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Online Legal Advice: Ethics in the Digital Age

Paige A. Thomas

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COMMENT

Paige A. Thomas *

Online Legal Advice: Ethics in the Digital Age

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I. INTRODUCTION

Twenty years ago, a person looking for a lawyer would browse the Yellow Pages,¹ seek recommendations from friends and family, or try to recall names from billboards. After obtaining a contact number, the next step was calling and scheduling a meeting with an attorney in his office. Following that initial interview, an agreement for representation could be formally obtained through a letter of engagement or unceremoniously with a simple handshake. But, times have changed. The Internet has flipped this interaction on its head by allowing prospective clients to pose legal questions to attorneys via text and even real-time video chat.² This enhanced technology allows attorneys to operate a worldwide storefront at a minimal cost.³

Inevitably, however, with the good comes the bad. In the wake of this Internet-driven era, a host of problems concerning privacy rights and consumer usage have emerged.⁴ Websites have transformed from personal

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1. See Eileen Libby, *www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients*, A.B.A. J., Jan 2011, at 22, 22 (“[L]awyer websites have replaced business cards and Yellow Pages advertising.”).

2. See, e.g., LAWZAM, <https://www.lawzam.com> (last visited Oct. 28, 2013) (representing an example of a website where prospective clients may speak and video chat with attorneys).

3. See J.T. Westemeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 270 (2004) (reasoning that because websites are available to anyone with Internet access, they serve as storefronts for lawyers with a much larger audience).

4. See, e.g., Merri A. Baldwin, *What’s a Little Tweet Among “Friends”: Ethical and Liability Risks Posed by Lawyers’ Use of Social Media*, 37 A.L.I. A.B.A. CONTINUING LEGAL EDUC. 443, 448–51 (2011) (highlighting various ethical and liability concerns such as disclosure of client confidences, inadvertent attorney–client relationship, improper solicitation, violation of attorney advertising rules, and judicial integrity); Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 115–16 (2009) (noting that social media sites have garnered significant media attention and concern, and those concerns are “multiplied when legal professionals use social networking tools”); Michael E.

social outlets into branding machines for professionals and corporations hoping to generate new business.⁵ With little-to-no authority in place to adequately address these problems,⁶ social media is quickly becoming the next legal ethics battleground.⁷ Though social media provides flexible office hours⁸ and a worldwide appeal, for attorneys utilizing it in a professional rather than personal capacity, it presents numerous red flags.⁹ Even unintentionally, social media carries serious liability issues for lawyers.¹⁰ This Comment highlights the dangers facing attorneys, and the legal profession at-large, in maintaining an online presence.¹¹

Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 149 (2012) (acknowledging issues related to social media that arise from attorney usage and suggesting that additional questions arise when social media comes into the courthouse and courtroom); Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR. ASS'N (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html> (recommending that attorneys recognize the implications stemming from their online usage in order to effectively protect clients and their confidences).

5. See, e.g., Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 153 (2012) (declaring that law firms are using social media and discovering how it fits into their marketing model); J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 272 (2004) (acknowledging that numerous bar ethics committees receive questions regarding attorney webpage usage for obtaining clients); Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, WIS. LAW., May 2012, available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (stressing the pressures felt by attorneys to brand their firms and stay connected to clients).

6. See generally Craig Estlinbaum, Essay, *Social Networking and Judicial Ethics*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 2 (2012) (discussing social media related problems faced by judges today); Zachary C. Zurek, Comment, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 242 (2013) (addressing the rise of online legal forums and the legal profession's battle against the unauthorized practice of law).

7. See J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 269–70 (2004) (concluding that as more and more lawyers and law firms take to the web to promote themselves and their practice, the number of complex ethical questions rise).

8. See *id.* at 271 (discussing why more lawyers are turning to the Internet to promote their practice). Specifically, the allure of instant access and communication, coupled with the competitiveness of the legal market and its relatively low attendant expense has garnered the attention of not only lawyers, but also bar ethics committees. *Id.* at 272.

9. Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR ASS'N (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html>.

10. See, e.g., Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous*, A.B.A. J., Feb. 2011, at 49, 50 (illustrating the story of Sean W. Conway, a defense attorney, who never anticipated he would be facing ethics charges resulting from what he considered an ordinary blog post, but later was determined by the Florida Bar Association to have been in violation of five ethics rules).

11. Specifically, this Comment addresses inadvertent attorney–client relationships, unauthorized practice of law, conflicts of interest, solicitation, and negligence—all commonly found

The beauty of the old days was the simple fact that individuals had face-to-face interactions with their lawyers, clearly defining the lines of the attorney–client relationship and setting out the scope of work to be performed. This process made for greater accountability between the lawyer and his client. Now, in this Internet age, where immediacy and response time are driving factors in an attorney’s online presence, the approach is far more informal. An inherent danger lies in off-the-cuff remarks, made on the Internet, a platform generally associated with distressingly low standards of research, citation and accountability. While an attorney may view these remarks as mere suggestions, if a client perceives them to be legal strategy—or worse, advice—that attorney may be at risk of a malpractice suit.

For example, a client with a legal question may not want to go through the process, time, and expense of researching a lawyer and setting up an interview appointment—only to be told that nothing can be done to resolve the issue. Alternatively, that client could be informed that the research alone may cost thousands of dollars, with no guarantee the research (and expense) would lead to a positive result. However, what if the same client could go online, ask an actual attorney a legal question, and get a response faster, all from the comfort of home and for free?

That hypothetical example is now an actual social-networking platform, thanks to the website LawZam.com.¹² LawZam is essentially an online social networking platform pairing lawyers and clients together for free videoconferencing consultations.¹³ Think match.com¹⁴ for attorneys and clients. Since its launch in June 2012,¹⁵ the site has received more than 10,000 members representing nearly all fifty states.¹⁶ The appeal of LawZam and similar sites is that it gives lawyers the ability to “create digital storefronts so prospective clients can determine which lawyer they want.”¹⁷ LawZam is not the only Internet service geared toward matching

in the LawZam Model. This Comment does not address issues relating to judges’ Facebook conduct, evidentiary, admissibility and authentication issues, confidentiality issues, and advertising rules.

12. LAWZAM, <https://www.lawzam.com> (last visited Oct. 28, 2013).

13. See Leigh Jones, *Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet*, NAT’L L.J. (Aug. 20, 2012) (content available through LexisNexis) (describing the purpose and general functions and benefits of LawZam.com).

14. See MATCH.COM, <http://www.match.com/help/aboutus.aspx?lid=4> (last visited Oct. 28, 2013) (“Our mission is simple: to help singles find the kind of relationship they’re looking for.”).

15. *LawZam Creates a Lawyer District to Shop Online for Legal Services*, LAWYERIST.COM, <http://lawyerist.com/lawzam-creates-a-lawyer-district-to-shop-online-for-legal-services-sponsored-post/> (last visited Oct. 28, 2013).

16. *Id.*

17. *Id.*

Internet users with attorneys who provide live answers to legal questions, and in some instances, even representation.¹⁸ Although still in its beginning stages, apparent red flags already exist with this attorney–client matchmaking model.

The sheer number of issues arising from legal social media stem, in part, from the permanent nature of the Internet. Attorneys often do not realize that by making a statement or giving advice through an online forum, they are essentially going “on the record” and are forever linked to those remarks. Attempts to pull it out of the cyber record will not succeed—what users put on the Internet remains there forever.¹⁹

Another key issue affecting the online legal community is the performance of conflicts checks, or the utter lack thereof.²⁰ Conflicts-check issues arise in a number of ways, just as they do in the offline world,²¹ including, but not limited to: engaging in conversations with prospective clients who present an issue adverse to a current client, taking a stance on an issue inconsistent with your firm or colleagues, and inadvertently establishing an attorney–client relationship.²² Conducting

18. See, e.g., Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR ASS'N (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html> (mentioning other crowd sourcing sites similar to the LawZam model, including LawPivot, which allow prospective clients to post questions to a number of member attorneys to the service and the lawyers respond back to the prospective client); Catherine J. Lanctot, *Attorney–Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 154–55 (1999) (providing examples of other websites purporting to offer legal advice, some for a fee and others for free).

19. See Angelina Perez, *Campaign to Teach Student Lesson of Internet Permanency*, KDFW NEWS CHANNEL 10, <http://www.newschannel10.com/story/14197907/campaign-to-teach-students-lesson-of-internet-permanency> (last visited Oct. 28, 2013) (campaigning the message of Amarillo ISD—hoping to teach students what they put out on the Internet remains there forever).

20. See Eileen Libby, *Conflicts Check, Please*, A.B.A. J., Jan. 1, 2010, at 24, available at http://www.abajournal.com/magazine/article/conflicts_check_please/ (outlining the steps typically involved in performing a conflicts check); see also Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 163 (2012) (examining how conflicts of interest problems arise in large part due to the anonymity aspect of the Internet); Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, WIS. LAW., May 2012, available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (listing risks associated with social media usage and suggesting that “[t]here are many times when social media is not the best forum to use”).

21. See, e.g., *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244, 259 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding that defendant attorneys did not have a conflict of interest and, therefore, did not breach their fiduciary duty to Tanox in reaching a settlement).

22. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3 (determining whether a conflict of interest exists means that a lawyer should apply reasonable measures, consistent with the size and type of law firm, to decide the parties and issues involved); Steven C. Bennett, *Ethics of Lawyer Social*

conflicts checks may be a passing thought for the attorney giving advice on the Internet, but failure to do so can result in malpractice and grievances with the state bar.²³

Another common pitfall for the attorney taking to the Internet as a means of offering legal services is negligence. Setting aside the perils of the involuntary reactions discussed above, there is, of course, also a real danger in providing bad advice.²⁴ Typical examples of this issue arise when attorneys offer advice in an area of law in which they are unfamiliar or give advice on a complex issue without the adequate experience and research to fully appreciate the complexities.²⁵ This problem is of particular significance with websites like LawZam that tender inexperienced attorneys—potentially fresh out of law school—who may be struggling to find a job and in need of a quick paycheck.²⁶ Instead of finding work with a law firm where recent graduates can learn from seasoned attorneys, young lawyers are jumping straight into the practice and exposing themselves to unforeseen liability.

Specific to websites like LawZam, which markets itself as “speed-dating for the legal world,”²⁷ the idea of matching an attorney with an individual for brief informational screening sessions walks a fine line between acting

Networking, 73 ALB. L. REV. 113, 124–25 (2009) (recognizing that conflicts issues can arise in a variety of scenarios, from the imposition of a conflict of one lawyer to another in the same law firm, failing to perform a name check within the firm’s database, or taking a definitive legal position on a website and representing a client with the opposite legal position); Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH & B. MINN. (Nov. 10, 2010), <http://mnbenchbar.com/2010/11/social-media-for-lawyers/> (advancing three different ways conflicts of interest issues arise from social media usage).

23. See, e.g., S.C. Bar Ethics Advisory Comm., Formal Op. 12-03 (2012), *available at* 2012 WL 1142185 (cautioning “lawyers to treat online communications with potential clients just as [you] would a live meeting, specifically regarding conflict checking”).

24. There is a distinction between advice and opinion. Lawyers should be careful when providing any information to people via the Internet because what they might construe as opinion is likely to be received as legal advice, regardless of whether it was intended as opinion only. See Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, WIS. LAW., May 2012, *available at* <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&tissue=5&articleid=2416> (“There is a huge difference between providing legal information and giving legal advice.”).

25. See *id.* (emphasizing that not taking the time to verify the advice provided to clients may result in a claim of negligence or misconduct).

26. See MARTINDALE-HUBBELL, http://careers.martindale.com/c/job.cfm?site_id=7302&jb=10707224 (last visited Sept. 13, 2012) (on file with the *St. Mary’s Law Journal*) (advertising that there is no minimum legal experience required for LawZam other than being in good standing and receiving a law degree from an ABA accredited university).

27. See Leigh Jones, *Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet*, NAT’L L.J. (Aug. 20, 2012) (content available through LexisNexis) (“LawZam wants to be thought of as speed-dating for the legal world.”).

as a pitchman to gain prospective clients and providing the professional responsibility that the Bar requires. Not only is solicitation of clients unethical, but attorneys selling themselves may lead to misrepresentations and promises that cannot be kept.²⁸ Furthermore, the unauthorized practice of law is another issue at the forefront of legal social media usage.²⁹ Specifically, an attorney videoconferencing with clients in different parts of the country, where they are not licensed, could be accused of the unauthorized practice of law.

