *See* Post of Carlos Miller, *N.C. judge Beth Dixon learns hard lesson in social media,* Photography Is Not a Crime: It's a First Am. Right Blog, (Sept. 1, 2010), *at* http://carlosmiller.com/2010/09/01/north-carolina-judge-learns-hard-lesson-in-social-media/.

126. Dahlia Lithwick & Graham Vyse, *Tweet Justice: Should judges be using social media?*, Slate.com, Apr. 30, 2010, *at* http://www.slate.com/id/2252544.

127. *Id.*

128. *See* Miriam Rozen, *Social Networks Help Judges Do Their Duty*, Tex. Lawyer, Aug. 25, 2009, *available at* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433293771 (reporting that the judge admitted that "a handful of defense lawyers have objected to her monitoring, … suggesting she is violating their right to free speech); Ky. Op., *supra*, note 124 (questioning whether a judge's active monitoring of offenders under his jurisdiction via social-networking sites would be appropriate under the state's judicial code of conduct and whether "such conduct raises separation of powers concerns"); *see also* In re Baker, 74 P.3d 1077 (Or. 2003) (censuring a judge who witnesses alleged probation violation, ordered the offender into court, and then presided over a probation-violation hearing).

129. *In re: B. Carlton Terry, Jr.*, *supra*, note 31.

130. Debra Cassens Weiss, *Ga. Judge Resigns After Questions Raised About Facebook Contacts*, ABA J., Jan. 7, 2010, *at* http://www.abajournal.com/news/article/ga._judge_resigns_after_questions_raised_about_facebook_contacts/.

131. *Id.*

Another example involved a Florida judge, who was accused of having an inappropriate relationship with a prosecutor.[132] According to the complaint filed by the Florida's Judicial Qualifications Commission, the judge and lawyer exchanged an average of 9.35 communications per day over the course of approximately five months.[133] At the time, the prosecutor was trying a capital-murder case before the judge.[134] The defendant in the case, who had been found guilty and sentenced to death, was awarded a new trial in light of the allegations and the judge resigned prior to appearing before the state agency.[135]

C. Integrity-Related Risks

1. Honesty

"Candor to any tribunal must be the hallmark of lawyer conduct."[136] The general prohibition against dishonesty is set forth in Rule 8.4, which instructs lawyers to avoid "dishonesty, fraud, deceit or misrepresentation" in all facets of their professional and personal lives.[137] Similarly, Rule 4.1 prohibits the making of a "false statement of material fact or law" in the course of representing a client.[138] And Rule 3.3 requires the exercise candor in the specific context of litigation and related proceedings.[139] Furthermore, Rule 4.1(b) prohibits a lawyer from knowingly "fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[140]

New York personal injury attorney and popular blogger Eric Turkewitz executed an April Fool's prank that has drawn fire from some ethics commentators.[141] On April 1, 2010, he posted on his blog that he had accepted a position as

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132. *See* Tonya Alanez, *Broward judge accused of inappropriate relationship with prosecutor*, Sun Sentinel, Mar. 4, 2010, *available at* http://articles.sun-sentinel.com/2010-03-04/news/fl-judge-gardiner-investigated-20100303_1_gardiner-judicial-qualifications-commission-state-judicial-watchdog-agency.

133. *Id.*

134. *Id.*

135. *See* Jon Burstein & Paula McMahon, *Embattled Broward Judge Ana Gardiner Resigns*, Sun Sentinel, Apr. 22, 2010, *available at* http://articles.sun-sentinel.com/2010-04-22/news/fl-judge-gardiner-resigns-20100422_1_omar-loureiro-loureiro-trial-gardiner.

136. In re Amberly, 996 A.2d 793, 2010 Del. LEXIS 259, at *20 (Del. June 1, 2010).

137. Del. Prof. Cond. R. 8.4(c).

138. *Id.* at 4.1.

139. *Id.* at 3.3, cmt. 1 (explaining that the rule governs the conduct of a lawyer who is representing a client in the proceedings of an adjudicatory body, and all ancillary proceedings, such as depositions).

140. *Id.* at 4.1(b).

