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Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media.

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ARTICLE

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Abstract. "When All That Twitters Is Not Told; Ethical Considerations in the Use of Social Media"

This Article will examine the ethical issues posed by lawyers' use of social media platforms in light of the ABA Ethics Commission 20/20 changes to the Model Rules of Professional Conduct. Social networking has had a transformative effect both on the way society shares information and on the legal profession. Much of the discussion to date focuses on the discovery and use of evidence from social media sites in criminal cases and civil litigation, but attention must also be directed to the ethical quandaries posed by the legal profession's use of social media.

This Article will consider issues such as the duty to provide competent representation in the digital age; the trend of requiring lawyers, as a matter of professional competence, to be up-to-date on the use and implications of social media; and maintaining client confidentiality in the age of Facebook and Twitter. It will also discuss ethical risks that can arise from fact gathering and preservation of evidence in the social media context.

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I. INTRODUCTION

The advent of social networking platforms such as Facebook, Twitter, LinkedIn, and YouTube has revolutionized how people communicate and share information. Facebook has over one billion users worldwide, and one out of every seven online minutes is spent on the site alone.[1] Excluding mobile users, Americans log approximately 10.5 billion minutes on Facebook daily.[2] Twitter, the popular micro-blogging site on which users can "tweet" messages of 140 characters or less, has gone from processing 5,000 tweets a day in 2007 (within a year of its launch) to over 400 million tweets daily in 2012.[3] According to the Pew Institute, 65% of adult Americans maintain at least one social networking profile.[4]

For lawyers in particular, the legal profession's embrace of social media has evolved from the digital equivalent of a perfunctory handshake, to a full-on bear hug of a long-lost friend. According to a recent study by American Lawyer Media (ALM), nearly 75% of law firms in the United States employ social networking platforms such as Facebook, Twitter, LinkedIn, and YouTube for marketing purposes.[5] In another study performed by the American Bar Association (ABA), 88% of the responding law firms reported having a LinkedIn presence, while 55% acknowledged using Facebook and another 13% can be found on Twitter.[6] Moreover,

1. Emil Protalinski, *Facebook Accounts for 1 in Every 7 Online Minutes*, ZDNET.COM (Dec. 27, 2011, 3:55 AM), http://www.zdnet.com/blog/facebook/facebook-accounts-for-1-in-every-7-online-minutes/6639.

2. Emil Protalinski, *10.5 Billion Minutes Spent on Facebook Daily, Excluding Mobile*, ZDNET.COM (Mar. 28, 2012, 5:28 AM), http://www.zdnet.com/blog/facebook/10-5-billion-minutes-spent-on-facebook-daily-excluding-mobile/11034; Kevin Weil, *Measuring Tweets*, TWITTER (Feb. 22, 2010), http://blog.twitter.com/2010/02/measuring-tweets.html.

3. Anna Gervai, *Twitter Statistics—Updated Stats for 2011*, MARKETINGGUM.COM (July 2011), http://www.marketinggum.com/twitter-statistics-2011-updated-stats/; Matt McGee, *With 400 Million Tweets Per Day, Twitter Spending "Inordinate Resources" on Improving Content Discovery*, MARKETINGLAND.COM (June 7, 2012, 2:33 PM), http://marketingland.com/twitter-400-million-tweets-daily-improving-content-discovery-13581.

4. MARY MADDEN & KATHRYN ZICKUHR, PEW RESEARCH CTR., 65% OF ONLINE ADULTS USE SOCIAL NETWORKING SITES: WOMEN MAINTAIN THEIR FOOTHOLD ON SNS USE AND OLDER AMERICANS ARE STILL COMING ABOARD (Aug. 2011), *available at* http://pewinternet.org/~/media//Files/Reports/ 2011/PIP-SNS-Update-2011.pdf.

5. *2012 Am. Law. Tech. Survey: Highlights from Our 17th Annual Survey of Law Firm Technology*, AMERICANLAWYER.COM, http://www.americanlawyer.com/PubArticleALD.jsp?id=1202575625114&Highlights_from_the_2012_Am_Law_Tech_Survey&slreturn=20130030145246 (click on "Social Networking" tab) (last visited Apr. 5, 2013).

6. Robert Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, LAWSITESBLOG.COM (Aug. 16, 2012), http://www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html (citing 2012 ABA LEGAL TECHNOLOGY SURVEY REPORT: WEB AND COMMUNICATION TECHNOLOGY (v. IV)).

22% of the lawyers surveyed indicated their firms maintain an online blog (an increase from the previous year's 15%).[7]

Additionally, a lawyer's use of social media goes beyond using such platforms merely as marketing tools. In an age in which seemingly everyone is sharing the details of their lives online, lawyers use social networking sites for discovery in all types of litigation, ranging from family law and criminal proceedings to personal injury, employment, commercial, and even intellectual property matters.[8] Social media content is used in virtually all aspects of litigation, posing new questions about privacy issues and the parameters of discovery in the digital age and raising issues of authentication and other evidentiary hurdles.[9] Social media brings new causes of action (e.g., libel by Twitter) and innovative approaches to common problems. For example, a growing number of jurisdictions, including courts in both the United Kingdom and the United States, now permit service of process via social networking sites for those hard to reach through more traditional avenues of communication.[10]

However, emerging technologies also raise new ethical quandaries for lawyers. Before an attorney "friends" a client or tweets about his or her latest big deal or courtroom triumph, the attorney should consider how this paradigm shift (represented by social networking) shapes the ethical landscape for lawyers. This Article examines these ethical issues in light of the changes to the Model Rules of Professional Conduct approved in the wake of the ABA Commission on Ethics 20/20 (the Commission), as well as evolving case law from around the country, particularly with regard to the following: a lawyer's duty to provide competent representation; a lawyer's communications with a client and duty of confidentiality; a

7. *Id.*

8. *See* Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 10 (2012) (inquiring as to whether "the existing discovery scheme [can] adapt to adequately deal with social-media discovery"); Sandra Hornberger, *Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence*, 27 TOURO L. REV. 279, 279–81 (2011) (explaining why courts must adapt to changes in the discovery process because of evolving technology and the advent of social networks).

9. *See, e.g.*, John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 469 (2011) ("Litigators in all areas of civil litigation need to understand . . . the types of useful evidence to be gleaned from social networking sites, . . . as well as the authentication issues and privacy concerns that have been raised with respect to the admissibility of content from a social networking profile.").

10. John G. Browning, *Your Facebook Status—"Served": Service of Process Using Social Networking Sites*, 2 REYNOLDS CTS. & MEDIA L.J. 159, 173–75 (2012). *See generally id.* at 165–73 (discussing how the concept of service of process via social media has spread to countries such as Australia, New Zealand, Canada, and Singapore).

lawyer's duty to gather information in an ethically responsible manner; a lawyer's duty to preserve information; and a lawyer's duty to behave ethically where jurors are concerned. Legal scholars argue that new media platforms such as Facebook or Twitter mandate the creation of new rules of ethics for attorneys while additionally requiring that attorneys unfamiliar with evolving technology become informed of its uses.[11]

This Article, however, argues that none of these positions represents a pragmatic or viable approach to the ethical questions raised by a lawyer's use of social media. While the advent of social networking has irrevocably altered the legal landscape, these new forms of communication are still governed by the same common denominator: they remain forms of communication, albeit electronically stored and transmitted, rather than memorialized on paper. As the recent amendments to the ABA Model Rules of Professional Conduct reflect, the "old" rules fit the "new" technology sufficiently to fulfill the goals of adequately protecting both the profession and the public. As the Commission itself concluded in its December 2011 report, "In general, we have found that the principles underlying our current Model Rules are applicable to these new developments. As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul."[12]

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11. *See, e.g.*, Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 137 (2009) ("[T]he constant addition of social networking tools to the array of communications methods that lawyers use every day has already made [the ABA Guidelines] incomplete."); Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. REV. 241, 284 (2011) ("[O]ur current standards of professionalism, and the ethical rules on which they lean, are inadequate to curtail unprofessional social media use and social networking. But, for better or for worse, we live in the Facebook age. Unregulated, these tools pose risks to our professionalism. However, with proper guidance, they can be powerful and productive tools for the legal community."); Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 358 (2010) (calling for the adoption of "written guidelines specifically and directly addressing the use of social networks and their potential to affect the legal community"); Samuel C. Stretton, *Changing Times Mean Changing Ethics Issues for Lawyers*, LEGAL INTELLIGENCER (May 9, 2012), *available at* http://www.briggs.com/files/upload/Magnuson_NCACC_04.pdf ("[L]awyers, even those who aren't truly into computer technology, may have to start spending some money and taking some courses to learn.").

12. Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Commission on Ethics 20/20 to ABA Entities et al., at 2 (Dec. 28, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_commission_actions_december_2011_final.authcheckdam.pdf. While ethical issues can, and certainly do, arise from lawyers' use of social media in marketing their practices, this Article focuses primarily on ethical concerns arising from the use—or misuse—of social media as a part of the actual practice of law, including the gathering of information, preservation of evidence, selection of jurors,

II. THE ABA ETHICS 20/20 COMMISSION, THE DUTY OF COMPETENT REPRESENTATION, AND A NATIONWIDE TREND

In 2009, then-ABA President, Carolyn Lamm, announced the creation of the Commission on Ethics 20/20.[13] The Commission's purpose was to conduct "a thorough review of the ABA Model Rules of Professional Conduct" and the regulation of the legal profession against the backdrop of advances in technology and the globalization of the legal practice.[14] Over the course of three years, the Commission studied how both technology and globalization influence the practice of law and how the regulation of the profession should be updated in light of this impact.[15] Regarding technology, the Commission noted:

> [It] affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services. Even more fundamentally, technology has transformed the delivery of legal services by changing where and how those services are delivered (e.g., in an office, over the Internet or through virtual law offices), and it is having a related impact on the cost of, and the public's access to, these services.[16]

After the study concluded, the Commission circulated its report, invited comment, and "split its recommendations to the [ABA House of Delegates]" for consideration at the ABA's annual meeting in August 2012; a second set of resolutions will be submitted for consideration in 2013.[17] While several resolutions involve issues related to the globalization of the legal practice (such as outsourcing legal services and changes in admission standards), Resolution 105A: Technology and Confidentiality[18] is most germane to this Article. The Commission cited the impact of technology in its overview report filed in August 2012,

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etc. Moreover, while ethical prohibitions against ex parte contact with judges is a ripe area of critical analysis, it is best examined in the context of a discussion focusing on judicial ethics opinions addressing the propriety of judges' activities on social media. As such, that subject is beyond the scope of this Article.

13. *About Us*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Apr. 5, 2013).

14. *Id.*

15. *Id.*

16. ABA COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 4 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20 _20_final_hod_introdution_and_overview_report.authcheckdam.pdf.

17. *Id.* at 1.

18. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

noting that it "has irrevocably changed and continues to alter the practice of law in fundamental ways. . . . Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve."[19] In this same report, the Commission also noted that while technology can both increase the quality and decrease the cost of legal services, "[l]awyers . . . need to understand that technology can pose certain risks to clients' confidential information and that reasonable safeguards are ethically required."[20]

At the heart of the changes proposed by the Commission, and approved by the ABA, was one core tenet of the practice of law—competence.[21] Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness[,] and preparation reasonably necessary for the representation."[22] The Commission's change can be found in Comment 6 to Rule 1.1, which now provides as follows: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[23]

The additional text to Rule 1.1 mandates that competency mean more than keeping current with statutory developments or common law changes in one's particular field, but also requires having sufficient familiarity with, and proficiency in, technology, which may impact both the substantive area of legal practice itself and how the lawyer delivers these services. Regarding the latter, the Commission noted "a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document."[24] It further explained that staying current with "the benefits and risks

19. ABA COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 3 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf

20. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 6 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

21. *Id.* at 3.

22. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012).

23. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 3 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

24. *Id.*

associated with relevant technology"[25] pertains to "how lawyers conduct investigations, engage in legal research, advise their clients, and conduct discovery. These tasks now require lawyers to have a firm grasp on how electronic information is created, stored, and retrieved."[26]

An understanding of social networking sites, such as Facebook, is pivotal to accomplishing lawyerly tasks in the digital age. After all, with numerous family lawyers frequently making use of incriminating content from social networking sites, can family law practitioners truly claim they meet the obligation of competence if they fail to search the Facebook pages of both the client and the adverse spouse?[27] In an era in which a growing number of states pass laws outlining how to administer an individual's digital assets (such as a decedent's Facebook page), the question arises as to whether a wills and estate planning specialist truly addresses all of his clients' needs if the attorney is not taking digital assets into consideration.[28] While the changes made by Comment 6 to Rule 1.1 are silent as to the specifics, the sheer pervasiveness of social media in our modern society, coupled with its relative ease of use, demonstrates that a lawyer who ignores social media will fail to provide competent representation.

Additionally, while not addressed in the changes promulgated by the ABA, the duty of diligence in Model Rule 1.3 has bearing on this discussion as well. Comment 1 to Rule 1.3 provides that "[a] lawyer must . . . act . . . with zeal in advocacy upon the client's behalf."[29] An issue arises as to whether one is truly zealously advocating for a client if the attorney fails to check the Facebook page of her client's soon-to-be ex-spouse for potentially case-altering online evidence. In today's world, where so much information is available online, and at a time when the majority of one's peers are making effective use of such information, the

25. *Id.*

26. ABA COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW, at 4 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_ introdution_and_overview_report.authcheckdam.pdf.

27. *See also Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers: Facebook Is Primary Source for Compromising Information*, AAML.ORG (Feb. 10, 2010), http://aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey- (revealing 81% of respondents used such evidence in their cases).

28. *See* John Conner, Comment, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & CMTY. PROP. L.J. 301, 305 (2011) (describing digital assets); *see also* Laura E. Stegossi, *Estate Planning and Administration in the Digital Age*, LEGAL INTELLIGENCER (Feb. 5, 2013), http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202586465130 ("A few states, namely Connecticut, Idaho, Indiana, Oklahoma[,] and Rhode Island, have passed laws granting an individual's representative the right to access and manage certain digital accounts.").

29. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012).

answer must be a resounding "yes."

The Commission's revision of the standard of competent representation can hardly be called a radical shift from the norms of practice. To the contrary, the revision reflects not just the realities of practice in the twenty-first century, but also a growing trend among courts throughout the United States to hold lawyers professionally accountable when it comes to making use of social media and other online resources.[30] One author has gone so far as to state that "[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."[31]

Numerous state courts considering due diligence issues recognize an implicit "duty to Google." In *Munster v. Groce*,[32] an Indiana appellate court was incredulous that the plaintiff's attorney trying to serve the absent defendant, Groce, had failed to Google him as a matter of due diligence.[33] The opinion noted the court itself had done so and immediately obtained search results that yielded a different address for Groce, as well as "an obituary for Groce's mother that listed numerous surviving relatives who might have known his whereabouts."[34] Additionally, in *Dubois v. Butler ex rel. Butler*,[35] a Florida appellate court questioned the effectiveness of an attorney who only checked directory assistance in an effort to get an address to serve the missing defendant.[36] The court compared such a method in the age of the Internet and social media as the equivalent to using "the horse and buggy and the eight track stereo."[37] Likewise, in the Louisiana case of *Weatherly v. Optimum Asset Management, Inc.*,[38] the appellate court considered the validity of a tax sale of an office condominium where the sheriff's office had sent notice to the property's former owner/assignor, but never notified the current owner/assignee.[39]

30. *See* Sharon Nelson, John Simek & Jason Foltin, *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 11–14 (2009) (discussing the growing trend of using various social media platforms in case development).

31. *Id.* at 14.

32. Munster v. Groce, 829 N.E.2d 52 (Ind. Ct. App. 2005).

33. *Id.* at 61 & n.3.

34. *Id.* at 61 n.3.

35. Dubois v. Butler *ex rel.* Butler, 901 So. 2d 1029 (Fla. Dist. Ct. App. 2005).

36. *Id.* at 1031.

37. *Id.*; *see also* Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISCOURSE 27, 43 (2010) (emphasizing the position taken by the court "seem[ed] to demonstrate that the [Internet] is not only acceptable, but actually preferable, to the old methods of finding people").

38. Weatherly v. Optimum Asset Mgmt., Inc., 923 So. 2d 118 (La. App. 2005).

39. *Id.* at 120.

Notice was published in a local newspaper, which proved little help to Weatherly, the current owner, who lived out of state.[40] Weatherly sued "to annul the tax sale" while the new owners defended it on grounds that Weatherly was not reasonably identifiable for purposes of the notice requirement.[41] The court upheld the trial judge's conclusion that Weatherly was "reasonably identifiable" and that the adverse party had not met its responsibility to exercise due diligence after the trial judge's own performance of an Internet search easily found Mr. Weatherly.[42]

In 2010, the Missouri Supreme Court in *Johnson v. McCullough*[43] revealed a new standard for providing competent representation in the digital age: the duty to conduct online research during the voir dire process.[44] During the voir dire phase of a medical malpractice trial, plaintiff's counsel inquired whether anyone on the venire panel had ever been a party to a lawsuit.[45] While several members of the panel were forthcoming in their responses, one prospective juror, Mims, was not.[46] Following a defense verdict, plaintiff's counsel researched Mims on Missouri's online document database, Case.net, and learned of multiple previous lawsuits involving the juror.[47] The trial court granted a motion for new trial based on Mims's intentional concealment of her litigation history, and the Missouri Supreme Court affirmed.[48] The court reasoned:

> [I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search . . . when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.[49]

Taking this into consideration, the court imposed a new affirmative duty

40. *Id.*
41. *Id.* at 121.
42. *Id.* at 121, 123.
43. Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (en banc).
44. *Id.* at 558–59; *see also* Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 628 (2012) ("After the court's decision in *Johnson*, Missouri began setting aside time to allow attorneys to research jurors prior to the start of trial.").
45. *Johnson*, 306 S.W.3d at 554.
46. *Id.* at 554–55.
47. *Id.* at 555.
48. *Id.* at 555, 559.
49. *Id.* at 558–59.

on lawyers by holding that "a party *must* use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial."[50]

Another example of courts holding lawyers to a higher standard of competency, at least regarding technology, can be seen in decisions involving claims of ineffective assistance of counsel. In *Cannedy v. Adams*,[51] the petitioner challenged his conviction for the molestation of his stepdaughter on the basis of ineffective assistance of counsel.[52] Under applicable law, in order to meet the threshold for ineffective assistance of counsel, Cannedy needed to prove his attorney's representation did not meet the standard of reasonableness in addition to showing that a reasonable probability existed that, but for the errors of counsel, the proceeding's results would have been different (i.e., the *Strickland* test).[53] The *Strickland* standard is high, with the review of an attorney's performance being "highly deferential" and supported by the "strong presumption" that counsel exercised reasonable professional judgment and rendered adequate assistance.[54] In *Cannedy*, the petitioner maintained that his trial counsel failed to inquire about a friend of the purported victim who had seen a posting on the Internet in which the victim admitted fabricating the molestation allegations.[55] This friend and her mother would have testified that she looked at the victim's online profile and saw statements by the young woman denying any abuse had occurred.[56] The witness would have brought to light that the victim had

50. *Id.* (emphasis added); *see also* John Constance, Note, *Attorney Duty to Search Case.net for Juror Nondisclosure: Missouri Supreme Court Rule 69.025*, 76 MO. L. REV. 493, 494 (2010) (noting the court enacted a litigation history search on prospective jurors "[i]n an attempt to reduce the number of retrials granted due to juror nondisclosure").