Without clear guidance on what interactions are permissible in the world of social media, attorneys are encountering ethics problems due to their inability to apply outdated ethics rules to new technology.³⁰ Social media has a powerful presence in society that will continue to grow in the future. Yet, even at its current stage of development, it directly impacts practitioners on a daily basis—from their credibility and reputation, to their inability to practice law after disbarment for unethical conduct, and the broad principle of losing clients to these virtual outlets. This Comment provides practitioners with a better understanding of the apparent risks in social media use, as seen through the LawZam website model, and how to navigate these uncharted waters absent American Bar Association (ABA) and state regulations directly addressing social media. In doing so, attorneys may better be able to assess the benefits and burdens of maintaining an online presence while not running afoul of professional responsibility rules.³¹

28. See J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 288 (2004) (stating that lawyers are prohibited from communicating in ways that create unjustified, false, or misleading expectations).

29. See Off. of Disciplinary Couns. v. Palmer, 761 N.E.2d 716, 723 (Ohio Bd. Unauth. Prac. 2001) (finding that the attorney did not engage in the unauthorized practice of law when he offered general advice on his website, amoraethics.com); see also MODEL RULES OF PROF'L CONDUCT R. 5.5 (2012) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

30. Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's also Dangerous*, A.B.A. J., Feb. 2011, at 49, 50; see also Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 118–19 (2009) (reiterating that lawyers have a duty to stay apprised of new professional responsibility pronouncements and should frequently check with the ABA and their local bar for developments); Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 149 (2012) (suggesting that the Internet provides an incomplete map for lawyers attempting to find their way through the social media arena due to the rapid change of legal doctrines, the frequent and expansive growth of technological developments, and a set of professional rules written before the Internet era).

31. See Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, WIS. LAW., May 2012, available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (listing the following

II. ONLINE LEGAL FORUMS

“Social media’ is an umbrella term for social interaction using technology . . . with any combination of words, pictures, video, or audio.”³² The term applies to a range of online forums, such as social networking sites (namely Facebook), blogs, micro blogs (Twitter), and other dynamic websites.³³ Since the birth of Facebook in 2004,³⁴ social media’s exponential growth into the commercial market has whipped corporations and media service providers into a frenzy.³⁵ Thanks to this emergence of online forums, today almost anything can be accomplished with the click of a mouse—even hiring an attorney.³⁶

A. *The LawZam Model*

Marketed as a social networking platform, LawZam provides a forum in which Internet users seeking legal advice may visit and engage in free, live, face-to-face consultations with attorneys.³⁷ In that sense, the LawZam model is not unlike a dinner party host, bringing people together in an environment that facilitates open communication and mutual gain. Upon arrival at the website, visitors have several options in their quest for legal advice. First and foremost, visitors may search for a lawyer by a particular

benefits and burdens of social media: staying current, inexpensive marketing, opportunity to demonstrate competency in technology, immediacy, mobility; and the flip side—losing control over content, blurring lines, establishing unrealistic expectations, false and misleading statements concerning lawyer’s ability and services).

32. Debra L. Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J., Mar. 2010, at 186.

33. *Id.*

34. February 4, 2004 marked the launch of Facebook. Sarah McGrath, *A Timeline of Famous Historical Events in February*, SUITE101 BLOG (Feb. 10, 2011), <http://suite101.com/article/a-timeline-of-famous-historical-events-in-february-a346026>. In eight years time, Facebook became the largest social networking website, with over one billion subscribers per month. *Number of Active Users at Facebook Over the Years*, BOSTON.COM (Oct. 4, 2012), <http://www.boston.com/business/technology/2012/10/04/number-active-users-facebook-over-the-years/4MqAmvMGrDFH7EXDE97uYI/story.html> (announcing that the active number of users per month has reached one billion as of October 4, 2012).

35. See, e.g., JDSUPRA, <http://www.jdsupra.com> (last visited Oct. 28, 2013) (exemplifying an online repository for legal documents, forms, and articles that help attorneys market their research, writing, and firms); LAWLINK, <http://www.lawlink.com> (last visited Oct. 28, 2013) (illustrating a social network aimed at the legal profession); LEGAL ONRAMP, <http://legalonramp.com> (last visited Oct. 28, 2013) (“Legal OnRamp is a Collaboration system for in-house counsel and invited outside lawyers and third party service providers.”); see also Debra L. Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J., Mar. 2010, at 186 (providing a list of various social media platforms widely used in the legal profession).

36. LAWZAM, <https://www.lawzam.com> (last visited Oct. 28, 2013).

37. See *id.* (follow “About Us” hyperlink) (describing itself as a social networking platform that effectively functions as a venue for communication).

area of law, geographic region, or even by name.³⁸ If that is not appealing, they may live chat or video conference any attorney currently logged on to the website, or leave a message for an offline attorney to schedule a future meeting time.³⁹ Thus, any attorney registered with LawZam is never more than a few clicks away. As an added feature, visitors may sidestep the entire process of selecting a lawyer by simply typing their question in the “Ask a Lawyer” dialogue box on its main webpage, and waiting for a response from one of LawZam’s more than ten thousand practicing advocates.⁴⁰ Once a legal match is made,⁴¹ visitors may carry on with representation just as if they had stepped into that lawyer’s office.⁴²

In March 2013, LawZam announced the release of its mobile application for use on iPhones and iPads, allowing an even broader range of accessibility as legal consumers can now text chat lawyers and video conference from virtually anywhere.⁴³ While this level of access to legal aid is unprecedented, it is not without value to the typical consumer. According to the ABA’s Standing Committee on the Delivery of Legal Services Harris Poll, 18% of respondents said “they would be ‘very likely’ or ‘somewhat likely’” to look for a lawyer to handle a matter through social networking sites.⁴⁴ Certainly, the message is clear. Society is shifting toward capitalizing on technological advancements, particularly when such advancements come with the benefits of ease and immediacy, at only a minimal or no added expense for the consumer.⁴⁵

38. *Id.*

39. *Id.*

40. *Id.*

41. *See id.* (addressing “How it Works” with a short video clip found on the right hand side of the website).

42. Although LawZam claims that no attorney–client relationship is established by the video consultation itself, that is no guarantee that one has not formed. *See* Ethics Traps to Consider, Inadvertent Attorney–Client Relationship discussed *infra*.

43. *LawZam® Releases Mobile App for Legal Video Consultations on iPhone and iPad*, PRWEB (Mar. 20 2013), <http://www.prweb.com/releases/2013/3/prweb10546948.htm>.

44. Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It’s also Dangerous*, A.B.A. J., Feb. 2011, at 49, 51.

45. It is worth noting that other online legal platforms, purporting to offer various forms of legal assistance, have recently come under fire for alleged ethics violations. For example, LegalZoom is currently the subject of a class action lawsuit involving claims concerning the unauthorized practice of law in Missouri. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1057–58 (W.D. Mo. 2011); *see also* Zachary C. Zurek, Comment, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY’S J. LEGAL MAL. & ETHICS 242, 266–80 (2013) (examining issues with the unauthorized practice of law arising out of certain legal websites); Debra Cassens Weiss, *Suit Claims LegalZoom’s Document Prep Is Unauthorized Practice*, A.B.A. J., Feb. 19, 2010, available at http://www.abajournal.com/news/article/suit_claims_legalzooms_document_prep_is_unauthorized_practice (discussing the pending litigation involving LegalZoom). More than a year since its

B. *The Blogosphere*

Another popular forum for online legal advice, and the subject of its own numerous ethics opinions, is the world of constantly updated, unfiltered, user generated, bulletins, called blogs.⁴⁶ “Blogs”⁴⁷ attempt to mimic stream-of-consciousness by combining text, pictures, videos, newspaper articles, and even other websites in a form that would be recognizable to a typical diarist.⁴⁸ Blogging, the idiom for updating a blog, has gained traction as yet another way for people to discuss opinions and observations on a particular topic, with the added ability to have viewers post questions or provide commentary.⁴⁹ The blog’s operator, who can range from a single individual to a group of authors or even a company or institution, invites discussion by posting a prompt message, on a discrete issue.⁵⁰

Blogs, once just a platform for moderated discussion boards, are now a driving force in business.⁵¹ In fact, today, the share of American companies using blogs for marketing purposes is nearly 40%, with those

inception, it still remains to be seen whether LawZam and other similar websites providing a communication platform for consumers and practitioners will face similar litigious action of their own, with suits like *Janson v. LegalZoom* as the precedent.

46. See Marshall Brain, *How Blogs Work?*, HOW STUFF WORKS.COM, <http://computer.howstuffworks.com/internet/social-networking/information/blog.htm> (last visited Oct. 28, 2013) (explaining that a blog is a single page of entries, mimicking a stream-of-consciousness, written by a single author and made available to the public).

47. See Debra L. Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J., Mar. 2010, at 186 (writing that a blog is essentially an “online journal that discusses opinions or reflections on various topics and usually provides a mechanism for readers to comment”).

48. Marshall Brain, *How Blogs Work?*, HOW STUFF WORKS.COM, <http://computer.howstuffworks.com/internet/social-networking/information/blog.htm> (last visited Oct. 28, 2013).

49. Debra L. Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J., Mar. 2010, at 186 (observing that a distinguishing characteristic of blogs is that they invite the public to post commentary); Marshall Brain, *How Blogs Work?*, HOW STUFF WORKS.COM, <http://computer.howstuffworks.com/internet/social-networking/information/blog.htm> (last visited Oct. 28, 2013) (recognizing that when bloggers see something they like on other sites, they comment on it).

50. For an example of a typical legal blog, see WALL ST. J. L. BLOG, <http://blogs.wsj.com/law/> (last visited Oct. 28, 2013) (allowing visitors to read a full post, comment, recommend the posting via Facebook or Twitter).

51. See generally Dave Davies, *Why Blog: The Benefits of Business Blogging for Visitors & Links*, SEARCH ENGINE WATCH (Mar. 14, 2013), <http://searchenginewatch.com/article/2067370/Why-Blog-The-Benefits-of-Business-Blogging-for-Visitors-Links> (analyzing the benefits of blogging in terms of attracting visitors and providing useful information); Ken Makovsky, *Why Should Companies Blog?*, FORBES (May 14, 2012, 4:32 PM), <http://www.forbes.com/sites/kenmakovsky/2012/05/14/why-should-companies-blog/> (suggesting reasons why companies should blog); Nicole Beachum, *Bloggging is More Important Today than Ever Before*, SOCIAL MEDIA TODAY (Apr. 6, 2013), <http://socialmediatoday.com/nicolebeachum/1338806/bloggging-more-important-today-ever> (expressing why blogging is of such importance “[i]n today’s internet-based society”).

same companies benefiting from nearly 55% more overall website traffic.⁵² While these figures alone are noteworthy, their ramifications for the future are astounding—even in the legal profession. Nearly half of those polled by the ABA's Standing Committee on the Delivery of Legal Services stated that they would use the Internet as a resource for finding legal aid in some fashion.⁵³ In addition to the 18% mentioned by the Standing Committee poll as being likely to seek legal counsel through social networking sites, another 15% stated they were likely to use blogs; and further, 14% acknowledged they were likely to turn to some form of email discussion lists.⁵⁴ These results suggest that now more than ever people are going online in search of legal assistance.

C. *Legal Websites, A Broad Range*

While LawZam's use of videoconferencing and emphasis on venue rather than service make it unique in the field, providing online legal advice is hardly an exclusive model. Joining the online legal revolution, and its growing market share, a number of websites offer visitors the ability to pose legal questions and receive answers.⁵⁵ These sites vary in a number of ways, from what they offer—whether it is forms, advice or even representation—to what they charge, but the same theme bleeds through: the days of finding a lawyer at a dinner party, or by referral from a neighbor, while perhaps not over, are certainly numbered.

These websites typically feature columns highlighting recent legal questions with their respective responses provided by designated legal experts.⁵⁶ Some websites even supply other services, such as publishing

52. Magdalena Georgieva, *An Introduction to Business Blogging*, HUBSPOT.COM, available at http://cdn1.hubspot.com/hub/53/introduction_to_business_blogging.pdf (last visited Oct. 28, 2013).

53. Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's also Dangerous*, A.B.A. J., Feb. 2011, at 49, 51.

54. *Id.*

55. See, e.g., JUSTANSWER, <http://www.justanswer.com> (last visited Oct. 28, 2013) (providing legal answers to submitted questions for a fee); LAWDINGO, <https://www.lawdingo.com> (last visited Oct. 28, 2013) (offering in-person and online legal advice and other services); LAWGURU, <http://www.lawguru.com> (last visited Oct. 28, 2013) (allowing its users to ask legal questions, view recent questions and answers from other website visitors and providing legal forms for use); LAWPIVOT, <https://www.lawpivot.com> (last visited Oct. 28, 2013) (delivering online legal advice to consumers).