141. *See* New York Personal Injury Law Blog, *at* www.newyorkpersonalinjuryattorneyblog.com/.

the official White House blogger.[142] His post spread quickly around the blogosphere, fooling several reporters, including the New York Times.[143]

Not everyone appreciated the humor in his joke.[144] Authors of the *Ethics Alarm* blog wrote that a "web hoax" by a lawyer constitutes misconduct, regardless of the day on which the hoax is performed. Turkewitz disagreed and argued that the hoax was not connected to his representation of a client.[145] In a post responding to his critics, Turkewitz wrote, "if you make the April Fool's joke an ethical violation, then so too are misrepresentations surrounding surprise parties, Santa Claus and The Tooth Fairy."[146]

2. Civility

Civility is the Delaware standard.[147] This standard is set forth in the *Principles of Professionalism for Delaware Lawyers* (the "Principles"), which are intended to "promote and foster the ideals of professional courtesy, conduct, and cooperation."[148] The Principles define professional civility as conduct that "shows respect not only for the courts and colleagues, but also for all people encountered in practice."[149] It requires "emotional self-control" and prohibits "scorn and superiority in words or demeanor." Conduct by a lawyer that is "abusive, rude, or disrespectful" violates the duty of civility.

Although the duty of civility is emphasized in the Principles, it is, by no means, absent from the rules of professional conduct. For example, Rule 3.5(d) prohibits a lawyer from engaging in conduct "intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."[150] And Comment 3 to Rule 8.2 encourages lawyers to "continue traditional efforts to defend judges and courts unjustly criticized," thus suggesting an affirmative

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142. *See* Posting of Eric Turkewitz, *On Becoming the White House Law Blogger*, (Apr. 1, 2010), *at* http://www.newyorkpersonalinjuryattorneyblog.com/2010/04/on-becoming-the-white-house-law-blogger-updated-x3.html.

143. *See* Maureen O'Connor, *NYT Fooled Twice on April Fools' Day*, Gawker, Apr. 2, 2010, *at* http://gawker.com/5507891/nyt-fooled-twice-on-april-fools-day.

144. *See* Posting of Eric Turkewitz, *Welcome New Readers (Gawker, Instapundit, Right-Wing Blogosphere and others),* (Apr. 1, 2010) (subsequently updated), *at* http://www.newyorkpersonalinjuryattorneyblog.com/2010/04/welcome-new-readers-gawker-instapundit-right-wing-blogosphere-and-others-bumped-and-updated-x2.html (listing blogs and news sources that discussed his prank).

145. *See* Post of Jack Marshall, *Of Interns, Heroes, and Hoaxes*, Ethics Alarms Blog, (Apr. 3, 2010), *at* http://ethicsalarms.com/2010/04/03/of-interns-heroes-and-hoaxes/.

146. Debra Cassen Weiss, *Lawyer Says April Fools' Joke Was Not an Ethics Violation*, ABA J., Apr. 6, 2010, *at* http://bit.ly/bvIFcs.

147. *See, e.g.,* David S. Broder, *In Del. campaign for Senate, civility rules*, Wash. Post, (July 29, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072804526.html; Post by Katrina Dewey, *Del.'s Art of Judging*, Harvard Law Sch. Forum on Corporate Governance & Fin. Regulation, (July 14, 2009), *at* http://blogs.law.harvard.edu/corpgov/2009/07/14/delaware%E2%80%99s-art-of-judging/#more-2555.

148. Principles of Professionalism for Del. Lawyers, (2003), *available at* http://courts.delaware.gov/forms/download.aspx?id=39428.

149. *Id.*

150. Del. Prof. Cond. R. 3.5(d).

duty to act if others violate the decorum rule, as well as a duty to refrain from engaging in conduct that would itself constitute a violation.[151]

Less-than-favorable commentary directed towards judges has been a common theme. For example, Kristine Ann Peshek was brought before the disciplinary commission not only for revealing confidential information about clients but also for making disrespectful comments about the judges before whom she frequently appeared, including describing one as "Judge Clueless." [152] Florida attorney Sean Conway was reprimanded for calling a judge an "evil, unfair witch" in a blog post, criticizing her practice of setting what he claimed to be unreasonably short time periods before trial.[153] He appealed the decision unsuccessfully to the Florida Supreme Court on constitutional grounds, arguing that his comments were protected by the First Amendment.[154]