51. Cannedy v. Adams, No. ED CV 08-1230-CJC(E), 2009 WL 3711958 (C.D. Cal. Nov. 4, 2009).

52. *Id.* at *1.

53. *Id.* at *15 (citing Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984)). The *Strickland* standard for ineffective assistance of counsel is as follows: "Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 688, 694, 697).

54. *Id.* (citing Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004)). *See generally* Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 108–09 (2010) (acknowledging the *Strickland* case controlled claims for ineffective assistance of counsel for many years).

55. *Cannedy*, 2009 WL 3711958, at *1, *16.

56. *Id.* at *16 (citing a written statement by the friend of the victim, which was attached to Cannedy's motion for new trial).

made up the claims of molestation against Cannedy "because she wanted to move to her natural father's home in Northern California where she was [happier] and had more friends."[57] Cannedy claimed that despite telling his trial counsel about this witness and the online recantation, the lawyer did nothing.[58] The trial attorney later acknowledged that such a statement would have had "tremendous value to him as defense counsel, . . . [and] that if he could have 'proved that [the stepdaughter] did, in fact, put [the statement] on her [MySpace] page or . . . [Facebook page],' . . . such evidence would have provided a motive for her to make up a false charge against the defendant."[59]

The appellate court agreed the attorney should have followed this lead and therefore concluded that the attorney's representation did not meet the *Strickland* standard for professional competence. The court further stated, "Any attorney acting reasonably would have considered the proposed testimony to be extremely significant, potentially exculpatory evidence."[60] While noting the unreasonableness of the attorney's effort and the prejudice that resulted from it were "fairly clear," the court was at a loss to explain why it had happened.[61] It ultimately concluded that, among other potential reasons, the trial counsel may have simply been technologically incompetent, speculating that he "misunderstood the workings" of the website "in ways that caused him to depreciate the value of the information."[62]

Other efforts to characterize a lawyer's supposed failure to make use of social networking evidence as ineffective assistance of counsel have been less successful. In *People v. Sawyer*,[63] the defendant argued that his conviction for criminal sexual conduct involving his daughter was the result of, among other reasons, ineffective assistance of counsel.[64] Sawyer claimed his lawyer failed to admit Facebook posts that impeached the alleged victim's credibility; in the posts, she discussed using marijuana throughout the trial despite her sworn testimony "that she had stopped using the drug."[65] Despite Sawyer's claim that such exhibits would have been "game changing," the court was unconvinced and denied the claim

57. *Id.* (citing a written statement by the witness).
58. *Id.*
59. *Id.* at *23.
60. *Id.* at *29.
61. *Id.* at *34 n.19.
62. *Id.*
63. People v. Sawyer, No. 306271, 2012 WL 4899690 (Mich. Ct. App. Oct. 16, 2012).
64. *Id.* at *1, *8–9.
65. *Id.* at *10–11.

for ineffective assistance of counsel.[66] It noted Sawyer's lawyer had closely questioned the victim about these Facebook posts and that failure to introduce the exhibit could have been sound trial strategy because "trial counsel effectively brought to light the most damaging statements in the Facebook feed, raising questions concerning the victim's credibility without bringing the exhibit in."[67]

Cannedy and *Sawyer* demonstrate that an attorney's comfort level with technology, particularly the evidence to be gleaned from social networking sites, will be an issue when analyzing effectiveness of counsel.[68] In *Sawyer*, for example, the claim of ineffective assistance of counsel was rejected in part because the lawyer was aware of the impeaching Facebook postings and effectively used them in cross examination (even if he did not admit them into evidence).[69]

The heightened technology-use standard enunciated in *Johnson* was later codified in Missouri Supreme Court Rule 69.025, which became effective January 1, 2011.[70] It mandates background Internet searches on potential jurors, specifically Case.net searches of a potential juror's litigation history.[71] However, the first reported case interpreting Rule 69.025 and the *Johnson* standard only raised more questions about the scope and timing of such Internet searches by trial counsel.

In *Khoury v. ConAgra Foods, Inc.*,[72] the plaintiffs sued ConAgra for personal injury damages, claiming Elaine Khoury suffered from bronchiolitis obliterans, a lung disease supposedly caused by chemical vapors emitted when Elaine prepared and consumed ConAgra's microwave popcorn.[73] The day before voir dire, when the members of the venire

66. *Id.* at *11.

67. *Id.*

68. *See* Cannedy v. Adams, No. ED CV 08-1230-CJC(E), 2009 WL 3711958, at *29 (C.D. Cal. Nov. 4, 2009) (stressing the importance of investigating an AOL online message the victim had posted); *Sawyer*, 2012 WL 4899690, at *11 (admitting the attorney effectively used evidence from a Facebook news feed); *see also* Kenneth N. Rashbaum, Matthew F. Knouff & Dominique Murray, *Admissibility of Non-U.S. Electronic Evidence*, 18 RICH. J.L. & TECH., Fall 2011, at 1, 59–60 ("A few years ago, social media and networking sites would not have registered on the average practitioner's radar. However, potential evidence from such sites must be preserved if relevant, and at least one [] [c]ourt has now held that counsel's failure to investigate and introduce evidence from such social networking sites could constitute ineffective assistance of counsel." (citations omitted)).

69. *Sawyer*, 2012 WL 4899690, at *11.

70. MO. R. CIV. P. 69.025; *see* John Constance, Note, *Attorney Duty to Search Case.net for Juror Nondisclosure: Missouri Supreme Court Rule 69.025*, 76 MO. L. REV. 493, 494 (2011) (explaining the "official court rule explaining the requirement was issued shortly after the *Johnson* decision").

71. MO. R. CIV. P. 69.025.

72. Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (Mo. Ct. App. 2012).

73. *Id.* at 193.

panel would be questioned about their prior litigation history, both sides conducted searches of Missouri's Case.net.[74] Both "parties exercised their peremptory strikes" and their strikes for cause, and a jury was empanelled.[75] The next morning, ConAgra's counsel alerted the court that their Internet research revealed Facebook postings by one juror, Piedimonte, indicating bias and an intentional failure to disclose information.[76] The attorneys argued Piedimonte was "a prolific poster for anti-corporation, organic foods."[77] ConAgra requested a mistrial, or alternatively, to strike Piedimonte from the jury.[78] The "court denied the motion for mistrial[,] but" did strike Piedimonte from the jury.[79] The trial proceeded with a full jury panel and three, rather than four, alternate jurors.[80] After a defense verdict, the Khourys appealed.[81] The Khourys argued, among other things, that Piedimonte should not have been removed from the jury and that ConAgra's broader Internet search was not timely.[82] The appellate court rejected this argument, observing that the *Johnson* standard and the subsequent Missouri Supreme Court Rule 69.025 were limited to Case.net searches of a potential juror's litigation history, not a broader search for any alleged material nondisclosure.[83] As the court pointed out:

> The rule could have similarly required "reasonable investigation" into other areas of "possible bias" and could have required such "reasonable investigation" to include a search of Internet social and business networking sites such as *Facebook*, *MySpace*, or *LinkedIn*, to name a few. And, the rule could have similarly required "reasonable investigation" of potential jurors via Internet search engines such as *Google* or *Yahoo!*, to name a few. Or, the rule could have simply required a blanket "Internet search" on "any and all issues of prospective juror bias." But, clearly, it does not.[84]

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 195, 199.
82. *Id.*
83. *Id.* at 202; *see* Chip Babcock & Luke Gilman, *Use of Social Media in Voir Dire*, 60 ADVOC. (TEX.), Fall 2012, at 44, 47, *available at* http://www.litigationsection.com/downloads/Advocate_V60_Fall2012.pdf ("The Missouri Supreme Court recently noted that the availability of technology to investigate a [juror's] prior litigation history obligates counsel to use reasonable efforts to investigate jurors early in the case.").
84. *Khoury*, 368 S.W.3d at 202 n.12.

Although the appellate court limited its reasoning to the plain text of the rule, it did acknowledge the potential in the digital age for revisiting Rule 69.025. It stated that "the day may come that technological advances may compel our Supreme Court to re-think the scope of required 'reasonable investigation' into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled."[85]

Requiring a degree of familiarity with technology as a key component of competent representation by counsel is hardly an American innovation. In 2004, the Canadian Bar Association (CBA) modified its Code of Professional Conduct to address technology competence. Chapter 2 of the Code had long provided that a "lawyer owes the client a duty to be competent to perform any legal services undertaken on the client's behalf."[86] The CBA subsequently added Commentary 4, specifically referring to technological competence:

> Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which those principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas in which the lawyer [practices]. *The lawyer should also develop and maintain a facility with advances in technology in areas in which the lawyer [practices] to maintain a level of competence that meets the standard reasonably expected of lawyers in similar practice circumstances.*[87]

III. DUTY OF CONFIDENTIALITY

Another area rife with potential ethical pitfalls in the age of Facebook and Twitter is that of client communications and acting competently to preserve client confidentiality. Here again, the ABA Commission on Ethics 20/20 weighed in with a change to Model Rule 1.6, dealing with confidential information.[88] A new section, 1.6(c), provides the following: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[89] While the earlier version of Rule 1.6 set forth the lawyer's duty not to reveal a client's confidential information,

85. *Id.* at 203.