56. See generally JUSTANSWER, <http://www.justanswer.com> (last visited Oct. 28, 2013) (identifying a list of "General Questions" asked by users followed by answers from presumably qualified individuals); LAWDINGO, <https://www.lawdingo.com> (last visited Oct. 28, 2013) (prompting users to type in their legal issue or browse a list of attorneys in order to have their problem personally addressed); LAWPIVOT, <https://www.lawpivot.com> (last visited Oct. 28, 2013)

legal forms for consumer use, explanations of how to take certain legal action *pro se*, or, like LawZam, client–attorney matching.⁵⁷ So, not only can a potential client “meet” an attorney before moving forward, that attorney is now essentially with that client at all times—only an instant message away.

III. GOVERNING ETHICS PRINCIPLES

A. *Evolution of the ABA’s Rules of Professional Responsibility*⁵⁸

The original body of rules governing lawyer conduct and ethics was the 1908 Canons of Professional Conduct (Canons).⁵⁹ The Canons were considered merely aspirational guidelines and consisted of thirty-two “rules.”⁶⁰ In 1964, the ABA House of Delegates formed a Special Committee on Evaluation of Ethical Standards—otherwise referred to as the “Wright Committee”—to determine whether revisions were needed for the then-current edition of the Canons. In response, the Wright Committee rewrote the rules of professional conduct and replaced the Canons of Professional Conduct in 1969 with the Model Code of Professional Responsibility (Model Code), which stood until 1982.⁶¹

(providing users with “Public legal Q&A” as a free resource for their benefit).

57. JUSTANSWER, <http://www.justanswer.com> (last visited Oct. 28, 2013); LAWINGO, <https://www.lawdingo.com> (last visited Oct. 28, 2013); LAWPIVOT, <https://www.lawpivot.com> (last visited Oct. 28, 2013); LAWZAM, <https://www.lawzam.com> (last visited Oct. 28, 2013).

58. See generally CTR. FOR PROF’L RESP., A.B.A., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at v (2006) (providing a complete explanation of legislative history and formulation of the ABA’s Model Rules of Professional Responsibility).

59. Those rules were last amended in 1963 and were a compilation of the following: Alabama Bar Association’s Code of Ethics implemented in 1887, a collection of legal ethics lectures given by Judge George Sharswood from the University of Pennsylvania School of Law, and fifty resolutions extracted from David Hoffman’s *A Course of Legal Study*. HENRY S. DRINKER, LEGAL ETHICS 23–24 (1953); GEORGE SHARSWOOD, LEGAL ETHICS (5th ed. 1884) (non-paginated introductory memorial); see also MODEL RULES OF PROF’L CONDUCT Preface (2002) (tracing the evolution of the Rules of Professional Conduct in the legal profession); SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (2008) (explaining that these writings taken together inspired the formulation of the Canons of Professional Ethics).

60. CODE OF PROF’L ETHICS (1908), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/1908_code.authcheckdam.pdf; accord SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (2008) (describing the structure of the canons and how they were perceived by legal professionals).

61. MODEL RULES OF PROF’L CONDUCT Preface (2002); SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (2008).

The Model Code retained the aspirational character of the 1908 Canons through an “Ethical Considerations” section, but added, among other things,⁶² a “Disciplinary Standards” section which contained black letter mandatory standards.⁶³ In 1977, the House of Delegates tasked the Kutak Commission to evaluate “whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law.”⁶⁴ After thorough research and study, the Kutak Commission determined that another piecemeal amendment would not result in a comprehensive collection of law governing the legal field.⁶⁵ As a result, since 1983, lawyers’ obligations have been governed by the restyled American Bar Association’s Model Rules of Professional Conduct (Model Rules).⁶⁶ Most states have now adopted these Model Rules.⁶⁷

62. See MODEL CODE OF PROF’L RESPONSIBILITY Preface (1983) (emphasizing that there were four major revisions from the Canons to the Model Code); see also SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (2008) (highlighting the similarities and difference between the Model Code and the Canons). Those revisions include: (1) amending certain laws governing attorney conduct that were either partially addressed or completely excluded from the Canons; (2) supplying certain codes with needed editorial revision; (3) implementing provisions subjecting individuals violating rules with practical sanctions; and (4) modernizing the rules to adequately address societal urbanization and the evolution of the legal system. MODEL CODE OF PROF’L RESPONSIBILITY Preface (1983).

63. SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (2008).

64. The commission determined a “piecemeal amendment of the ABA Model Code of Professional Responsibility would not sufficiently clarify the profession’s ethical responsibilities in light of changed conditions.” CTR. FOR PROF’L RESP., A.B.A., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at v (2006). Therefore, the commission began preparing numerous working drafts, each containing extensive and significant modifications to the Model Code. *Id.* The large dissemination of working drafts coupled with vast amounts of open hearing testimony allowed the commission to receive comments from a host of individuals and committees, including but not limited to “state and local bar associations, sections and committees of the ABA, and other interested parties.” *Id.* The commission’s chair, Robert J. Kutak, noted, “the overriding objective of the Commission . . . [was] to develop professional standards that are comprehensive, consistent, constitutional and, most important, congruent with other law.” *Id.*

65. MODEL RULES OF PROF’L CONDUCT Preface (2013); CTR. FOR PROF’L RESP., A.B.A., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at v (2006).

66. The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (2008). The new rules drastically changed the older provisions of the Model Code by adding extensive provisions and restructuring the format with black letter law followed by commentary. *Id.* The evolution of these rules stem from a gradual process of extending both “legal and moral concepts found in other bodies of law to lawyer behavior.” *Id.*

67. California is the only state that has not adopted the Model Rules. *State Adoption of Model*

Consistent with its tradition of rule drafting, the ABA established the Ethics 2000 Commission in 1997.⁶⁸ The Ethics 2000 Commission was charged with updating and recommending changes to the 1983 Model Rules, a task similar to those of the Wright Committee and Kutak Commission.⁶⁹ Of particular concern for the Ethics 2000 Commission was attempting to reform the Model Rules and provide national uniformity among jurisdictions.⁷⁰ The ABA's Model Rules continue to reflect a nationally recognized framework for implementing professional conduct standards,⁷¹ and have been modified as recently as 2013.⁷²

B. *Texas Disciplinary Rules of Professional Conduct*

In 1909, the Texas Bar Association adopted the Texas Canons of Ethics (Texas Canons),⁷³ modeled after the then-existing ABA Canons of Professional Ethics.⁷⁴ Those Texas Canons were in effect until 1971 when the Texas Code of Professional Responsibility replaced them (Texas Code).⁷⁵ Following the ABA's adoption of the Model Rules in 1983, the

Rules, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Oct. 28, 2013). Texas adopted the Rules on June 20, 1989. *Id.*

68. SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 19 (2008).

69. The ABA adopted the Commission's recommendations in 2002, which are reflected in the current Rules. *Id.*

70. See Margaret Colgate Love, *ABA 2000 Ethics Commission: Final Report-Summary of Recommendations*, GA. ST. UNIV. COLL. LAW, <http://law.gsu.edu/ccunningham/PR/ABA-Ethics2000Summary.htm> (last visited Oct. 28, 2013) (discussing that the Ethics Commission came into being to perform a thorough analysis of the current rules in light of apparent shortcomings found in some rules and to resolve disparities existing in the rules from jurisdiction to jurisdiction). Additionally, the Restatement of Law Governing Lawyers, then nearing completion, had also underscored the need for a comprehensive rule review, thereby creating national uniformity to the Ethics Commission. *Id.*

71. See generally MODEL RULES OF PROF'L CONDUCT Preface (2013) (outlining the ABA Model Rules' transformation from their original Canon format and stressing the ABA's goal in pursuing standards of professional competence and conduct applicable to all jurisdictions).

72. See *Most Recent Changes to the Model Rules*, CTR. FOR PROF'L RESP., A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Oct. 28, 2013) (indicating by month and year when certain revisions to the model rules occurred).

73. See *Canons*, TEX. ETHICS REP., <http://www.law.uh.edu/libraries/ethics/canons/> (last visited Oct. 28, 2013) (recognizing the forty-three Texas canons). See generally Cullen Smith, *The Texas Canons of Ethics Revisited*, 18 BAYLOR L. REV. 183 (1966) (reviewing of the history of the Texas Canons of Ethics).

74. *Id.* at 183.

75. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3-4 (11th ed. 2012).

State Bar of Texas also began considering those rules for possible incorporation.⁷⁶ The Texas committee charged with evaluating the 1983 Model Rules determined that it would incorporate the Model Rules' "restatement" format—comprised of black letter law followed by commentary.⁷⁷ This development was a departure from the existing Texas Code⁷⁸ format, which mirrored the ABA Code consisting of canons.⁷⁹

In 1989, both the Supreme Court of Texas and the Texas Court of Criminal Appeals adopted the Texas Lawyer's Creed.⁸⁰ The creed is a mandate for professionalism, which, according to Judge Lamar McCorkle, "gave voice to the cornerstones and timeless principles of justice and fairness of our profession."⁸¹ One year later, the Texas Code was repealed

76. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 1 (1990).

77. *Id.*

78. *Id.* The Texas Code of Professional Responsibility was adopted in 1971. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3–4 (11th ed. 2012).

79. After extensive revisions, a final proposed draft of the Texas Disciplinary Rules was submitted to the Board of Directors of the Texas State Bar in 1987. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 2–3 (1990). Following its submission, the rules underwent additional scrutiny and revision from bar sections, lawyers and committee review. *Id.*; see also Barbara Hanson Nellerhoe & Fidel Rodriguez, Jr., *Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04*, 28 ST. MARY'S L. J. 443, 447 (1997) (citing David J. Beck, *Legal Malpractice in Texas*, 43A BAYLOR L. REV. 1, 8 n. 43, 22 n. 67, 147–48 (1991)) (following the repeal of the Texas Code of Professional Responsibility, all canons, including disciplinary rules and ethical considerations were replaced).

80. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3 (11th ed. 2012). On May 22, 1989, Justice Eugene A. Cook, Associate Justice of the Supreme Court of Texas and "father of professionalism," requested "authorization from the entire Supreme Court to form a Supreme Court Advisory Committee on Professionalism, whose members will be those who have expressed 'an interest in restoring professionalism and civility to the practice of law.'" *Texas Lawyer's Creed Timeline*, TEX. CTR. FOR LEGAL ETHICS, <http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/Texas-Lawyer-s-Creed-Timeline.aspx> (last visited Oct. 28, 2013); *History of the Texas Lawyer's Creed*, TEX. CTR. FOR LEGAL ETHICS, <http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/History-of-the-Texas-Lawyer-s-Creed.aspx> (last visited Oct. 28, 2013). The advisory committee held meetings to draft and revise a professionalism statement for use by Texas lawyers. *Texas Lawyer's Creed Timeline*, TEX. CTR. FOR LEGAL ETHICS, <http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/Texas-Lawyer-s-Creed-Timeline.aspx> (last visited Oct. 28, 2013). It was well received by lawyers, law schools, and the press. *History of the Texas Lawyer's Creed*, TEX. CTR. FOR LEGAL ETHICS, <http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/History-of-the-Texas-Lawyer-s-Creed.aspx> (last visited Oct. 28, 2013).

81. *History of the Texas Lawyer's Creed*, TEX. CTR. FOR LEGAL ETHICS, <http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/History-of-the-Texas-Lawyer-s-Creed.aspx> (last visited Oct. 28, 2013). Copies of papers relating to the Creed's drafting process are held by the Texas Supreme Court Historical Society. *Id.* For some of those documents are available via the Texas Legal Ethics website, see *Texas Lawyer's Creed Timeline*, TEX.

and replaced with the Texas Disciplinary Rules of Professional Conduct (Texas Rules)⁸² by an overwhelming approval of 84.14%.⁸³ Essentially, the Texas Rules track the same format and layout of the ABA Model Rules,⁸⁴ yet there are many variations between these two sets of rules.⁸⁵ The Texas Rules serve as the disciplinary standards embracing “Texas law of professional discipline for lawyers.”⁸⁶ Since 1990, the Texas Rules have gone through various amendments, the most recent being in 2005.⁸⁷ Additionally, the supreme court’s Professional Ethics Committee⁸⁸ regularly issues advisory ethics opinions. As of October 2013, there have been 637 opinions issued, covering a wide array of professional responsibility topics.⁸⁹

CTR. FOR LEGAL ETHICS, <http://www.legalethictexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/Downloads.aspx> (last visited Oct. 28, 2013).