Social media also has been a forum for the unfortunate display of lawyers' incivility towards their adversaries. For example, Assistant State Attorney White, of the *Gilligan's Island*-themed blog post, referred to his opposing counsel as "weasel face."[155] Jay Kuo was working as a temporary prosecutor through a work-exchange program when he blogged about a case, calling his opposing counsel a "chicken" for requesting a continuance. After being alerted to the posts, the presiding judge described Kuo's conduct as "juvenile, obnoxious and unprofessional." The judge also noted that Kuo's choice of a public medium for the publication of his commentary was likely reckless due to the possibility that a post will be "distributed uncontrollably."[156]

3. Fairness

Rule 3.4(e) requires a lawyer to act with fairness to the opposing party and counsel in trial.[157] Specifically, the rule prohibits the lawyer from alluding to any matter he does not "reasonably believe is relevant or that will not be supported by admissible evidence."[158] Rule 4.4(a) prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden" in representing a client.[159] Thus, a lawyer may be limited in how he uses what he finds as

151. *Id.* at 8.2, cmt. 3. *See also id.* at 8.2(a) (a lawyer "shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer").

152. *See In re Pesheck*, *supra*, note 79.

153. *See* Posting of Sean Conway, *Judge Aleman's new (illegal) "One-week to prepare" policy*, JAABlog, (Oct. 30, 2006), *at* http://jaablog.jaablaw.com/2006/10/30/judge-alemans-new-illegal-oneweek-to-prepare-policy.aspx.

154. *See* Respondent's Response to Rule to Show Cause Order in *Fla. Bar v. Conway*, No. SC08-326, (June 12, 2008), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-07-12-Conway%27s%20Brief%20for%20Florida%20Supreme%20Court.pdf.

155. *See* Posting of Margaret M. DiBianca, *Just Sit Right Back and You'll Hear a Tale … of a Lawyer and His Facebook Page*, Going Paperless Blog (Apr. 25, 2010), *at* http://bit.ly/9Jc1ce.

156. Pam Smith, *Judge Reprimands Temp Prosecutor for Personal Blog*, Law.com, Apr. 28, 2006, *at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1146139204085.

157. Del. Prof. Cond. R. 3.4(e).

158. *Id.*

159. *Id.* at 4.4(a).

the result of an online investigation. In other words, just because information may be titillating does not mean that it is relevant to the case or ethical to use.

For example, imagine a worker's-compensation claimant who alleges to have suffered an on-the-job back injury. He claims that his injury precludes him from enjoying his favorite hobby, deep-sea fishing. The lawyer for the defendant-insurer discovers a video on YouTube of the claimant at a deep-sea fishing competition, clearly as a participant, being interviewed at the start of the event. This evidence would certainly be relevant in the discovery context and one could imagine its purpose for impeachment as well.[160]

But what if there was a second video of the same interview but posted on YouTube by a different user. The quality of the second video is quite poor and the sound is barely audible. But, at the end of the clip, the plaintiff is shown receiving a good-luck-kiss from a beautiful woman, who, it turns out, is not his wife. The lawyer shows both clips to the plaintiff at his deposition. He is clearly discomforted by the first video but becomes quite upset when he sees the second.

During pretrial preparations, the lawyer identifies the second video for inclusion as a trial exhibit. He chose the second video over the first because, despite its poor quality, he thinks it will give the plaintiff sufficient motivation to settle the case. Under these facts, the lawyer risks violating Rule 4.4(a) because the true purpose of using the video is to embarrass the plaintiff by exposing his extramarital affair.[161]

IV. CONCLUSION

All lawyers should be cautious to comply with their ethical duties in the context of social media. Even those who do not participate in social media should be knowledgeable about the potential dangers that exist. The issues are many and complex and should be expected to change and develop with time. Until the duty of competence require actual knowledge of social media, ethical best practices suggest that we familiarize ourselves with the medium at least enough to consider the issues in an educated manner.

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160. *See* Embry v. Indiana, 923 N.E.2d 1, 4-5 (Ind. Ct. App. 2010) (finding that prosecution's use of witness' MySpace profile as evidence of impeachment was proper).

161. *See* Del. Prof. Cond. R. 4.4(a).