86. CANADIAN BAR ASS'N CODE OF PROF'L CONDUCT ch. 2, R. 1 (2009).

87. *Id.* ch. 2, cmt. 4 (emphasis added).

88. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2012) (providing lawyers with the model rule regarding information confidentiality).

89. *Id.*

it did not indicate what ethical obligations lawyers have to prevent such disclosures and how to safeguard a client's confidential information in the digital age.

The proposal behind adding 1.6(c) identified three distinct scenarios involving technology and the inadvertent disclosure of confidential information. "First, information can be inadvertently disclosed, such as when an email is sent to the wrong person."[90] Second, "information can be accessed without authority" through a data security lapse by a third party hacking into a lawyer's email account or a law firm's private network.[91] The third type of disclosure can occur "when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet."[92]

Rule 1.6(c) imposes an ethical obligation on attorneys to take reasonable efforts to prevent such disclosures.[93] This could conceivably include implementing encryption and other data security measures, developing a social media policy for the attorneys and staff, and, of course, exercising common sense when using social media.[94] Comment 18 to the Rule acknowledges that disclosures can occur even if the lawyer takes all reasonable precautions.[95] Yet, even if such precautions cannot ensure the protection of a client's confidential information in every circumstance, the black letter language of Rule 1.6 nevertheless imposes on lawyers the duty to take reasonable precautions.[96] As far as guidance on the steps that might be considered "reasonable," the Commission declined to provide specific suggestions, primarily because "technology is changing too rapidly to offer such guidance[,] and [] the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available."[97] However, the Commission identified a non-exhaustive list of factors that lawyers should consider when safeguarding clients' confidential information. These include "the

90. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 4 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

91. *Id.*

92. *Id.*

93. MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2012).

94. *See id.* R. 1.6(c) & cmt. 17 (requiring lawyers to choose a reasonable form of communication with an expectation of privacy).

95. *Id.* R. 1.6(c) & cmt. 18.

96. *Id.*

97. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 5 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, . . . and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."[98]

Such issues are hardly new grounds for ethics authorities. In 2010, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2010-179.[99] In it, the committee confronted the issue of whether "an attorney violate[s] the duties of confidentiality and competence . . . by using technology to transmit or store confidential client information when the technology [might] be susceptible to unauthorized access by third parties."[100] These technology concerns are particularly relevant, given the proliferation of smartphones and tablets that enable attorneys to work virtually from anywhere, as well as the rapid adoption of "bring your own device" (BYOD) policies in many work environments. Like the ABA Commission, California's committee identified numerous factors to consider when determining whether an ethical violation occurred, including "the urgency of the situation," the client's instructions, and any special circumstances.[101]

The ABA's Standing Committee on Ethics and Professional Responsibility also entered the fray. In Formal Opinion 11-459,[102] this committee discussed the duty to protect the confidentiality of email communications with a client.[103] The committee imposed a duty on the lawyer to "warn the client about the risk of sending or receiving electronic communications [to which] a third party may gain access."[104] In particular, the committee called for lawyers to "first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communication" and, if so, to "take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client."[105]

Given the popularity of social media and the degree to which so many people—including clients—employ sites like Facebook and Twitter as

98. *Id.*

99. State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010).

100. *Id.* at 1.

101. *Id.* at 6.

102. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011).

103. *Id.* at 1.

104. *Id.*

105. *Id.* at 4.

avenues of communication, it is easy to envision lawyers tweeting about a key ruling or griping about a client who gives misleading information.[106] For attorneys who have developed a social, as well as a professional, relationship with the client, a general counsel's seemingly casual invitation via Facebook to a weekend barbecue might also include a reference to an upcoming matter of business, e.g., "I'm worried about our CFO's deposition. He makes a lousy witness and has an axe to grind. See you Saturday."[107] Lawyers who are not careful with their own communications, or who fail to remind clients to use more secure channels, run the risk of revealing case strategy or even privileged information to a whole host of third party Facebook friends, Twitter followers, and even potential strangers receiving the information via "re-tweets" or status "shares."[108] With sites like Facebook regularly tweaking their user privacy options, it is not enough simply to depend on the integrity of a user's privacy settings.[109] Checking in on FourSquare or revealing one's location through other sites with geo-location features can expose something deemed private to curious eyes.[110] In addition, even having one's LinkedIn contacts list or Facebook friends publicly viewable poses the risk of disclosing a confidential relationship. Consequently, practitioners should take care to police not only their own communications using social media, but they should also advise their clients about potential threats to the confidentiality of their own online messages.

Using social networking platforms to discuss privileged communications also invites the danger of a confidentiality waiver. In one recent case, a California court found the plaintiff in a copyright infringement lawsuit

106. *See* Michael E. Getnick, *Social Media: The Good, the Bad and the Ugly*, 81 N.Y. ST. B.J. 5, 5 (2009) (suggesting the proscription in Model Rule 3.6 against publicizing extrajudicial statements applies equally to blogs and social networking sites just as it does to traditional media outlets).

107. *Cf.* Karen Erger, *Will You Be My (Facebook) Friend?*, 98 ILL. B.J. 210, 211 (2010) (warning that "friending" on sites like Facebook requires caution from attorneys to not disclose confidential information or create attorney–client relationships inadvertently).

108. *See* Robert Tiedeken, *The Changing Face of Tort Litigation*, 35 WYO. LAW. 11, 11 (2012) (focusing on the importance of using social networking sites to investigate potential clients prior to litigation and warning clients once pretrial begins against using Facebook and Twitter).

109. *See* Lindsay S. Feuer, Note, *Who Is Poking Around Your Facebook Profile?: The Need to Reform the Stored Communications Act to Reflect a Lack of Privacy on Social Networking Websites*, 40 HOFSTRA L. REV. 473, 486 (2011) (discussing the privacy policies of Facebook, Twitter, and MySpace and warning that there is never a guarantee of privacy on these sites).

110. *See* Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 190 (2011) (providing several hypothetical examples of how geographical locating applications associated with social networking sites could potentially disclose confidential information).

had waived the attorney–client privilege through emails to third parties and blog posts discussing conversations with counsel.[111] The plaintiff, Lenz, sued Universal Music Corporation, alleging Universal knowingly misrepresented that a video posted by the plaintiff on YouTube infringed Universal's copyright in a song.[112] After filing suit, but prior to trial, Lenz visited several online chat rooms and blogs where she discussed, among other things, conversations she had with counsel concerning her motivation for filing the lawsuit.[113] After Universal discovered the posts, it argued that in making them Lenz had waived the attorney–client privilege.[114] The court agreed the online communications related to the substance of the plaintiff's conversations with her lawyer waived the privilege.[115]

In addition, given the expanding body of cases nationally in which courts have rejected parties' objections based on privacy when it comes to the discoverability of communications made via social media, lawyers or attorneys should advise their clients not to be pulled into a false sense of security by their profiles' privacy settings. For example, in one personal injury case, the plaintiff resisted efforts by the defendant to gain access to her Facebook page, claiming she had a reasonable expectation of privacy in the statements she posted there.[116] The court disagreed, holding she must disclose everything on the Facebook page in discovery.[117] The court had little sympathy for the plaintiff's privacy concerns:

> By definition, there can be little privacy on a *social* networking website. Facebook's foremost purpose is to "help you connect and share with the people in your life." That can only be accomplished by sharing information with others. Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets.[118]

Sadly, there is no shortage of examples of online breaches of confidentiality. In 2006, an Oregon lawyer posted confidential personal and medical information about a former client on a listserv, and the result was a ninety-day suspension.[119] In *Muniz v. United Parcel Service,*

111. Lenz v. Universal Music Corp., No. 5:07-cv-03783 JF (PVT), 2010 WL 4789099, at *1, *5 (N.D. Cal. Nov. 17, 2010).

112. *Id.* at *1, *5.

113. *Id.* at *4.

114. *Id.* at *1.

115. *Id.* at *5.

116. Largent v. Reed, No. 2009-1823, 2011 WL 5632688, at *6 (Pa. Ct. C.P. Nov. 8, 2011).

117. *Id.* at *9, *13.

118. *Id.* at *9–10.

119. *In re* Quillinan, 20 DB Rptr. 288, 289, 291 (2006).

Inc.,[120] the plaintiff's attorney (who had prevailed in an employment action and was now making an application for fees) faced a potentially volatile situation when the other side sought attorney's postings on social networking sites and on a listserv for the California Employment Lawyers Association (CELA).[121] The attorney allegedly posted comments criticizing the judge and offering other opinions about the defense counsel and the trial.[122] Because the magistrate to whom the matter was referred refused to compel the production of the postings on relevance grounds, she did not address whether such postings could be considered subject to the attorney work product privilege, but there were, no doubt, some tense moments for plaintiff's counsel.[123]

In September 2012, Anya Cintron Stern, a Miami-Dade County, Florida, public defender, represented Fermin Recalde on murder charges stemming from the fatal stabbing of his girlfriend in 2010.[124] When Recalde's family brought him fresh clothing to wear at trial, corrections officers held up the items for routine inspection.[125] Stern, then thirty-one years old, used her cellphone to snap a photo of Recalde's leopard print underwear and subsequently "posted the photo on her personal Facebook page with a caption suggesting the client's family believed the underwear was 'proper attire for trial.'"[126] Prior to this incident, Stern allegedly posted on Facebook a statement that called her client's innocence into question.[127] Although Stern's Facebook page was set to private, someone who saw the post notified Judge Leon Firtel, who subsequently granted a mistrial in the case.[128] The Miami-Dade Public Defender's Office promptly fired Stern, stating that "[w]hen a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and it gives the appearance that he is not receiving a fair trial."[129]

Similarly, in May 2010, former Illinois assistant public defender

120. Muniz v. United Parcel Serv., Inc., No. C-09-01987-CW (DMR), 2011 WL 311374 (N.D. Cal. Jan. 28, 2011).

121. *Id.* at *1–2.