82. See Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 5 (1990) (noting the inclusion of the word “disciplinary” into the title of the Texas Rules, which was notably absent from the Model Rules, perhaps reiterating that the violation of the Texas rules subjects one to official reprimand).

83. *Id.* at 3 n. 12 (citing *Texas’ New Disciplinary Rules Become Effective Jan. 1, 1990*, 52 TEX. B.J. 1023 (1989)) (“[The P]roposed Texas Rules were approved by 84.14% of those voting in referendum conducted from May 19–June 19, 1989.”).

84. The Texas Rules contain an introduction consisting of preamble, scope, and terminology sections which are followed by a laundry list of articles grouped according to relationship or professional obligation. TEX. DISCIPLINARY RULES PROF’L CONDUCT (2005), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G, app A (West 2005) (TEX. STATE BAR R. art. X, § 9).

85. See *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, A.B.A. (2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.authcheckdam.pdf (detailing the differences between state and ABA rules regarding confidentiality, advertising, and solicitation).

86. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 5 (1990); see *State v. Malone*, 692 S.W.2d 888, 896 (Tex. App.—Beaumont 1985, writ ref’d n.r.e.) (acknowledging that the disciplinary rules carry the same effect as statutes), *rev’d on other grounds*, 720 S.W.2d 842 (Tex. App.—Beaumont 1986, no writ); see also TEX. DISCIPLINARY RULES PROF’L CONDUCT preamble ¶ 10 (2005) (“The Texas Disciplinary Rules of Professional Conduct are rules of reason . . . [they] define proper conduct for purposes of professional discipline . . . [and] are imperatives, cast in the terms shall or shall not.”).

87. See CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 3 (11th ed. 2012) (discussing a Texas State Bar referendum vote in November 2004 and the amendments that followed in 2005).

88. Listing of Texas Supreme Court Committees, TEX. B., http://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources (select “For Lawyers” hyperlink; then select “Resources Guide” hyperlink; then select “Ethics Resources” hyperlink) (last visited Oct. 28, 2013).

89. See generally Index of Ethics Opinions, TEX. ETHICS REP., <http://www.law.uh.edu/libraries/ethics/opinions/ethicssubjectindexb.html> (last visited Oct. 28, 2013) (listing the various ethics opinions available upon request from the Texas Bar website).

C. *Ethics 20/20 Commission Addressing Changes in Technology*

On September 20, 2010, the ABA's Commission on Ethics 20/20 Working Group on the Implications of New Technology (Working Group)⁹⁰ released a memorandum entitled, *Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools*.⁹¹ The Working Group was charged with examining recent legal ethics issues emerging from technological advancements, specifically the Internet and Internet-related forums.⁹² The purpose of the paper, which was addressed to various ABA entities, courts, bar associations, law schools, and attorneys, was to elicit feedback on the current remedies being considered by the Working Group prior to submission to the House of Delegates for review.⁹³

The Working Group's evaluation discussed a myriad of issues including: (1) the guidance or standards needed for attorneys regarding their social networking sites, blogs and websites;⁹⁴ (2) the guidance needed for lawyers

90. "The Commission was created in 2009 to perform a thorough review of the ABA Model Rules of Professional Conduct and the system of lawyer regulation in the context of advances in technology and global legal practice developments." *Committees & Commissions*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/committees_commissions.html (last visited Oct. 28, 2013); see also Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Tech., CTR. FOR PROF'L RESP., A.B.A., 1, 1 (Sept. 20, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/client_confidentiality_issuespaper.authcheckdam.pdf (explaining the Working Group's research in the technology sector).

91. Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Tech., CTR. FOR PROF'L RESP., A.B.A. 1, 1 (Sept. 20, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientconfidentiality_issuespaper.authcheckdam.pdf.

92. See generally *id.* (specifying the four particular online methods that the Working Group focused on with respect to identifying recent ethical issues: (1) social and professional networking sites; (2) blogging; (3) pay advertising sites and (4) attorney websites).

93. The commission went through various reports and draft proposals over a two-year period. *ABA Commission on Ethics 20/20 Work Product*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Oct. 28, 2013). On February 21, 2012 the commission submitted its final revised draft proposal on *Technology and Client Development*, which went through additional modifications before becoming adopted in August 6, 2012. *Id.*

94. The commission considered a number of different ways for providing guidance to attorneys, including but not limited to: a policy statement to the House of Delegates; a white paper suggesting that lawyer social media use should be considered an extension of advertising; and proposed amendments to Model Rules, Article 7, either to the rules themselves or within the commentary. See Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Internet Based Client Development Tools, CTR. FOR PROF'L RESP., A.B.A. 1, 3 (Sept. 20, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientdevelopment_issuespaper.authcheckdam.pdf ("The Commission seeks to determine what guidance it should offer to lawyers regarding their use of social

to avoid establishing inadvertent attorney–client relationships through the Internet;⁹⁵ and (3) the circumstances that could potentially trigger application of the Model Rules to attorney participation in blogs.⁹⁶ Following the submission of the Working Group’s paper, which underwent extensive revision, the House of Delegates approved amendments to the ABA Model Rules on August 6, 2012, incorporating verbiage to resolve lingering uncertainties and confusion of the Rules’ applicability to attorney use of technology.⁹⁷

D. *The Internet and Social Media’s Effect on the Rules*

The Model Rules, Texas Rules, and their numerous research committees are set up in a reactionary manner—meaning they assess changes in society and their impact on the applicability to both the Model Rules and Texas Rules. As a result, the rules tend to lag behind recent developments in the law and technological advancements. It is during this “lagging” period that practitioners should be particularly cautious and mindful of overstepping professional responsibility boundaries.

Take for instance the Ethics 20/20 Committee mentioned above, which issued its paper on lawyer use of technology as a means of client development.⁹⁸ That paper was issued eliciting feedback in 2010,

and professional networking sites, especially when lawyers use those sites for both personal and professional purposes.”).

95. Entertaining a number of proposals for furnishing meaningful guidance to practitioners, the commission considered the following options: a policy statement to the House of Delegates; a white paper acknowledging that attorney use of social media be categorized as advertising; or consider modification to Model Rule 1.18, either to the rule itself or in the commentary. *Id.*

96. *Id.*

97. A number of changes were made to the Model Rules. Significant to this Comment, changes were made to the following: Model Rule 1.18 (Duties to Prospective Clients), Model Rule 7.1 (Communications Concerning a Lawyer’s Services), Model Rule 7.3 (Direct Contact with Prospective Clients), Model Rule 5.5 (Unauthorized Practice of Law), Model Rule 1.1 (Competence), and Model Rule 1.4 (Communication). 105A Report to House of Delegates, Commission on Ethics 20/20, A.B.A. 1, 1 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf (last visited Oct. 28, 2013) (discussing the changes approved by the House of Delegates to Model Rules 1.1 and 1.4 as of August 6, 2012); 105B Report to House of Delegates, Commission on Ethics, A.B.A. 1, 1 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.authcheckdam.pdf (last visited Oct. 28, 2013) (outlining the changes by the House of Delegates to Model Rules: 1.18, 7.1, 7.3, and 5.5).

98. Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers’ Use of Internet Based Client Development Tools, CTR. FOR PROF’L RESP., A.B.A. 1, 3 (Sept. 20, 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientdevelopment_issuespaper.authcheckdam.pdf.

addressing concerns that had surfaced up to that time, yet it was not adopted until August 6, 2012—some two years later.⁹⁹ Without a doubt, additional ethics issues materialized during that two-year period that were not contemplated in 2010, and thus would not be reflected in the most recent amendments.

This is precisely the problem lawyers find themselves in today—the very nature of the Internet is that of a living, breathing forum, evolving as users become more numerous and sophisticated. The ABA committees currently in place simply cannot keep up. Even the most current amendments do not go far enough in providing practical guidance for social media usage. Instead, attorneys are left with a still-and-ever-outdated set of rules, which made little substantive change from the previous rules. Until adequate rules are in place providing guidance on social media usage, a good rule of thumb that lawyers should employ is asking, “Would this action be ethical in the offline world?”¹⁰⁰ If the answer is no, then ask whether it is likely to be unethical in the online world as well.¹⁰¹

IV. ETHICAL TRAPS TO CONSIDER

A. *The Inadvertent Attorney–Client Relationship*

This ethics vulture continually preys on lawyers using social media as a method of communicating with prospective clients. At first blush, it seems rather simple to tell when an attorney–client relationship has been established, but reviewing state bar ethics opinions quickly dispels that notion.¹⁰² The initial step in making a determination begins by

99. *Id.*

100. JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW 163 (Eddie Fournier, ed. Thomas Reuters/Aspatore 2010) (suggesting that if you would not engage in certain actions offline, then you should not perform them online).

101. *Id.* (stating that if certain behavior would be unethical offline, it is likely unethical on the Internet as well).

102. Compare ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, (2010) (cautioning lawyers to consider some of the ethical obligations that arise from content and features found on lawyer sites and stating that lawyers who respond to inquiries should contemplate whether Model Rule 1.18 applies), and Ohio Informal Op. 99-9, (Ohio Sup. Ct. Dec. 2 1999), available at 1999 WL 1244454, at *2 (concluding it is proper for an attorney to post an online intake form on an Internet site allowing visitors to email legal questions and receive responses, but reminding attorneys that response to specific questions “carries all the traditional duties owed by a lawyer to a client”), and S.C. Bar Ethics Advisory Comm., Formal Op. 12-03, (2012), available at 2012 WL 1142185, at *5 (rendering an advisory that lawyers' participation in sites such as www.justanswer.com, where lawyers

understanding that, it is the reasonable expectations of the prospective client that trigger the creation of the relationship, *not* the expectations of the lawyer.¹⁰³ Perhaps surprisingly, this standard allows formation of an attorney–client relationship without an engagement letter.¹⁰⁴ This reasonable expectation standard can be dangerous when applied to social networking sites—and sites such as LawZam—because an interactive dialogue exchanged between lawyer and layperson concerning legal issues invites a reasonable expectation by the layperson to understand that he was

sign up with a web service, answer questions posed by people, and receive compensation from the website, is improper because the site invites specific questions about legal issues and elicits specific legal advice, and small, conspicuous statements attempting to disclaim any formation of an attorney–client relationship are not sufficient), *and* S.C. Bar Ethics Advisory Comm., Formal Op. 94-27, (2007) (expressing that attorney online presence for the purpose of giving general legal discussions through the Internet is permissible, but that such information must not be characterized as advice or be considered representation of a client), *and* N.Y. St. Bar Comm. on Prof'l Ethics, Op. 899 (Dec. 21, 2011) (debating whether a lawyer may answer legal questions in chat rooms and social networking sites and noting that such activities may establish an attorney–client relationship implicating violations of certain Model Rules), *with* Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2003-164 (2003) (commenting that no attorney–client relationship is established when an individual asks a specific question to an attorney on a radio call-in show or similar format because the caller does not have a reasonable belief that such a relationship is formed, either explicitly or implicitly), *and* Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2005-168 (2005) (accepting that because of disclaimer statement, no attorney–client relationship was formed when a wife asked a question through a website because she was interested in filing for divorce, stated that she liked website, and needed a good lawyer to obtain a reasonable property settlement, retain secrecy of her own affair, and maintain conservatorship of her child).

103. *See* *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1316–17 (7th Cir. 1978) (holding that an attorney–client relationship exists when a lay person submits confidential information to a lawyer with the reasonable belief that the lawyer was acting in professional capacity), *rev'd on other grounds*, 588 F.2d 221 (7th Cir. 1978); Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 120 (2009) (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 (2000)) (“An attorney–client relationship arises when a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person, . . . and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.”); Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH & B. MINN. (Nov. 10, 2010), <http://mnbenchbar.com/2010/11/social-media-for-lawyers/> (claiming that an attorney–client relationship can be established under a tort theory if an individual seeks and receives legal advice and under a contract theory if the circumstances and behavior between the parties shows an agreement to perform services); Gabriel Miller, *Social Responsibility*, TRIAL, Jan. 2011, at 20, 24 (discussing that whether an attorney–client relationship has been established depends on the reasonable expectations of the potential client).

104. *See* *Westinghouse*, 580 F.2d at 1316–17 (explaining that an attorney–client relationship can be implied by behavior of the parties); *Togstad v. Veselt, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (determining under both contract and tort theory, that an attorney–client relationship existed for the purpose of a malpractice claim by a client against an attorney with whom she met for one hour to a discuss possible lawsuit, but was informed she did not have a case and was not referred to another attorney).

consulting the lawyer in a professional capacity.¹⁰⁵ A related sub-issue arising from this standard is clarifying the blurry distinction between providing legal *information* and offering legal *advice*.¹⁰⁶

While there is no bright line delineating when an attorney–client relationship begins, most state bars suggest that not only lawyers should exercise caution online, but if they decide to offer responses to legal inquiries, responses should be general communications that do not contain fact-specific circumstances.¹⁰⁷ As an additional measure, numerous authorities recommend when providing general legal information attorneys employ clear disclaimers¹⁰⁸ regarding the content of the information they are providing.¹⁰⁹ Disclaimers should state that no attorney–client

105. Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR. ASS'N (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html> (illustrating that the more specific the inquiry is from the questioner and the more specific the attorney's response, the more likely a relationship has been formed).

106. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (emphasizing that there is no bright line indicator to determine when legal information becomes legal advice and using the context and content of information to help differentiate between the two); see also Ariz. St. Bar, Formal Op. 97-04 (1997) (recommending that lawyers avoid offering specific answers to legal questions posed by individuals over the Internet unless their inquiry is so general that no fact-specific information is needed); D.C. Bar Legal Ethics Comm., Formal Op. 316 (2002) ("Providing legal advice . . . involves offering recommendations tailored to unique facts of a particular person's circumstances [L]awyers wishing to avoid formation of attorney–client relationships through . . . Internet communications should limit themselves to providing legal information."); J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 301 (2004) (echoing that attorneys should exercise extreme caution and ensure they only provide general legal information, not legal advice).

107. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, (2010) (indicating that a lawyer who answers hypothetical questions will not typically be characterized as offering legal advice and further recommending that consistent with previous ABA opinions, lawyers only provide general information, while cautioning the reader that it should not be taken as a substitute for actual legal advice); Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR. ASS'N (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html> (suggesting that specific questions and specific answers are more likely to constitute an attorney–client relationship).

108. This is an example of a disclaimer: "Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations." Michelle Sherman, *Navigating Social Media and Legal Ethics*, JDSUPRA.COM (Apr. 24, 2012), <http://www.jdsupra.com/legalnews/navigating-social-media-and-legal-ethics-80349/>.

109. See Eileen Libby, *www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients*, A.B.A. J., Jan. 2011, at 22, 23 (2011) (describing how a number of state bar opinions have analyzed online communications and determined that lawyers should employ disclaimers on their websites or social networking sites to avoid confidentiality and inadvertent attorney–client relationship issues). But see Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2005-168 (2005) (opining that a lawyer may request individuals to provide information to the

relationship is formed by the disclosure of information.¹¹⁰ These disclaimers may help shield attorneys from forming inadvertent attorney–client relationships.¹¹¹

Rule 1.18 of the ABA Model Rules of Professional Responsibility makes clear that an attorney–client relationship arises when a prospective client consults with an attorney about potentially forming a relationship.¹¹² Under that rule, an attorney–client relationship results when a potential client submits information in response to an invitation from a website, blog or similar medium.¹¹³ Through a series of hypotheticals, the ABA sets out its formal opinion on the issue of lawyer websites, requiring either a consultation or communication under Rule 1.18.¹¹⁴ However, the ABA Rules are clear that information unilaterally communicated to a lawyer,

lawyer through any electronic means, including the lawyer’s website, blog or email—with no attached duty of confidentiality if the lawyer has a clear disclaimer that he will not consider the material as confidential).

110. Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 164 (2012) (recommending that all social media postings utilize clear and conspicuous statements disclaiming the potential formation of a relationship); Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, *BENCH & B. MINN.* (Nov. 10, 2010), <http://mnbenchbar.com/2010/11/social-media-for-lawyers/> (suggesting that in order to avoid liability attorneys maintain disclaimers on their web content expressly stating that no attorney–client relationship has been formed); *see also* Cal. Comm. on Prof’l Responsibility & Conduct, Formal Op. 2003-164 (2003) (emphasizing that lawyers and law firms should pre-screen comments before they are posted on blogs and edit accordingly in order to avoid potential issues); Eileen Libby, *www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients*, *A.B.A. J.*, Jan. 2011, at 22, 23 (2011) (writing on the power of disclaimers and suggesting that disclaimers be used to prevent liability).

111. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010). *But see* Cal. St. Bar, Formal Op. 2004-165 (finding that a written disclaimer alone is not sufficient to prevent formation of an attorney–client relationship).

112. Model Rule 1.18(a) Duties to Prospective Client states: “A person who consults with a lawyer about the possibility of forming a client–lawyer relationship with respect to a matter is a prospective client.” *MODEL RULES OF PROF’L CONDUCT R. 1.18(a)* (2013); *see also* Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers’ Use of Social Media*, *AM. BAR ASS’N* (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html> (warning that the rules relating to potential clients apply to lawyers regardless of whether they are on Facebook or at a cocktail party).

113. *See* *MODEL RULES OF PROF’L CONDUCT R. 1.18 cmt.* (2013) (discussing the protection of a prospective client based on initial discussions); *see also* Va. St. Bar Standing Comm. on Legal Ethics, Legal Ethics, Formal Op. 1842 (2008), *available at* <http://www.vacle.org/opinions/1842.htm> (noting that a website that invites individuals to post information and receive a response essentially welcomes the formation of an attorney–client relationship).

114. The 2013 Model Rule 1.18(a) replaced the word “discusses” with “consults” in describing what type of exchange between a person and lawyer qualifies for possible attorney–client consideration. *Compare* *MODEL RULES OF PROF’L CONDUCT R. 1.18(a)* (2013) (“A person who consults with a lawyer . . .”), *with id.* *R. 1.18(a)* (2012) (“A person who discusses with a lawyer . . .”).

where the lawyer lacks a reasonable expectation of discussing legal issues, does not implicate the rule regarding the creation of attorney–client relationship.¹¹⁵

Applying the plain language and meaning of Model Rule 1.18 to the LawZam model implicates the formation of an attorney–client relationship the moment a potential client visits the website and types his legal question.¹¹⁶ As a result, there is a very low threshold to overcome before a person can claim an attorney–client relationship via the Internet.¹¹⁷ Therefore, attorneys should exercise caution before responding to an individual's legal inquiry, and also take pause to consider the effect their response may carry, crafting their answers accordingly.

B. *Conflicts Checks*

Conflicts of interest issues may arise at any point in the legal representation process—during interviews, throughout representation, and even post-representation.¹¹⁸ In the context of social media communications, conflicts problems commonly arise in a myriad of categories: (1) providing legal advice to an individual adverse to a current client—this is the typical conflict of interest commonly thought of by attorneys;¹¹⁹ (2) issue conflicts formed by an inconsistency between a legal

115. *Id.* R. 1.18 cmt. 2 (2013) (“[A] consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response.”). Lawyers need to provide specific warnings that indicate their response to an online question does not constitute legal advice. *Id.*

116. *See id.* R. 1.18 (interpreting the rule which states that an attorney–client relationship can be formed upon submitting questions through the website by a potential client requesting legal assistance); *see also* LAWZAM, <https://www.lawzam.com> (last visited Oct. 28, 2012) (visiting the website reveals a comment box titled, “Ask a Lawyer” with a prompt to type your legal question).

117. *But see* N.Y. St. Bar Ass’n Comm. on Prof’l Ethics, Op. 923, § 25 (May 18, 2012), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=66826> (holding that an individual who communicates with an attorney for the sole purpose of defrauding him and not obtaining legal services does not fall within the attorney–client relationship umbrella).

118. CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 351–52 (11th ed. 2012).

119. Model Rule 1.7 states that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2013). The rule continues by outlining what constitutes “a concurrent conflict of interest” and lists as the first scenario where “the representation of one client will be directly adverse to another client.” *Id.* R. 1.7(a)(1). Rule 1.7 also considers it to be a conflict of interest if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” *Id.* R. 1.7(a)(2).

position provided by the attorney—potentially on a blog or message board—and a position taken by the attorney or his law partner on behalf of another client;¹²⁰ and (3) revealing confidential information obtained from a prospective client in the scope of determining whether to undertake legal representation.¹²¹ Conflicts checking is critical, but the anonymity of the Internet severely frustrates the attorney's ability to properly comply with such an obligation.¹²²

In August 2010, the American Bar Association issued a Formal Ethics Opinion acknowledging the growing use of attorney websites as a means of communicating with the public.¹²³ The opinion cautions attorneys to limit what they provide to website visitors, making sure all content is informational, not advice, and is general rather than specific in nature.¹²⁴

120. Model Rule 1.10, "Imputation of Conflicts of Interest," states, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [the rules] . . ." *Id.*; see also Debra Cassens Weiss, *Akin Gump Chair Hits Partner's Personal Blog Post on 'Ugly' Indian Prayer*, A.B.A. J., Jan. 19, 2011, available at http://www.abajournal.com/news/article/akin_gump_chair_hits_partners_personal_blog_post_on_ugly_indian_prayer/ (writing about comments made on a blog post by an Akin Gump partner which the firm found to be insensitive; thereby, compelling the firm to issue a statement acknowledging that it had no affiliation with the website, that the website does not represent the views of the firm or its clients, and that the firm would be actively reviewing its social media policies in light of the incident).

121. This scenario potentially implicates Model Rule 1.7(a)(2) through the "materially limited" verbiage that gives rise to a conflict of interest between a current client and a prospective client, and Model Rule 1.18(b) which discusses duties owed to a prospective client and includes holding client confidences learned during the course of determining whether representation is possible. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2), 1.18(b) (2013); see also Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 163 (2012) (citing situations in which a conflict of issue may arise, including conflicts resulting from taking a position on an issue that is adverse to a client); Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH & B. MINN. (Nov. 10, 2010), <http://mnbenchbar.com/2010/11/social-media-for-lawyers/> (delineating the three most common scenarios in which conflicts issues arise during the course of the attorney-client relationship).

122. See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 156 (1999) (explaining that the possibility an attorney could create a conflict of interest simply by answering legal questions from someone with adverse interests from a present client is especially concerning given the Internet's anonymous nature); Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 31 (2012), available at http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=110896 (describing potential problems that arise from lawyers using social media and suggesting that one particular problem lies in providing legal advice without first checking for possible conflicts).

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

124. The rationale for such advice flows from the fact that communicating through the Internet makes it difficult, if not impossible, to pre-screen for conflicts of interest issues. Ariz. St. Bar Comm. Rules of Prof'l Conduct, Formal Op. 97-04 (1997), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480>.

While lawyers can maintain an electronic presence without necessarily violating ethics rules, they still have a duty to obtain sufficient information from prospective clients to perform conflicts checks before giving legal advice.¹²⁵ The forum of the communication does not change the standard imposed on the attorney; therefore, conflicts checks should occur just as if the client came to his office for an in-person meeting.¹²⁶

In an ethics opinion offered by the New York State Bar Association, in which an attorney sought approval to answer legal questions in chat rooms, the committee warned that a violation of ethics rules would result if the attorney provided legal advice and thereby established an attorney–client relationship without undergoing the requisite conflicts check as required by the rules.¹²⁷ The Supreme Court of Ohio issued a similar opinion discussing ethical guidelines for online legal representation.¹²⁸ In providing its advice to attorneys about whether they may engage in online

125. See S.C. Bar Ethics Advisory Comm., Formal Op. 94-27 (1994), available at <http://www.sbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/507/Ethics-Advisory-Opinion-94-27.aspx> (reaffirming that an attorney must be able to identify his client and perform a conflicts check prior to providing legal advice). Of course, attorneys may use remedial measures to resolve conflicts issues, including waiver. Model Rule 1.7 lists the exceptions for which an attorney may proceed with representing a client even when a conflict of interest is found. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1–4) (2013) (noting that an attorney may continue representing a client if the attorney believes he can still offer competent representation to each client, representation is not otherwise a violation of the law, representation does not concern claims “by one client against another” in the same proceeding or arising from the same action, and informed consent is given in writing); see also CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 351–52 (11th ed. 2012) (reiterating that “[b]efore undertaking any representation of a client, a lawyer must determine whether such representation would create a conflict of interest or a potential conflict of interest. If so, the next step is to determine whether remedial measures are possible to solve the conflict.”).