122. *Id.* at *8.

123. *Id.* at *9.

124. David Ovalle, *Lawyer's Facebook Photo Causes Mistrial in Miami-Dade Murder Case*, MIAMI HERALD (Sept. 13, 2012), http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

Kristine Ann Peshek was fired from her job and additionally received a sixty-day suspension of her law license for commentary posted on her blog that amounted to a violation of Rule 1.6.[130] Peshek frequently referred to clients by their first names, nicknames, or jail identification numbers.[131] She also described, in sometimes graphic detail, the clients' cases, drug use, and other embarrassing and potentially harmful information, even caustically critiquing their courtroom testimony.[132] In referencing one client, identified as "Dennis the diabetic," Peshek wrote that not only did he test positive for cocaine, but also that "[h]e was standing there in court stoned, right in front of the judge, probation officer, prosecutor[,] and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well."[133] Peshek was also not shy about referencing the judges she appeared in front of, going so far as to refer to one as "Judge Clueless."[134] Sometimes online breaches of confidentiality bring down even the most powerful attorneys.

While not all instances of lawyers' online ethical lapses necessarily involve breaches of confidentiality, one universal theme is poor judgment. Just as social media has yielded an abundance of "what were you thinking" examples of litigants making questionable postings, attorneys have been guilty of becoming online cautionary tales themselves. Consider the following examples:

Jim Letten, former U.S. Attorney for the Eastern District of Louisiana, resigned in December 2012 in the midst of an investigation into two of his top deputies who had ventured online to discuss pending cases before the U.S. Attorney's Office, comment on presiding judges, and anonymously attack the objects of their office's investigations.[135] Letten, a 2001 appointee of President George W. Bush, was the country's longest-tenured U.S. Attorney before his office was rocked by scandal over the investigation

130. *In re* Peshek, No. M.R. 23794, at *1–5 (Ill. May 18, 2010), http://www.iardc.org/lawyersearch.asp (search for "Peshek"; follow "Kristine Ann Peshek" hyperlink; click on "Rules and Decisions" hyperlink; follow hyperlink for document type "Consents Allowed"); *see also* David Brazy, *Beloit Lawyer Suspended for 60 Days over Blog Comments*, GAZETTEXTRA.COM (June 25, 2011), http://gazettextra.com/news/2011/jun/25/beloit-lawyer-suspended-60-days-over-blog-comments/ (noting that Peshek's law license was also suspended in Wisconsin for the same blog postings).

131. *In re Peshek*, No. M.R. 23794, at *2.

132. *Id.* at *3.

133. Complaint at para. 6, *In re Peshek*, No. M.R. 23794, *available at* http://www.iardc.org/09CH0089CM.html.

134. *In re Peshek*, No. M.R. 23794, at *4.

135. Sari Horwitz, *New Orleans U.S. Attorney Resigns Amid Scandal over Anonymous Online Postings*, WASH. POST (Dec. 6, 2012), http://articles.washingtonpost.com/2012-12-06/politics/35650115_1_federal-investigation-attorney-general-james-cole-prosecutor.

into the sources of anonymous online criticism of Fred Heebe, a local landfill owner under federal investigation.[136] Sal Perricone, one of Letten's top deputies, resigned in March 2012 when it was revealed he had made hundreds of online posts regarding Heebe and his company on NOLA.com (the website of *The New Orleans Times-Picayune*) under the pseudonym "Henry L. Mencken 1951."[137] Later, Letten confirmed First Assistant U.S. Attorney Jan Mann had also posted numerous comments on the same website; according to Heebe, Mann used the website repeatedly to criticize him and others.[138] Following the revelation, Letten promptly demoted Mann.[139]

In a disbarment proceeding filed in December 2011, the South Carolina Supreme Court made note of certain comments and postings made by attorney Michael T. Hursey, Jr. on his MySpace page.[140] These postings included profanity, nudity, and discussions of drug use along with the name of his law firm and the city in which he practiced.[141]

In July 2012, Justin Marrus, a Brooklyn Assistant District Attorney and the son of a New York Supreme Court judge, had his Facebook page posted on a national media outlet.[142] The page showed Marrus in blackface, holding a Confederate flag, and simulating prison rape.[143] A spokesman for the D.A.'s office stated, "We think [the photos] are abhorrent, stupid, and childish. [We are] asking Mr. Marrus for a full explanation of his conduct, which is totally unacceptable. And we will take appropriate action."[144]

In February 2011, Indiana Deputy Attorney General Jeffrey Cox tweeted that live ammunition should be used on pro-labor protesters in Madison, Wisconsin, and he also made a number of similar politically-charged comments on a blog he maintained.[145] The Indiana Attorney

136. *Id.*

137. *Id.*

138. John Simerman, *Jim Letten Demotes Second-in-Command, Tries to Quietly Weather Scandal*, TIMES-PICAYUNE (Nov. 9, 2012, 7:53 AM), http://www.nola.com/crime/index.ssf/2012/11/letten_demotes_second-in-comma.html.

139. *Id.*

140. *In re* Hursey, 719 S.E.2d 670, 671 (S.C. 2011).

141. *Id.*

142. Garth Johnston, *Should Brooklyn ADAs Wear Blackface, Simulate Prison Rape on Facebook?*, GOTHAMIST.COM (July 9, 2012, 2:41 PM), http://gothamist.com/2012/07/09/should_brooklyn_adas_put_blackface.php.

143. *Id.*

144. *Id.*

145. Debra Cassens Weiss, *Indiana Deputy AG Loses Job After Live Ammo Tweet*, A.B.A. J. (Feb. 24, 2011, 6:49 AM), http://www.abajournal.com/news/article/indiana_deputy_ag_loses_

General's office terminated him, stating, "We respect individuals' First Amendment right to express their personal views on private online forums, but as public servants we are held by the public to a higher standard, and we should strive for civility."[146] Cox later commented, "I think that in this day and age [my] tweet was not a good idea."[147]

In February 2012, an ethics complaint was filed against Jesse Raymond Gilsdorf, an attorney in Illinois, for "conduct . . . prejudicial to the administration of justice" and for "making extrajudicial statements that . . . would pose a serious and imminent threat to the fairness of an adjudicative proceeding."[148] Gilsdorf allegedly attempted to sway public opinion against the prosecutor and away from his drug client by posting a video of police officers engaged in an undercover drug buy (entitled "Cops and Task Force Planting Drugs") on YouTube in April 2011 and then linking it to his Facebook account.[149]

In *Miller v. State*,[150] the defendant's robbery conviction was overturned because during closing argument the prosecutor played the jury a YouTube video "created for school administrators to see 'how easy it was to conceal a weapon inside clothing.'"[151] The court held the video, which was not admitted into evidence, "was irrelevant, prejudicial, and confused issues."[152]

In *State v. Usee*,[153] a prosecutor who made racially insensitive comments on her public Facebook page was accused of prosecutorial misconduct and improperly influencing the jury.[154] The comments,

job_after_live_ammo_tweet/.

146. *Id.*

147. *Id.*

148. Complaint at para. 20, *In re* Gilsdorf, No. 12PR0006 (Ill. Att'y Registration & Disciplinary Comm'n) (filed Feb. 6, 2012), *available at* https://www.iardc.org/12PR0006cm.html. *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2012) (prohibiting attorneys involved in ongoing litigation from making prejudicial extrajudicial statements about the matter).

149. Complaint at paras. 1–2, 6, 11, *In re Gilsdorf*, No. 12PR0006, *available at* https://www.iardc.org/12PR0006cm.html.

150. Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 2009).

151. *Id.* at 195. *See generally* FED. R. EVID. 402 (providing irrelevant evidence shall not be admitted at trial); *id.* 403 (permitting judges to exclude evidence that could substantially prejudice a party or confuse the jury).

152. *Miller*, 916 N.E.2d at 197.

153. State v. Usee, 800 N.W.2d 192 (Minn. Ct. App. 2011).

154. *See id.* at 200 (denying the appellant's contention that he was "deprived of his right to a fair trial by an impartial jury" because of the prosecutor's Facebook posts); *cf.* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400–07 (2006) (examining the relationship between prosecutorial misconduct and a defendant's ability to receive a fair trial).

made during an attempted murder case, concerned her role as a prosecutor in "keep[ing] the streets of Minneapolis safe from the [Somalis]" (the defendant was a Somalian immigrant).[155] Notwithstanding this attorney's conduct, the appellate court did not overturn the defendant's conviction.[156]

In Guadalupe County, Texas, in May 2011, Assistant District Attorney Larry Bloomquist was ordered to appear before the court for violating a gag order after posting a status update on Facebook regarding an ongoing felony trial.[157]

In July 2012, a former prosecutor in Norfolk, Virginia, was charged with making a felony threat after allegedly threatening his former employer in a series of Facebook posts.[158]

Sarah Peterson Herr, a research attorney working for a Kansas appellate judge, was suspended in November 2012 pending an investigation into her tweets made during another attorney's ethics hearing.[159] The tweets criticized the former Kansas Attorney General Phill Kline's demeanor in the courtroom.[160] Kline was facing charges stemming from allegations that he misled others during an investigation into abortion providers (Kline is a longtime abortion opponent).[161] Herr's tweets referred to Kline as a "douchebag" and predicted he would be disbarred for seven years.[162] The tweets were removed, and Herr issued an apology:

> I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large, which was not appropriate for someone who works for the court system. . . . I apologize that because the comments were made on Twitter—and thus public—that they were perceived as a reflection on the Kansas courts.[163]

In April 2010, following a felony firearms case in Florida, a prosecutor posted a poem to Facebook about a trial which his co-counsel dubbed the

155. *Usee*, 800 N.W.2d at 200.