126. See, e.g., Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 99-9 (Dec. 2, 1999), available at http://search.supremecourt.ohio.gov/search?q=99-9&site=Advisory_Opinions&btnG=Search&client=default_frontend&proxystylesheet=default_frontend&output=xml_no_dtd&Submit1=Go&ulang=en&sort=date%3AD%3AL%3Ad1&entqr=3&entqrm=0&coe=UTF-8&cie=UTF-8&ud=1 (reminding attorneys that the same duties apply regardless of where the communication occurs).

127. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 899 (Dec. 21, 2011), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=60961.

128. The opinion considers whether online legal representation of potential clients through question and answer format is permissible without violating ethics rules. Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. 99-9 (Dec. 2, 1999), available at http://search.supremecourt.ohio.gov/search?q=99-9&site=Advisory_Opinions&btnG=Search&client=default_frontend&proxystylesheet=default_frontend&output=xml_no_dtd&Submit1=Go&ulang=en&sort=date%3AD%3AL%3Ad1&entqr=3&entqrm=0&coe=UTF-8&cie=UTF-8&ud=1. Specifically, that questioner wonders whether it is acceptable to post an online intake form on his law firm's website that allows visitors to post questions and receive emailed responses from members of the firm. *Id.*

legal representation, the board reinforced that all representation must first be free from any conflict of interest.¹²⁹ The court opined that where legal representation may occur through the Internet via email questions and answers, there must be an online intake form that allows the law firm to perform a conflicts check prior to even reviewing the legal question.¹³⁰

Every firm, small or large, should operate a conflicts checking system for prescreening clients.¹³¹ This system should be used for Internet communications and video consultations between lawyers and the public, especially for those sites attempting to match attorneys with prospective clients where the potential risk for a conflicts issue is apparent.¹³² In the scenario where an attorney engages in preliminary communications with a potential client to determine the possibility of representation, and during the scope of that communication a conflict of interest is revealed, the attorney is obligated to decline any representation and refrain from providing any legal advice.¹³³ For blogs and other non-real-time communications, disclaimers may assist the attorney in avoiding issue-based conflicts problems by putting labels on online content, designating it as an opinion of the author and not a reflection of the law firm or its clients.¹³⁴ Alternatively, firms may avoid disqualification by requiring

129. *Id.* at 2–3. The board explained further that “[just as] an attorney checks for conflicts when a client calls or comes to his office seeking legal services, an attorney must check for conflicts when a client e-mails seeking legal advice.” *Id.*

130. *Id.*

131. See CHARLES F. HERRING, JR., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE 353 (11th ed. 2012) (stating that all firms should prescreen clients for conflicts before rendering services, offering legal advice, or accepting engagement).

132. Because sites such as LawZam are set up for offering legal services, running conflicts checks is all the more critical, especially if it is found that these online platforms, as a result of their structure and objectives, create an attorney–client relationship the moment a communication is exchanged. Remembering that the moment an attorney–client relationship attaches, so do all the duties and professional responsibilities of the attorney to the client, including the duty to avoid conflicts of interest. See generally MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 4 (2013) (suggesting that an attorney should limit the information received during the initial consultation, but if the information reveals a conflict, the lawyer should inform the potential client and may also decline representation).

133. Even if the attorney is unable to represent the client, the communications may still be confidential and subject to ABA Model Rule 1.18, entitled “Duties to Prospective Clients.” See MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2013) (stating that a lawyer may not reveal client confidences learned from a prospective client in the course of determining possible representation); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) (holding that an attorney must protect information received from a would-be client seeking to employ the lawyer even when no services were actually performed because representation was otherwise declined).

134. See Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 126 (2009) (supporting the idea that law firms require individual publications to be accompanied with a disclaimer that the opinion represents the author only and should not be attributed to the law firm or

visitors of their blog or website to affirmatively consent to terms of use before posting or otherwise submitting information through the blog or website.¹³⁵

C. *Negligent Misrepresentation*

Negligence is a claim lawyers know all too well.¹³⁶ Every law school graduate is familiar with tort claims for breach of duty or standard of care, but seldom do attorneys, particularly recent graduates, equate negligence with their own actions.¹³⁷ However when such claims do arise, a claim of negligent misrepresentation against an attorney serves as a reminder to other practitioners that they are not unassailable in the eyes of the law but, instead, are subject to liability when providing bad advice or breaching client-owed duties.¹³⁸ In the more informal and relaxed setting of the online world, additional risks materialize for the attorney who does not adhere to the same degree of caution as in the offline world.¹³⁹ While electronic forums seem informal when compared with the four walls of an office, the standard of care owed to these users—potentially millions of

its clients).

135. See Mass. Bar Ass'n Comm'n on Prof'l Ethics, Formal Op. 07-01 (2007), available at <http://www.massbar.org/publications/ethics-opinions/2000-2009/2007/opinion-07-01> (opining that lawyers and their firms may avoid disqualification by posting a "terms of use" on their website and having potential clients affirmatively indicate their assent to the terms prior to using any email link found on the company's website).

136. See generally *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.").

137. *But see Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 113 (Tex. 2004) (discussing a malpractice suit made by a securities firm against its attorneys for negligence in allegedly mishandling its bankruptcy claims); *Grider v. Mike O'Brien, PC*, 260 S.W.3d 49, 53-54 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (involving a lawsuit initiated by Grider against her attorneys for negligent representation in her appeal in a medical malpractice suit and claiming the law firm was negligent for the following reasons: misstating the due date for filing her notice of appeal, advising her not to appeal an adverse judgment, failing to give timely notice that her motion for new trial had been denied, failing to notify her that the law firm would not handle the appeal, and failing to competently advocate Grider's claims).

138. See Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH & B. MINN. (Nov. 10, 2010), <http://mnbenchbar.com/2010/11/social-media-for-lawyers/> (noting that an attorney who "acts negligently or in breach of contract" may be subject to a malpractice claim, and recommending attorneys use caution before offering legal advice through social networking sites because of such risks).

139. See JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW* 163 (Eddie Fournier, ed., Thomson Reuters/Aspatore 2010) ("[T]he safest way to avoid any ethical problems associated with social networking activities is to regard one's statements and communications . . . as subject to the same ethical prohibitions as if the same words were expressed in a more traditional medium.").

people—should be *more stringent* rather than less.

One way in which negligence claims creep into the social media spectrum is when attorneys, in response to some Facebook post or law blog, provide quick, off-the-cuff, unresearched answers to the public on a particular legal issue.¹⁴⁰ Take, for example, an individual with a legal problem who goes on the Internet, comes across a legal matchmaking website, and decides to use the service. He presents his legal dilemma through the live video consultation feature found on the website. Because the attorney—who, judging by the fact that he is utilizing this service himself—may already be anxious for business, has this limited window to impress the potential client, he may provide an answer without thoroughly weighing all implications. If the client adheres to the advice and is then in an even worse position, he may bring a claim against the attorney for providing bad legal advice.¹⁴¹

Importantly, ABA Model Rule 1.1, entitled “Competency,” reiterates that attorneys should provide competent representation to all clients.¹⁴² As part of the commentary of Rule 1.1, the ABA stresses that attorneys have a duty to maintain competency¹⁴³ throughout the representation of a client.¹⁴⁴ Attorneys are subject to negligence or misconduct claims if they provide legal advice without undergoing the requisite research to ensure it is sound.¹⁴⁵ Competency, for purposes of the rule, includes being familiar and knowledgeable on recent changes in the law and attending continuing legal education programs, as well as understanding and respecting the

140. See Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 31–32 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (underscoring the risks associated with social media from making snap decisions).

141. Additionally, the website could face a claim of negligent recommendation for inadequately screening attorneys it promotes through the website. Leigh Jones, *Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet*, NAT'L L.J. (Aug. 20, 2012) (content available through LexisNexis).

142. The Rules indicate that competent representation includes “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

143. “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.” *Id.* R. 1.1 cmt. 5.

144. *Id.* R. 1.1 cmt. 8.

145. See Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 32 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (highlighting the additional risks posed by social media include negligence and even misconduct when attorneys fail to take the time to ensure the advice they are providing the public is not only accurate but also current).

benefits and risks of using relevant technology, i.e., social media.¹⁴⁶

Using the LawZam backdrop, some critics have suggested that there may be additional dangers from websites that employ graduates “fresh out of law school.”¹⁴⁷ This is potentially problematic when there is no requirement that lawyers have experience in a particular field or even experience practicing law.¹⁴⁸ Thomas Mason, partner at Zuckerman Spaeder, acknowledged, “If the lawyers don’t know what they’re talking about, it’s a problem for everybody.”¹⁴⁹ In light of recent periods of economic distress, translating into fewer available jobs in the job market, more graduates are using the Internet as a way to meet clients and instantly start practicing.¹⁵⁰ While jumping into practice without experience does not violate any ethics rules in and of itself,¹⁵¹ attorneys may be exposed to a host of problems absent some regulation or filtering system, which ideally would assign attorneys to legal issues based on fields of law in which they are knowledgeable, along with some vetting system, ensuring competency and experience rather than smooth talk and flash.

D. *Solicitation and False and Misleading Statements*

Soliciting potential clients runs afoul of professional responsibility rules enacted by both federal and state¹⁵² authorities.¹⁵³ Under Model Rule

146. See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013) (discussing the requirements for maintaining competence throughout the course of representation).

147. See Leigh Jones, *Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet*, NAT'L L.J. (Aug. 20, 2012) (content available through LexisNexis) (reporting that nearly 20% of attorneys providing services through LawZam graduated after 2008, prompting legal ethics experts to raise concerns about potential legal issues).

148. See *id.* (indicating that the website allows lawyers to jump into the job market and instantly gain clientele); see also MARTINDALE-HUBBELL, http://careers.martindale.com/c/job.cfm?site_id=7302&jb=10707224 (last visited Sept. 13, 2012) (on file with the *St. Mary's Law Journal*) (advertising a job opening for attorneys at LawZam that requires a degree from an ABA accredited school, membership of a state bar, and good standing but lists no minimum experience requirement).

149. Leigh Jones, *Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet*, NAT'L L.J. (Aug. 20, 2012) (content available through LexisNexis).

150. *Id.*

151. After all, we have to start somewhere.

152. The Texas Rules are similar to the ABA Model Rules with respect to solicitation. Only minor differences are present in the Texas version, which include additional commentary explaining non-profit organization exemption and forms of electronic communications that may be considered face-to-face solicitations. See Tex. Comm. on Prof'l Ethics, Formal Op. 561 (2005), available at <http://www.legalethics.texas.com/getattachment/8b9e6585-6275-478b-a33846525d4ce291/Opinion-561.aspx> (claiming that a Texas lawyer may *not* participate in an Internet lawyer-client matching service where potential clients post their legal problems, which are then forwarded to attorneys who registered to be able to respond online).

153. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2013); TEX. DISCIPLINARY RULES PROF'L

7.3,¹⁵⁴ if a lawyer's motive is monetary benefit, the lawyer shall not solicit¹⁵⁵ professional employment, either "in-person, [through] live telephone or real-time electronic contact."¹⁵⁶ The sense of immediacy and confrontation drive the need for such solicitation rules.¹⁵⁷ The rule's commentary explicates that because there are alternative, and perhaps better, means of communicating to those in need of legal assistance, there is justification for prohibiting solicitation.¹⁵⁸ Recent debate concerns whether social media communications should fall under the "real-time conversation" umbrella or if they should be considered individual solicitations at all because they are directed to the public-at-large.¹⁵⁹

When applied in context to an online forum, solicitation occurs more frequently in chat rooms, chat services, and through email communications.¹⁶⁰ However, with their speed-dating model, websites like LawZam, who operate by providing "brief real-time consultations,"

CONDUCT R. 7.03 (2005).

154. As part of the new 2012 amendments, Rule 7.3 originally titled "Direct Contact with Prospective Clients" has been modified to "Solicitation of Clients." MODEL RULES OF PROF'L CONDUCT R. 7.3 (2013).

155. According to rule 7.3, comment 1, "solicitation" is defined 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 to provide, legal services." *Id.* R. 7.3 cmt. 1. Comment 2 goes further by acknowledging that there is a real potential for abuse if a "direct in-person, live telephone or real-time electronic communication" occurs with someone seeking legal services. *Id.* R. 7.3 cmt. 2.

156. *Id.* R. 7.3(a); see also N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 918 (April, 2012), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=65710&Template=/CM/ContentDisplay.cfm> (holding that a lawyer may post a video on his website for educating laypersons about a legal subject without violating solicitation rules so long as the video does not go beyond its intended educational framework). The Rules' list, of course, includes exceptions regarding categories of persons contacted by a lawyer who do not come within the rule. Those persons include: other lawyers, family members, or those with a "close personal, or prior professional relationship." MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2013).

157. *Id.* R. 7.3 cmt. 2; Gabriel Miller, *Social Responsibility*, TRIAL, Jan. 2011, at 24–25.

158. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 3 (2013); see also Ariz. St. Bar Comm. Rules of Prof'l Conduct, Formal Op. 99-06 (1999) ("Arizona lawyers ethically may not participate in an Internet service that sends legal questions from individuals to attorneys based upon the subject matter of the question.").

159. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2013); see also Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 132 (2009) (citing Joel Michael Schwarz, *Practicing Law over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 HARV. J.L. & TECH. 657, 669 (2001)) (recommending a "sliding scale" standard for concluding when a website is considered a solicitation and suggesting that "merely hosting a passive website" does not rise to the level of soliciting).

160. See St. Bar Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) (indicating attorney communication with a potential client in a chat room is a violation of the solicitation rules); see also *Anderson v. Ky. Bar Ass'n*, 262 S.W.3d 636, 638–39 (Ky. 2008) (holding that an attorney posting a website offering legal services following a fatal airplane crash warranted punishment for violating the rules of professional conduct).

may qualify as solicitations because of the “real-time” communication designation.¹⁶¹ But the problem goes slightly deeper still. Assume that an individual goes to a legal-services related website like LawZam, and engages in a brief initial consultation with a lawyer. Now consider that on the other end of the communication is an attorney hungry for work. The attorney has only a few minutes to demonstrate his knowledge and skill on the subject matter in hopes of being retained and representing the person with their claim. Essentially, what may be happening is that the lawyer transforms into a smooth-talking, used car salesman,¹⁶² trying to get business by persuading the individual not only of the lawyer’s knowledge and expertise, but also exaggerating the potential client’s need for representation in the first place.¹⁶³ A similar scenario is possible through the use of blogs or other social media platforms so long as the exchanges occur through a “real-time” feature.¹⁶⁴

The above example—brings to light a similar problem that typically coexists with solicitation—making false or misleading statements.¹⁶⁵ Such statements alone will carry disciplinary action.¹⁶⁶ Model Rule 7.1 discusses communications regarding lawyer services.¹⁶⁷ The rule holds that lawyers should not provide false or misleading information to the public about the lawyer’s services.¹⁶⁸ Insofar as a lawyer misstates his expertise, promises more than he can deliver, uses puffery to gain business, or overstates a layperson’s need for representation, he or she would come within the scope of a Rule 7.1 violation.¹⁶⁹ In the above example, this scenario could easily come into play when the attorney is aggressively

161. See LAWZAM, <https://www.lawzam.com> (last visited Oct. 28, 2013) (noting that communications occur through real-time videoconferencing).

162. As a future member of a profession that is often derided as smooth talking and impersonal, I mean no disrespect to used-car salesmen the world over. This is just an acknowledgement of existing stereotypes.

163. See generally MODEL RULES OF PROF’L CONDUCT R. 7.3 comments (2013) (expressing concern over the potential for abuse in face-to-face solicitations).

164. See generally *id.* R. 7.3(b) (acknowledging the apparent danger of solicitation occurring in “real-time” communications between lawyers and potential clients).

165. *Id.* R. 7.1; see also Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 31 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (admitting that one potential risk of social media usage is making false or misleading statements about an attorney’s services).

166. See MODEL RULES OF PROF’L CONDUCT R. 7.1 (2013) (violating the Model Rules subjects an attorney to possible disciplinary action or grievance).

167. “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” *Id.*

168. *Id.*

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

attempting to get business in a short amount of time (i.e., inflating one's level of expertise by using excessive legalese and stating the prospective client has a winning case).¹⁷⁰ Because the typical prospective client's understanding of the legal process is uninformed, he or she is more willing to accept the word of his or her potential attorney than professional advice in almost any other field.¹⁷¹ As our society becomes more tech-savvy, additional revisions to the Model Rules will be necessary to decide how the solicitation rules will adequately address videoconferencing websites and similarly situated blogs.

E. *Unauthorized Practice of Law*

Perhaps one of the most readily recognizable ethics issues plaguing the online legal community involves the unauthorized practice of law.¹⁷² While the allure of the Internet and maintaining an online presence carries immediate, worldwide exposure with relatively low attendant costs,¹⁷³ it

170. *But see* S.C. Bar Ethics Advisory, Formal Op. 11-05 (2011), available at <http://sbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx> (holding that an attorney seeking to use "daily deal" websites like Groupon are okay so long as they are still in compliance with Rules 7.1 and 7.2 requiring that attorneys refrain from giving any false or misleading information about the lawyer's services in an attempt to receive financial gain).

171. *See 24 Tips: Getting the Most Out of Your Lawyer*, CENT. VA. LEGAL AID SOC'Y, <http://www.cvlas.org/resource-24tips.html> (last visited Oct. 28, 2013) (advising people to listen to their lawyers because they know the legal system and how the law applies to the facts).

172. *See* Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 128 (2009) (explaining that maintaining a social media presence or legal blog may expose attorneys to unauthorized practice of law issues across jurisdictions); Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 161 (2012) (suggesting that the interactive nature of social media comment posting coupled with its broad reach creates the justifiable risk of unauthorized practice of law); J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 284 (2004) (acknowledging that with the advent of the Internet the number of unauthorized practice of law issues has significantly risen); Zachary C. Zurek, Comment, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 242, 250-77 (2013) (listing Certified Public Accountants, certain administrative agents, and those involved with online legal document preparation as possible individuals engaging in the unauthorized practice of law); Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH & B. MINN. (Nov. 10, 2010), <http://mnbenchbar.com/2010/11/social-media-for-lawyers/> (highlighting that social media does not have any physical borders which makes it easy for lawyers to succumb to ethics violations); Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 32 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (warning lawyers that content uploaded on the web is viewable anywhere in the world and cautioning lawyers not to engage in practice outside their jurisdiction).

173. *See, e.g.*, Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 30 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (reporting

simultaneously creates additional risks for attorneys who provide legal advice in one jurisdiction to an individual in another jurisdiction.¹⁷⁴ This situation is easy to imagine. Take for example an attorney who manages a legal blog or a Facebook page; a stranger visits the site and posts a question to the attorney, and the attorney receives the message and provides legal advice. Now, if the attorney and the stranger both reside in Texas, there is likely no unauthorized practice of law issue.¹⁷⁵ However, if the attorney is in Texas and the stranger is in Ohio, for instance, there will likely be an ethics violation for practicing law in a jurisdiction without a license.¹⁷⁶

It is important to understand that the nature of the Internet distorts this issue for attorneys because blogging and comment posting is frequently done anonymously or through usernames, making it difficult to ascertain the source of the content or where the commentator is located.¹⁷⁷ In the

that one of the main benefits of using social media is that it provides a cost-effective way of reaching large audiences all over the world).

174. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2013) (discussing that a lawyer may only practice law in jurisdictions in which the lawyer is licensed and otherwise authorized to practice); see also Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 156 (1999) ("Lawyers answering questions about the law in jurisdictions in which they are not licensed to practice may violate restrictions against the unauthorized practice of law.").

175. Although with respect to social media issues, there could, however, be other ethical problems arising from the exchange of communication, including but not limited to: solicitation, making false or misleading statements, advertising violations, conflicts checking problems, confidentiality concerns, and competency issues. See, e.g., Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 30 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (asserting that potential risks of using social media are making misleading comments that violate advertising rules).

176. Unless, of course, the attorney is also licensed to practice in the state of Ohio. See *In re Discipline of Lerner*, 197 P.3d 1067, 1069 (Nev. 2008) (asserting that whether the unauthorized practice of law has occurred is determined on a case-by-case basis and requires the "exercise of judgment in applying general legal knowledge to a client's specific problem," and holding that an attorney licensed to practice law in Arizona but maintaining an extensive practice in Nevada constituted a violation of the unauthorized practice of law for which a public reprimand was proper); *Office of Disciplinary Counsel v. Palmer*, 761 N.E.2d 716, 720 (Ohio Bd. of Comm'rs on the Unauthorized Practice of Law 2001) (finding that an executive director who created a legal blog offering his opinion and offering to help people with their legal issues did not engage in the unauthorized practice of law because he did not actually provide specific legal advice to visitors of the website). See generally MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 1 (2013) (outlining the parameters for multijurisdictional practice of law for attorneys, specifically addressing that a lawyer may practice in multiple jurisdictions so long as he has been admitted to practice in those jurisdictions).

177. See Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 163 (2012) (proposing that it is difficult for practitioners to know their audience when communicating over the Internet because anonymity and pseudonymity are quite common in the online world).

oft-cited case, *Office of Disciplinary Counsel v. Palmer*,¹⁷⁸ David Palmer, an executive director maintaining the website *amoraethics.com*, was accused of the unauthorized practice of law.¹⁷⁹ His website contained disclaimers that he was not an attorney but suggested he would provide advice on how to deal with legal problems.¹⁸⁰ Because the Supreme Court found the information posted by Palmer to be of a general nature and *not individualized*, he did not engage in the unauthorized practice of law.¹⁸¹ The court, however, was quick to underscore that had Palmer actually given legal advice in response to a specific question posed by a visitor of his site, he would have engaged in practicing law without a license.¹⁸²

ABA Model Rule 5.5 states: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”¹⁸³ The rule further states that a lawyer not authorized to practice law in a given jurisdiction may not establish an office or other “systematic and continuous presence in [that] jurisdiction . . . or hold out to the public or otherwise represent that [he] is admitted to practice law.”¹⁸⁴ The inclusion of this language suggests that

178. *Office of Disciplinary Counsel v. Palmer*, 761 N.E.2d 716 (Ohio Bd. of Comm’rs on the Unauthorized Practice of Law 2001).

179. *See id.* at 718 (suggesting that Palmer committed multiple unauthorized practice of law violations). Specifically, Palmer was accused on three grounds: (1) allegedly providing free legal advice through his website, *amoraethics.com*; (2) affixing the letters J.D. after his name on his letterhead and representing that he was offering free legal advice; and (3) filing a brief in 1988 with the Ohio Court of Appeals. *Id.*

180. *Id.* There were several disclaimers on the website which indicated that some legal matters should be resolved without the need of an attorney and its associated costs. *Id.* at 718–19. The disclaimer also stated that Palmer was not an attorney and listed his employment history in the legal field. *Id.* It further invited people to submit brief summaries of legal issues for review and advice by Palmer, and he would provide a response unless he felt the individual required attorney services, in which case he would provide attorney names to the individual. *Id.*

181. *See id.* at 720 (“The publication of general legal advice on Palmer’s [website], good or bad, is not of itself the unauthorized practice of law.”).

182. *See id.* (“If Palmer actually gave legal advice in specific response to a question from one of his readers, he would have engaged in the unauthorized practice of law.”).

183. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2013). The Model Rules are much more extensive than the Texas Rules when addressing the unauthorized practice of law. *Compare id.* R. 5.5 (detailing the circumstances in which a lawyer’s actions constitute the unauthorized practice of law, and setting forth general exceptions to the rule for practicing in other jurisdictions without running afoul of Rule 5.5), *with* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 5.05 (“A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”).

184. *See* MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 4 (2013) (explaining that “presence” does not require the lawyer to be physically present in order to qualify under the

blogging or any interactive social media presence may run afoul of the unauthorized practice of law regulations.¹⁸⁵ A blog, website, or even a Facebook page, does not exist solely in the jurisdiction where it was created. In the eyes of the law, that website does not exist in one place at all, but rather, in *every* location where it is accessed. So, potentially, a website without the proper disclaimer could create jurisdictional problems for an attorney without a single conversation, electronically or otherwise, with a layperson from another jurisdiction who accesses a website and acts on the advice posted there. The rule does indicate, however, a limited number of exceptions to the general rule that prohibits practicing law in a jurisdiction other than where the attorney is licensed.¹⁸⁶

For websites offering live video consultation between attorneys and clients, multijurisdictional practice-of-law dangers are ever-present.¹⁸⁷ To avoid being exposed to such ethics violations, attorneys should sufficiently pre-screen individuals before offering any legal advice to ensure they are not reaching into jurisdictions in which they are not licensed.¹⁸⁸ If an individual seeking legal advice contacts an attorney outside his jurisdiction, the attorney should refrain from offering any legal advice and should direct the individual to contact an attorney within his jurisdiction. Additionally, lawyers should employ disclaimers clearly setting forth the attorney's certifications and jurisdictional license restrictions so that individuals are aware of where the attorney can and cannot practice.¹⁸⁹

systematic and continuous presence test).