156. *Id.* at 201.

157. Roy Bragg, *Guadalupe County Prosecutor Fined for Facebook Comments*, SAN ANTONIO EXPRESS-NEWS (May 11, 2011, 10:11 PM), http://www.mysanantonio.com/news/local_news/article/Guadalupe-County-prosecutor-fined-for-Facebook-1376185.php.

158. Louis Hansen, *Ex-Norfolk Prosecutor Charged over Facebook Posts*, VIRGINIAN-PILOT (July 27, 2012), http://hamptonroads.com/2012/07/exnorfolk-prosecutor-charged-after-facebook-post.

159. John Milburn, *Kansas Court Staffer Suspended over Kline Tweets*, KAN. CITY STAR (Nov. 17, 2012), http://www.kansascity.com/2012/11/16/3920875/kansas-court-staffer-suspended.html.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

"trial from hell."[164] The poem (intended to be sung to the tune of the theme song from "Gilligan's Island") went as follows:

> Just sit right back and you'll hear a tale/A tale of fateful trial/That started from this court in St. Lucie County . . . Six jurors were ready for trial that day for a four-hour trial, a four-hour trial/The trial started easy enough/But then became rough/The judge and jury confused/If not for the courage of the fearless prosecutors/The trial would be lost, the trial would be lost.[165]

Although the trial judge granted a mistrial, the parody was not cited as one of the grounds (it had been posted only after deliberations were over).[166] Still, Chief Assistant State Attorney Tom Bakkedahl was clearly unhappy with the ditty, especially regarding references to the "gang banger defendant" and "the weasel face" defense lawyer.[167] He characterized the prosecutor's conduct as "immature" behavior that his office would need to learn from.[168]

An Oregon attorney was publicly reprimanded for unethical conduct that began as an online prank.[169] The attorney went online to Classmates.com and adopted the identity of a local teacher (purportedly a high school classmate of the attorney).[170] He posted messages suggesting the teacher had had sex with students.[171] Although the attorney argued no professional misconduct was involved, the Oregon Supreme Court disagreed.[172] The court held he had violated the Oregon Code of Professional Responsibility Disciplinary Rule 1-102(A)(3), which prohibits dishonesty, fraud, deceit, and misrepresentation.[173]

As the above examples show, lawyers must be aware and conscious of their online activity; what many believe to be innocent and harmless postings can have tremendous, negative impacts on their professional careers.

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164. JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW 150 (West 2010).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *In re* Carpenter, 95 P.3d 203, 205–06 (Or. 2004).

170. *Id.* at 206.

171. *Id.* at 205.

172. *Id.* at 207–10.

173. *Id.* at 205; *see* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2012) (providing that an attorney who engages in conduct such as misrepresentation, deceit, fraud, or dishonesty commits professional misconduct). *See generally* Sean Keveney, Note, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381, 384–400 (2002) (discussing the background, origin, and scope of Rule 8.4(c) and the problems associated with it).

IV. ETHICAL INFORMATION GATHERING

Another significant area of ethical concern for lawyers using social media involves gathering information about a party or witness. There generally is not an ethical issue in looking at the publicly viewable portion of an individual's social networking profile; however, what about those Facebook pages with privacy restrictions that allow only friends to view such nonpublic content? May an attorney, or someone working for that attorney, attempt to become someone's friend in order to gain such access? If the person is a represented party, the answer is clearly no.[174]

Under Rule 4.2 of the Model Rules of Professional Conduct, a lawyer should not communicate or cause another person to communicate with an individual represented by counsel without the prior consent of that individual's attorney.[175] In May 2011, the San Diego County Bar Association's Legal Ethics Committee considered this Rule's applicability in the digital age after it was presented with an interesting situation in which a lawyer undertook representation of an allegedly wrongfully discharged employee.[176] Although the attorney knew the defendant company was represented by counsel, he sent friend requests to two high-ranking employees of the defendant employer that his client "identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page."[177] The Ethics Committee ruled the lawyer's request violated both the rule against contacting a represented party and the lawyer's duty not to deceive others, suggesting that lawyers seeking access to a represented party on social media sites must either seek such information through formal discovery channels or contact the party's attorney to request consent to such a communication.[178]

174. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2012) (addressing the rule regarding communications to a person represented by an attorney).

175. *Id.*; *see* Yvette Ostolaza & Ricardo Pellafone, *Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites*, 11 J. HIGH TECH. L. 56, 88–92 (2010) (discussing the ethical problems that can arise when attorneys attempt to access private social media profiles for investigative purposes).

176. *See* San Diego Cnty. Bar Ass'n Ethics Comm., Legal Ethics Op. 2011-2 (2011), *available at* http://www.sdcba.org/index.cfm?pg=LEC2011-2 (analyzing California Rule of Professional Conduct 2-100, the California equivalent of Model Rule 4.2).

177. *Id.*

178. *See id.* (requiring attorneys to seek consent from opposing counsel before gaining access to a represented party's social media site). *But see* Yvette Ostolaza & Ricardo Pellafone, *Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites*, 11 J. HIGH TECH. L. 56, 90–91 (2010) (speculating that it might be appropriate for a lawyer to request access to a represented party's private profile without consent from opposing counsel if "the represented party's act of approving or

The San Diego Bar Ethics Committee expressly rejected the notion that friending a represented party is the same as accessing an opposing party's publicly viewable website.[179] The very reason for making the friend request is to overcome the barrier to access that a social media user places on his page.[180] The prohibition against contact with a party represented by counsel is designed to prevent disruption of the trust central to the attorney–client relationship.[181] The Committee also distinguished this situation from those in which some level of permissible subterfuge is acceptable.[182]

Is an attorney's friend request a communication "about the subject of the representation?"[183] Here the Committee looked to the motivation behind the request itself.[184] If the friend request—which normally makes no reference to anything except the sender's name—is motivated by a search for information about the case, then it is about "the subject of the representation."[185]

The issue of potential deception or misrepresentation to third parties—those not represented by counsel—is at the heart of several other ethics opinions and at least one lawsuit. In separate opinions, the Philadelphia Bar Association Ethics Committee (March 2009),[186] New York City Bar Association Committee on Professional Ethics (September 2010),[187] and the New York State Bar Association Committee on Professional Ethics

disapproving access to their profile is the conduct that the attorney wishes to observe").

179. San Diego Cnty. Bar Ass'n Ethics Comm., Legal Ethics Op. 2011-2 (2011), *available at* http://www.sdcba.org/index.cfm?pg=LEC2011-2; *accord* Michael C. Smith, *Social Media Update*, 58 ADVOC. (TEX.), Spring 2012, at 2, 10, *available at* http://www.litigationsection.com/downloads/Advocate_Vol58_Spring_2012.pdf (indicating that the Stored Communications Act may prohibit discovery of private information on Facebook).

180. *See* San Diego Cnty. Bar Ass'n Ethics Comm., Legal Ethics Op. 2011-2 (2011), *available at* http://www.sdcba.org/index.cfm?pg=LEC2011-2 ("It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user . . . may post in contexts to which access is unlimited.").

181. *See id.* (describing the purpose of the rule as protecting the interests of a person from opposing counsel in the matter).

182. *Id.* For example, in a 2011 case, the United States Court of Appeals for the Ninth Circuit upheld a prosecutor's use of fake subpoena attachments to a cooperating witness with whom the criminal would be communicating. United States v. Carona, 660 F.3d 360, 364–65 (9th Cir. 2011).

183. San Diego Cnty. Bar Ass'n Ethics Comm., Legal Ethics Op. 2011-2 (2011), *available at* http://www.sdcba.org/index.cfm?pg=LEC2011-2.

184. *Id.*

185. *Id.*

186. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009).

187. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2 (2010).

(September 2010)[188] held that a lawyer—or someone working under a lawyer's supervision, such as a paralegal—could not friend a witness under false pretenses.[189] Pointing to both Pennsylvania and New York's prohibition against "knowingly mak[ing] a false statement of material fact or law to a third person,"[190] as well as their ban on "conduct involving dishonesty, fraud, dec[eption], or misrepresentation,"[191] each of the committees found that attempting to gain access to someone's social media by friending a witness, or by having a third party friend that witness at the lawyer's behest, would be unethical.[192] As the Philadelphia Bar observed, failing to tell the witness of the lawyer's role or his paralegal/investigator's affiliation with the lawyer "omits a highly material fact . . . that the third party who [requests] access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness."[193] As the New York City Bar opinion also noted, the increasing use of social media websites by lawyers, and the fact that deception is even easier in the virtual world than in person, makes this an issue of heightened concern in the digital age.[194]

Unfortunately, the scenarios considered by the Philadelphia, New York, and San Diego Bar Ethics Committees played out in real life in a pending disciplinary proceeding in New Jersey. Two New Jersey lawyers, John Robertelli and Gabriel Adamo, face ethics charges stemming from their defense of a personal injury case in 2009.[195] The attorneys allegedly directed a paralegal, Valentina Cordoba, to friend twenty-year-old plaintiff

188. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010).

189. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2 (2010); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843, at 1, 2 (2010); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-2, at 3 (2009). *See generally* Mary Pat Gallagher, *When "Friending" Is Hostile*, DAILYREPORTONLINE.COM (Sept. 6, 2012), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202570272827&When_friending_is_hostile (discussing the ethics opinions by the three bar committees).

190. PENN. R. PROF'L CONDUCT R. 4.1(a) (2012); N.Y. RULES OF PROF'L CONDUCT R. 4.1 (2009).

191. PENN. R. PROF'L CONDUCT R. 8.4(c) (2012); N.Y. RULES OF PROF'L CONDUCT R. 8.4(c) (2009).

192. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2 (2010); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843, at 1, 2 (2010); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-2, at 3 (2009).

193. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02, at 3 (2009).

194. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2 (2010).

195. Complaint at 2, Office of Attorney Ethics v. Adamo, Docket Nos. XIV-2010-0484E & XIV-2010-0485E (N.J. Ethics Comm. Nov. 16, 2011).

Dennis Hernandez during the litigation "so they could access information on his Facebook page that was not available to the public."[196] According to the ethics complaint, Robertelli and Adamo's use of the paralegal's friend request "was a ruse and a subterfuge designed to gain access to non-public portions of [the] Facebook page for improper use" in defending the case.[197] The two lawyers denied the charges, claiming they merely directed the paralegal to perform general Internet research and "never instructed her to 'friend'" Mr. Hernandez, who was represented by counsel.[198] Robertelli and Adamo face violations of the following rules of the New Jersey Rules of Professional Conduct (RPC):

> RPC 4.2 (communicating with a person represented by counsel); . . . RPC 5.1 (b) and (c) (failure to supervise a subordinate lawyer); RPC 5.3 (a), (b), and (c) (failure to supervise a [nonlawyer] assistant); 8.4 (a) (violation of the [RPCs] by inducing another person to do so and violating the [RPCs] through the acts of another); 8.4 (c) (conduct involving dishonesty, fraud, deceit[,] and misrepresentation); and RPC 8.4 (d) (conduct prejudicial to the administration of justice).[199]

Robertelli, who supervised Adamo, is also charged with violating New Jersey RPC 5.1(b) and (c), governing the ethical obligations incumbent upon "lawyers for the actions of the attorneys they supervise."[200]

Even assuming everything in the light most favorable to the accused attorneys, Robertelli and Adamo's conduct is still troubling from the standpoint of the technological competency now expected of attorneys. Robertelli, who has no Facebook presence, and Adamo, a self-confessed rare user of the social networking site, both claim to be unfamiliar with Facebook's privacy settings and to not know how to distinguish between

196. Mary Pat Gallagher, *When "Friending" Is Hostile*, DAILYREPORTONLINE.COM (Sept. 6, 2012), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202570272827&When_friending_is_hostile; Donald Scarinci, *Warning for Lawyers: Facebook Is Not Always Your Friend*, MARTINDALE-HUBBELL BLOG (Sept. 28, 2012), http://blog.martindale.com/warning-for-lawyers-facebook-is-not-always-your-friend.

197. Complaint at 5, *Adamo*, Docket Nos. XIV-2010-0484E & XIV-2010-0485E.

198. Mary Pat Gallagher, *When "Friending" Is Hostile*, DAILYREPORTONLINE.COM (Sept. 6, 2012), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202570272827&When_friending_is_hostile.

199. Complaint at 6, *Adamo*, Docket Nos. XIV-2010-0484E & XIV-2010-0485E; Mary Pat Gallagher, *When "Friending" Is Hostile*, DAILYREPORTONLINE.COM (Sept. 6, 2012), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202570272827&When_friending_is_hostile.

200. Mary Pat Gallagher, *When "Friending" Is Hostile*, DAILYREPORTONLINE.COM (Sept. 6, 2012), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202570272827&When_friending_is_hostile; *see* Complaint at 6 n.1, *Adamo*, Docket Nos. XIV-2010-0484E & XIV-2010-0485E (explaining that the charges under Rule 5.1(b) and (c) are applicable only to Robertelli).

public and private content on the site.[201] In addition, although they knew Hernandez was represented by counsel, both lawyers claim to not understand the act of friending someone did in fact constitute a communication.[202] Such ignorance—assuming it is in fact ignorance—underscores the ethical dangers lurking for lawyers who are less familiar with social media and its nuances.

At least one case involving an ostensibly routine discovery request for social media content raised the troubling issues of waiver of attorney–client privilege and possible false friending for one attorney.[203] The plaintiff, Armstrong, a college student, objected to specific discovery requests from the defense for electronic communications with his father, who in his capacity as an attorney advised Armstrong on certain privacy issues.[204] Consequently, Armstrong argued his communications with his father were privileged.[205] The defendant, meanwhile, contended Armstrong's father was a fact witness to the case and that he had attempted to gain access to the defendant's Facebook account "by posing under a fake name."[206] Fortunately for the plaintiff and his father, the court found there was an attorney–client relationship and accordingly sustained Armstrong's objections to the defendant's discovery requests.[207] The court, however, did not consider the consequences of the father's actions;[208] if he truly acted in the capacity of his son's counsel and tried to gain access to the defendant's Facebook account under a false name, then potentially unethical conduct occurred.[209]

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201. *See* Mary Pat Gallagher, *When "Friending" Is Hostile*, DAILYREPORTONLINE.COM (Sept. 6, 2012), http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202570272827&When_friending_is_hostile (noting the attorneys claimed "they thought a friend request was an automatic process in which anyone who clicked the button could view another person's information and did not understand that friending someone 'meant reaching out to specifically request someone to accept an invitation'").

202. *Id.*

203. Armstrong v. Shirvell, No. 2:11-CV-11921, 2012 WL 1656241, at *4 (E.D. Mich. May 10, 2012).

204. *Id.* at *2.

205. *Id.*

206. *Id.* at *4–5.

207. *Id.*

208. *See id.* (failing to consider whether the attempted contact on Facebook was improper in his capacity as the plaintiff's attorney).

209. *Cf.* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2 (2010) (concluding that "a lawyer may not use deception to access information from a social networking webpage"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843, at 1 (2010) (positing that an attorney will not violate the Rules of Professional Conduct as long as he does not become friends with the other party on the social networking website); Phila. Bar Ass'n Prof'l Guidance

Allegedly improper use of social media has already led to legal action against one law firm, its investigator, and its insurance company client. A May 2012 state court lawsuit in Cleveland, Ohio, claims that an Ohio insurance defense firm hired an investigator to gain access to the privacy-restricted Facebook page belonging to a twelve-year-old plaintiff in a dog bite lawsuit.[210] According to the plaintiff's complaint, the investigator posed as one of the girl's Facebook friends, enabling him to view her private information and access over 1,000 posted messages and 221 photos between the minor plaintiff and her friends.[211] Recently, this pretexting or false friending has resulted in claims of invasion of privacy as well as violations of applicable wiretapping statutes for the interception of communications.[212]

V. THE DUTY TO PRESERVE EVIDENCE

Another area rife with ethical risks for lawyers involves the preservation of evidence. Lawyers likely do not want to discover embarrassing photos or comments on a client's Facebook page that can adversely impact the case. At the same time, lawyers cannot instruct their clients to remove the offensive content or to delete their Facebook accounts. Model Rule 3.4 prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so.[213] A lawyer's ethical duty to preserve electronically stored information encompasses social networking profiles.

In a cautionary tale for the twenty-first century, plaintiff's counsel in a recent Virginia wrongful death case, *Allied Concrete Co. v. Lester*,[214] directed his paralegal to instruct the client to "clean up" his Facebook page.[215] The client, the surviving widower of a young woman killed in a collision with one of the defendant's cement trucks, had a Facebook page that depicted him drinking and partying in the company of young women, including a photo in which he was "holding a beer can while wearing a T-shirt emblazoned with "I [love] hotmoms," which made him seem like

Comm., Op. 2009-02, at 2, 4 (2009) (indicating that intentional deception by stealthily friending the other party is not acceptable even if accessed through a third party).

210. Complaint at 3, Cope v. Prince, No. CV 12-781824 (Ohio Ct. Com. Pl. May 2, 2012).

211. *Id.* at 4–5.

212. *Id.* at 5–6; *see, e.g.*, Michael C. Smith, *Social Networking Update*, 58 ADVOC. (TEX.), Spring 2012, at 2, 10, *available at* http://www.litigationsection.com/downloads/Advocate_Vol58_Spring_2012.pdf (describing the Stored Communications Act prohibition of discovery of private information on Facebook).

213. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2012).

214. Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013).

215. *Id.* at 702.

anything but a grieving husband.[216] During discovery, plaintiff's counsel represented to the defense attorneys that his client did not have a Facebook account.[217] After a substantial verdict for the plaintiff, the defense lawyers sought a new trial based on spoliation of evidence.[218] The court assessed sanctions of $722,000 against the client and his lawyer, Matthew Murray—$542,000 against Murray and $180,000 against his client—for their "extensive pattern of deceptive and obstructionist conduct."[219] Courts are increasingly receptive to sanctions when it comes to the deletion of electronic evidence.[220]

VI. ETHICAL CONDUCT INVOLVING JURORS

Lawyers increasingly use social media platforms to screen jurors prior to jury selection. In an age in which many trials are derailed or verdicts overturned by the online misconduct of jurors, more and more lawyers are monitoring jurors online.[221] At least one court has explicitly upheld the practice of using the Internet to investigate potential jurors during voir dire. In *Carino v. Muenzen*,[222] a New Jersey appellate court refused to grant a new trial for a medical malpractice plaintiff after a trial judge prevented his lawyer from conducting online research on the venire panel, but specifically "found that the trial judge should have allowed [plaintiff]'s counsel to utilize his computer during jury selection."[223]

But what about the ethical issues involved in monitoring the social networking activities of jurors and prospective jurors? To date, only two ethics opinions have addressed this question:

In New York County Lawyers' Association [(NYCLA)] Committee on

216. *Id.* at 702–03.