185. See Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 127 (2009) (suggesting that a lawyer may be exposed to violations of the unauthorized practice of law because he may not "establish an office or other systematic or continuous presence" in a jurisdiction in which he is not licensed to practice).

186. See MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (dictating the limited circumstances in which an attorney may provide legal services on a temporary basis, including: when the lawyer obtains local counsel and local counsel is actively involved in the matter; when a lawyer's services are related to an arbitration or mediation and stem from a proceeding within the attorney's jurisdiction and do not require a pro hac vice admission; or a proceeding related to or concerning a pending proceeding where the attorney is assisting another attorney authorized to practice in that jurisdiction and is admitted pro hac vice).

187. See Leigh Jones, *Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet*, NAT'L L.J. (Aug. 20, 2012) (content available through LexisNexis) (emphasizing that LawZam operates by hosting initial online video consultations between attorneys and visitors to the website).

188. See *generally* MODEL RULES OF PROF'L CONDUCT R. 5.5 (setting forth the guidelines attorneys should follow in order to avoid disciplinary action).

189. See S.C. Bar Ethics Advisory Comm., Formal Op. 94-27 (1994), available at <http://www.scbare.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/507/Ethics-Advisory-Opinion-94-27.aspx> (involving a situation where an attorney sought to participate in general legal discussions via electronic media and the committee noted that such practice of law via electronic means may violate rules of professional conduct absent a clear notice of geographical

V. APPROACHES FOR AVOIDING LIABILITY

For the prudent advocate, ignoring social media cannot be the answer. Doing so could have potentially devastating effects on one's practice in the present and, most certainly, in the future.¹⁹⁰ As society becomes more technologically savvy and dependent, maintaining a social media presence will be necessary to stay competitive in the legal marketplace.¹⁹¹ Therefore, practitioners must learn how to utilize this free tool to their benefit, while respecting the boundaries of professionalism. To avoid ethics liability, three overarching approaches should be considered in assessing and managing social media risks in the professional arena: regulation-based, website-based, and attorney-based solutions. While any solution-based approach should, on its own, assist lawyers in avoiding liability, applying a hybrid approach will better shield a practitioner from the ire of their state bar and, potentially, from the kiss of death—license revocation.

The regulation-based remedy could include the creation of an oversight body to supervise social media issues and continuously draft guidelines for review and consideration by the ABA's ethics committee, which evolve along with social media.¹⁹² This approach, essentially an

limitations on the lawyer's ability to practice in only those jurisdictions for which he is licensed). This would include a disclaimer that the attorney is only licensed to practice in states X, Y, and Z. See Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 32 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (recommending that attorneys include on their webpages the jurisdictions in which they are licensed to practice law, so that visitors understand where the attorney can and cannot practice).

190. See Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR ASS'N (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html> (referencing the staggering numbers of both young and seasoned lawyers using social media as a means of generating business while acknowledging that those numbers are likely to increase over time).

191. See Robert Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, LAWSITES (Aug. 16, 2012), <http://www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html> (providing some of the highlights from the 2012 ABA's Legal Technology Report, including that 39.1% of practitioners claim to have retained a client directly or indirectly from blogging activities, 11.2% acknowledge the use of Twitter for professional purposes, and an astonishing 95% of lawyers admit to using LinkedIn, Facebook, or other social networking sites for career development, networking, investigation, client development, and education purposes).

192. See, e.g., Memorandum from the ABA Comm'n on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Technology, AM. BAR ASS'N 1, 3 (Sept. 20, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientconfidentiality_issuespaper.authcheckdam.pdf (suggesting that committees could be established to research changes in technology and propose new guidelines or issue a paper for consideration by the ABA's House of Delegates). Until such body is formed, attorneys are permitted to submit questions, comments, or concerns to the ABA for consideration. See *ABA Commission on Ethics 20/20*

acknowledgment that there is a definable lag between Internet-based content issues and implementation of laws or regulations addressing them, seeks to attack new issues as they arise, before they can cause serious damage.¹⁹³ Although it is impossible to entirely eliminate the lag between Internet activity and ethics standards, finding ways to rein in this lag would provide meaningful aid to the legal community by removing at least some of the current uncertainty.¹⁹⁴

In order to properly empower the regulation-based solution, continuing legal education (CLE) requirements should expand to include a yearly obligation solely focused on social media and other technological education.¹⁹⁵ Providing attorneys with the expectations of their state bar concerning social media usage helps, not hinders, legal professionals.¹⁹⁶ Therefore, requiring this CLE serves two main purposes: explaining to practitioners the best methods for exploiting social media as the business-generating tool it can and should be, as well as properly defining the boundaries of professional responsibility for attorneys who are so inclined. Until this social-media CLE is required by the various states, or recommended by the ABA, responsible practitioners should, on their own, consider attending one of the numerous annual seminars discussing ethics and social media issues.¹⁹⁷

Comments, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/comments.html (last visited Oct. 28, 2013) (maintaining an extensive comments page with a table of contents for all current topics available for comment by the Ethics 20/20 Commission and including an email link feature for ease of submitting material to the ABA).

193. See JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW* 205–06 (Eddie Forunier, ed., Thomas Reuters/Aspatore 2010) (noting that the Internet is growing and changing at a pace so fast that the law is unable to stay current and applicable with new developments in technology).

194. *But see* Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous*, A.B.A. J., Feb. 2011, at 49, 53 (according to Stephen Gillers, legal ethics professor of New York University Law School and member of the ABA's Ethics 20/20 Commission, the current rules are at a high enough level that they do not require further clarification to be applicable and effective with new technology).

195. Currently, Texas requires fifteen credit hours of CLE per year, three of which must be devoted to legal ethics or professional responsibility, or divided between both. Tex. State Bar R. art. XII, § 6, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005).

196. See Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous*, A.B.A. J., Feb. 2011, at 49, 53 (quoting David Hricik, law professor at Mercer University School of Law and former chair of the ABA Section of Intellectual Property Law's Committee on Professional Responsibility, calling for bar associations to provide meaningful guidelines on acceptable uses of social media because of the number of attorneys using them that do not know the boundaries).

197. For a listing of social media geared CLE available for purchase and download offered through the ABA, see ABA WEB STORE, <http://apps.americanbar.org/abastore/index.cfm?>

The website-based solution requires the use of clear and bold disclaimers throughout websites and blogs, renouncing any possible implication that an attorney–client relationship has been formed, and making visitors patently aware that general information on a website is not legal advice.¹⁹⁸ Although disclaimers alone are no guarantee that a visitor will not claim that legal advice was given or that an attorney–client relationship was formed, such disclaimers are a significant first step in shielding an attorney from these attacks or even rebutting such claims.¹⁹⁹ Of course, accompanying such disclaimers should be an attorney’s designation of states in which he or she can lawfully practice, because the attorney’s first priority, after all, is securing new business.²⁰⁰

Similarly, the website-based solution calls for attorneys to post terms-of-use in an open and obvious location on blogs and websites, and for requiring visitors to affirmatively consent to such terms before providing access, in an effort to aid attorneys in avoiding conflict of interest problems.²⁰¹ Such disclaimers, while protecting the attorney from liability, have the potential to achieve the ancillary goal of educating the public on the nature of online legal aid. As with all disclaimers, they should appear prominently on the website, in language and type that is readily identifiable and easily understandable to laypersons. This should be a relatively simple solution, given that most experienced practitioners are already familiar with the fact that disclaimers go a long way in limiting exposure to liability and resulting grievances.²⁰²

Of course, attorneys themselves can, and should, be part of the solution. By striving to achieve higher self-imposed standards, we will not only

fm=Product.Search&cid=84&layout=&tid=5&type=pte§ion=cle&sort=d (last visited Oct. 28, 2013). Additionally, state and local bar websites are a great resource for information on upcoming CLE seminars and conferences.

198. See Eileen Libby, *www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients*, A.B.A. J., Jan. 2011, at 22, 23 (highlighting that a number of state bar opinions have tackled online communications and determined that lawyers should employ disclaimers on their social networking sites to avoid confidentiality and inadvertent attorney–client relationship issues).

199. See Ethics Traps to Consider, Inadvertent Attorney–Client Relationship discussed *supra*.

200. See Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 32 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (recommending that an appropriate step in avoiding unauthorized practice allegations is to employ a clear disclaimer on online content stating the jurisdictions in which the attorney is licensed to practice).

201. See Mass. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 07-01 (2007) (reporting that legal professionals may avoid disqualification by posting a “terms of use” on their website to which clients must affirmatively assent before using the website’s email link).

202. Eileen Libby, *www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients*, A.B.A. J., Jan. 2011, at 22, 23.

become better attorneys but our profession will be all the better for it. This will require a clear definition of the scope and boundaries of employment with clients—online and off—and require attorneys to consider the permanency of words before posting them to the Internet for the world to see. Prudent attorneys should periodically review the rules of professional responsibility to ensure they are towing the line, and as necessary, familiarize themselves with new and changing rules in the realm of professional responsibility, as well as any legal developments in the area of social media—whether the ABA requires new CLEs or not.²⁰³

Additionally, attorneys must be more proactive in eliminating the ambiguities that find their way into the rules and take advantage of the present ability to pose questions to state bar ethics committees and panels.²⁰⁴ If concern about a particular behavior or action arises, state bar committees urge attorneys to make use of this forum for guidance and clarification rather than engage in behavior that potentially violates ambiguous or convoluted rules.²⁰⁵ If nothing else, the sheer size of the client pool on the Internet seems enticing, but a law license—so difficult to earn and impossible to recover once lost—is not worth jeopardizing for an easy score. As American lawyers have always known, the easy way is rarely the best, and is never the safest.

VI. CONCLUSION

Social media entered our homes, lives, and society like a tornado; it came quickly, without much notice, and completely changed the way we live and do business. It is relatively new, but it is clearly the future.²⁰⁶ Just as there are risks in any activity, sport or adventure, so too are there risks in interacting through social media.²⁰⁷ It would be shortsighted not

203. Although currently there are only a handful of ethics opinions concerning social media, more are certain to come.

204. See Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous*, A.B.A. J., Feb. 2011, at 49, 50 (recognizing the presence of ambiguities in the rules when applied to the online setting and how those ambiguities are already costing attorneys).

205. For information about submitting questions or comments to the ABA ethics committee see *ABA Commission on Ethics 20/20 Comments*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/comments.html (last visited Oct. 28, 2013).

206. See CAROLYN ELEFANT & NICOLE BLACK, *SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER 6–7* (American Bar Association 2010) (providing statistics on the number of users utilizing various social media outlets and suggesting that we have yet to see social media's full impact on that way our society interacts with one another).

207. See Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, BENCH & B. MINN. (Nov. 10, 2010), <http://mnbenchbar.com/2010/11/social-media-for-lawyers/> (outlining different

to embrace social media for the tool that it can be, both privately and professionally. However, if social media content is not given the requisite consideration and care before it is published to the world, it can be a piercing dagger to an attorney's career and license.²⁰⁸

Practitioners should not wait for the ABA or local state bars to take remedial measures that address ethics rules' applicability to social media. Rather, practitioners should interpret and apply the current rules themselves as best possible.²⁰⁹ If all else fails, the prudent practitioner should ask the following question before making a post on the Internet: would this statement carry liability in an offline setting?²¹⁰

risks for attorneys associated with social media usage); Thomas J. Watson, *Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?*, 85 WIS. LAW. 30, 31 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416> (addressing certain risks present when attorneys engage in social media usage in a professional capacity).

208. See, e.g., Complaint at 1, *In re Kristine Ann Peshek*, No. 6201779 (Ill. Att'y Registration & Disciplinary Comm'n Aug. 25, 2009), available at <https://www.iardc.org/09CH0089CM.html> (outlining disciplinary charges brought against an Illinois public defense attorney for publishing client confidences over the Internet through her blog "The Bardd (sic) Before the Bar – Irreverent (sic) Adventures in Life, Law, and Indigent Defense").

209. Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR ASS'N (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html>.

210. See JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW 163 (Eddie Fournier, ed. Thomas Reuters/Aspatore 2010) (suggesting that if you would not engage in such actions at your neighborhood bar, cocktail party, golf course or in a written letter, then you should not say them on Facebook, Twitter, blog or other electronic medium). For those attorneys and firms using social media, it may also be wise to invest in a social media insurance policy. See Kendall Kelly Hayden, *Social Media Users: R U Insurable?*, 74 TEX. B.J., Jan. 2011, at 96 (reporting that as a result of social media, insurers offer specific policies covering Internet-based business activity).