217. *Id.* at 702.

218. *Id.* at 701–02.

219. *Id.* at 703; *see* Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223, 2011 WL 9688369 (Va. Cir. Ct. Oct. 21, 2011) (recounting the trial court's findings after further hearings).

220. *See* Christou v. Beatport, L.L.C., No. 10-cv-02912-RBJ-KMT, 2013 WL 248058, at *14 (D. Colo. Jan. 23, 2013) (ordering sanctions for failure to preserve "text messages as potential evidence").

221. *See* John G. Browning & Carol Kreiling, *From Voir Dire to "Voir Google": Using Social Media in Jury Selection and Jury Monitoring*, LITIG. MGMT., Summer 2012, at 43 (emphasizing the increasing use by lawyers of the Internet to vet jurors); Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 7–8 (2012) ("Indeed, for better or worse, lawyers are frequently using social media to discover information about potential jurors, opposing counsel, and (less frequently) the judge herself." (citations omitted)).

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

223. *Id.* at *12.

> Professional Ethics Formal Opinion 743 (May 18, 2011), the Committee held that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page" is permissible so long as lawyers have no direct or indirect contact with jurors during trial. Significantly, the NYCLA cautioned lawyers to "not act in any way by which the juror becomes aware of the monitoring." The Committee, perhaps cognizant of the fact that sites like Twitter and LinkedIn allow users to view who has recently accessed their profile, reminded attorneys that access that a juror becomes aware of may very well constitute "an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial." In addition, the Committee took note of the prevalence of online misconduct by jurors. It concluded that if, during monitoring of jurors' social networking sites, a lawyer learns of juror misconduct, "the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must . . . bring such misconduct to the attention of the court, before engaging in any further significant activity in the case."[224]

The second opinion from the New York City Bar Association's Professional Ethics Committee agreed with the 2011 opinion from the New York County Lawyers Association, but also addressed the broader issue of what exactly constitutes an impermissible ex parte communication with a juror.[225] The Committee ruled that "communication" should be understood in its broadest sense.[226] This would include "not only sending a specific message but also any notification to the person being researched that he or she has been the subject of a lawyer's research efforts."[227] The paramount issue, in the eyes of the Committee, is that the juror or potential juror must not learn of the attorney's actions.[228] As the opinion states, "[T]he central question an attorney must answer before engaging in jury research . . . using a particular service is whether her actions will cause the juror to learn of the research."[229] The Committee further stated:

> [I]f a juror were to (i) receive a "friend" request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the

224. John G. Browning & Carol Kreiling, *From Voir Dire to "Voir Google": Using Social Media in Jury Selection and Jury Monitoring*, LITIG. MGMT., Summer 2012, at 43, 46.

225. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2012-2 (2012).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

> juror's pages, posts, or comments that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We [the Committee] further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended.[230]

In other words, ignorance or lack of familiarity will not be an excuse in committing such an ethical violation.[231] This position is consistent with the trend in cases around the country, along with the new requirement of being technologically conversant as part of providing competent representation, by holding attorneys to a higher standard insofar as technology is concerned.

Of course, there are ways to avoid making jurors aware that they are being followed on the Internet. Take Twitter for example: one company, X1 Social Discovery, offers a specialized public follow feature that enables access to all the past tweets of a specific user (up to 3,200 past tweets) and any new tweets in real-time without generating a formal follow request that results in a notification to the juror being followed.[232] As for a juror's privacy concerns, one must keep in mind that virtually all social networking sites remind their users of the public nature of what they are sharing. It is stated in Twitter's terms of service: "What you say on Twitter may be viewed all around the world instantly. You are what you Tweet!"[233]

The concept of attorneys performing online investigations and monitoring jurors' social media activities is not uniformly endorsed. One federal court concluded there is no recognized right for an attorney to monitor a juror's use of social media and opined that such efforts by lawyers could both intrude on the "safety, privacy, and protection against harassment" to which jurors are entitled and potentially stifle juror willingness to participate in the democratic system of justice.[234]

The earlier discussion of *Johnson* illustrated how lawyers increasingly are held to a higher professional standard insofar as the use of technology in juror selection is concerned.[235] A recent case from the Kentucky Supreme

230. *Id.*

231. *See id.* (providing guidance to attorneys who engage in jury research using social media).

232. *X1 Social Discovery Product Feature: Twitter Public Follow*, X1DISCOVERY.COM, http://x1discovery.com/video_public_follow.html (last visited Apr. 5, 2013).

233. *Terms of Service*, TWITTER (June 25, 2012), https://twitter.com/tos.

234. United States v. Kilpatrick, No. 10-CR-20403, 2012 WL 3237147, at *3 (E.D. Mich. Aug. 7, 2012) (citation omitted).

235. *See* Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010) (en banc) (concluding that because of the advances in technology, parties will carry the greater burden of uncovering

Court, *Sluss v. Commonwealth*,[236] reveals the potential dangers lurking in this area for the unwary.[237] In this case, appellant Ross Sluss was convicted of murder and driving under the influence of intoxicants after crashing his pickup truck into another vehicle with several passengers.[238] As a result of the crash, an eleven-year-old passenger in the other vehicle was killed.[239] The tragedy and ensuing criminal case garnered tremendous publicity, including extensive online discussion on Facebook and other social media sites. The trial court, sensitive to the amount of attention the case received before trial began, engaged in extensive voir dire procedures.[240]

After his conviction, Sluss sought a new trial based on juror misconduct, claiming two of the jurors, one being the jury foreperson, were Facebook friends with the victim's mother.[241] During voir dire, both jurors remained silent when asked if they knew the victim or any member of the victim's family.[242] Moreover, during individual voir dire, one of the accused jurors replied unequivocally that she did not have a Facebook account; the other juror acknowledged having a Facebook presence and being vaguely aware that something had been set up in the victim's name, although she did not share anything beyond that.[243]

The court analyzed the nature of the Facebook friend status and ultimately held this fact alone would be insufficient grounds for a new trial.[244] However, it was more troubled by the jurors' misstatements during voir dire, especially because it was unknown "to what extent the victim's mother and the jurors had actually communicated, or the scope of any actual relationship they may have had."[245] It acknowledged this was "the first time that [it was] asked to address [the issue of] counsel's investigation of jurors [through the] use of social media" and turned to whether the defense counsel should have discovered the online evidence of

information at an earlier point in litigation regarding the potential jurors' litigation history).

236. Sluss v. Commonwealth, 381 S.W.3d 215 (Ky. 2012).

237. *See id.* at 222 (discussing, in the context of disqualifying juror question and answers during voir dire, the difference between friendships and Facebook friendships and finding that merely indicating a friendship status on Facebook does not necessarily indicate a true friendship).

238. *Id.* at 218–19.

239. *Id.* at 218.

240. *Id.* at 221.

241. *Id.* at 220–21.

242. *Id.* at 221.

243. *Id.* at 222.

244. *Id.* at 222–23.

245. *Id.* at 224.

juror misconduct prior to the verdict.[246] The court ultimately held the juror misconduct did warrant, at a minimum, a hearing to determine the nature and extent of the Facebook conduct, or alternatively a new trial.[247] Additionally, it excused the attorney's failure to discover the misconduct earlier because the jurors' answers during voir dire had given him "little reason . . . to think he needed to investigate a juror's Facebook account or that he even could have done so ethically given the state of the law at the time of trial."[248] The court, however, extensively discussed the ethical parameters surrounding counsel's investigation of jurors on social media sites, referencing with approval the position advocated by the New York County Bar Association Ethics Committee.[249] Although conceding that "the practice of conducting intensive [I]nternet vetting of potential jurors is becoming more commonplace," the court made no decision whether there should be an affirmative duty for attorneys to perform such searches.[250] It observed that while much of the information being sought is likely public, "a reasonable attorney without guidance may not think this investigatory tactic appropriate, and it is still such a new line of inquiry that many attorneys who themselves are not yet savvy about social media may never even have thought of such inquiry."[251]

In light of the Ethics 20/20 Commission's recommendations and subsequent changes to the Model Rules, local rules holding lawyers to a standard of greater technological proficiency, and the use of social media platforms becoming more widespread among attorneys, it may eventually not be enough to get by without Facebook-ing the jury.

VII. CONCLUSION

The use of social networking in actual practice is both a necessary weapon in a lawyer's arsenal and a potential ethical minefield. Attorneys run the risk of breaching the duty to provide competent representation if they ignore all-pervasive social networking platforms like Facebook and Twitter and the utility they offer. Yet, at the same time, the misuse of social media in managing client communications, case investigation and fact-gathering, preserving evidence, and the selection and monitoring of jurors presents serious ethical issues. Attorneys would do well to heed

246. *Id.* at 226.
247. *Id.* at 229–30.
248. *Id.* at 226.
249. *Id.* at 227.
250. *Id.*
251. *Id.*

some of the same advice they dispense to clients: treat social media as simply another form of communication, subject to the same ethical constraints as the more traditional modes, and adopt a social media policy that will guide both lawyers and non-lawyer employees in the responsible use of social networking. In the digital age, sticking one's head in the analog sand is no longer an option.