The Iowa State Bar Association’s Federal Practice Seminar presents

2016 Federal Practice Seminar
Friday, December 16, 2016

Hot Topics in Ethics

1:30-2:30 pm

Presented by
Prof. Laurie Levenson
Loyola Law School
919 S. Albany St.
Los Angeles, California 90015

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FEDERAL PRACTICE SEMINAR

IOWA STATE BAR

“HOT TOPICS IN ETHICS”

Professor Laurie L. Levenson
Loyola Law School
December 16, 2016
Hypo #1

[Ready for Your Close Up?]

John Morelatch represents Acme Corporation. Acme was recently sued for employment discrimination against women under Title VII. The President of the company, Bill Crosby, is very upset about the lawsuit. The lawsuit has been highly publicized, threatening his reputation and that of his company.

Crosby wants to counter the negative publicity. In fact, he has spoken “off the record” to local reporters and is scheduled to do an interview with a local television station. Crosby is also up at 3:00 a.m. sending Twitter and Snapchat messages such as, “Nasty allegations. So wrong. All incompetent employees know how to do is sue.” Finally, Crosby has commented that it will be “an uphill battle” to get a fair trial given that the judge’s wife is well known in the community as being a “women’s libber.”

A. Which, if any, of Crosby’s actions pose an ethical problem for Morelatch?

1 - Speaking to reporters
2 - Posting comments on social media
3 - Discussing the judge’s possible bias
4 - All of the above
5 - None of the above

B. What is the best way for a lawyer to deal with this issue?

1 - Withdraw from the case
2 - Make the media appearances for the client
3 - Join the client during media interviews
4 - Provide a disclaimer regarding the client’s remarks
5 - None of the above

Authorities

Iowa Rule of Professional Conduct 32:3.6 (Trial Publicity)

Iowa Rule of Professional Conduct 32:3.5 (Impartiality and Decorum of Tribunal)

Iowa Rule of Professional Conduct 32:1.8(f)(2) (Conflicts of Interest: Current Clients: Specific Rules – Interference with Lawyer’s Independence of Professional Judgment)

Iowa Rule of Professional Conduct 32:2.1 (Advisor)
Hypo #2A

[Judicial Speech]

Judge Mark Bendet is handling another high-profile case in his courtroom. Frankly, he is rather fed up with the comments he hears from others regarding the case. He believes there has been a tremendous amount of misinformation regarding the case. Which of the following approaches would be appropriate for the judge to do to correct the public record:

1. - Talk privately to a reporter off the record regarding the problems with the reporting or ask his clerk to do so;
2. - Publish an op-ed regarding the case;
3. - Ask his local federal bar association to defend him in the press;
4. - Write an opinion addressing both the legal issues in the case and the misinformation in the press;
5. - Speak at an upcoming symposium where he can mention the inaccuracies regarding the coverage of the case;
6. - None of the above

Authorities

Code of Judicial Conduct, Canon 2A (Appearance of Impropriety)

Code of Judicial Conduct, Canon 3A(6) (Judge May Not Make Public Comments)

Hypo #2B

[The Tweeting Judge]

If the President can do it, Judge Bendet thinks he should be able to do so too. Every morning, he sends out a short Tweet regarding his upcoming day. Yesterday, it read: “They’re back. The lawyers who never stop talking.” Judge Bendet also posts on his Facebook page a picture of himself at a recent Bar Association event. In the picture, Bendet is standing with lawyers who have recently had cases in his courtroom.

Has Judge Bendet acted ethically?

1. - Yes
2. - No

Authorities

Code of Judicial Conduct, Canon 3 (Judges’ Impartiality)
Hypo #3

[Jurors Misbehavin’]

Judge Erlinger has spent the last six weeks presiding over a complicated wire fraud case. Before trial, she instructed jurors “not to read anything about the case in the newspaper, not to listen to anything about the case on the radio, not to watch anything about the case on the television, not to do any independent investigation regarding the case, and not to discuss the case with anyone outside of the jury deliberation room.”

During jury deliberations, the defense lawyer brings to the court’s attention that one of the jurors has been posting comments about her jury service on her Facebook page. The comments range from, “I’m glad we’ll be out of here soon” to “The defense is the most inarticulate guy I have ever heard. He couldn’t argue his way out of a paper bag.” The defense learned of these comments when his law clerk posed as one of the juror’s friends to see the Facebook page.

Questions

A. Has the defense lawyer acted ethically?

1 - Yes
2 - No

B. Should Judge Erlinger consider the juror’s comments on Facebook in deciding on a motion for a mistrial?

1 - Yes
2 - No

C. If a lawyer suspects a juror has been posting comments about a case on a Facebook page, can the judge order the juror to make the Facebook page available for inspection?

1 - Yes
2 - No

D. Finally, is it ethical for a lawyer to Google a juror for jury selection?

1 - Yes
2 - No
Authorities

ABA Model Rules of Professional Conduct 4.1 (Truthfulness in Statements to Others)

MRPC 4.1 (Truthfulness in Statements to Others)


Philadelphia Bar Association, Professional Guidance Committee Opinion 2009-02 (March 2009)

Association of the Bar of the City of New York Committee on Professional Judicial Ethics, Formal Opinion 2010-2

N.Y. State Bar Ass’n Ethics Opinion 843 (2010)


Hypo #4

[Tweet, Tweet]

During trial, Judge Erlinger notices that one of the spectators is using a handheld device. It turns out that the spectator is “Tweeting” the highlights of the proceedings to lawyers who will be trying a similar case in a different courtroom in the near future.

**Question**

Is the Tweeting permissible?

**Authorities**

Fed. R. Crim. Proc. 53 (Courtroom Photographing and Broadcasting Prohibited)


Hypo #5

[Too Busy for Court?]

Bruce Skywalker has requested an extension of the discovery hearing date because he claims that he is scheduled for major surgery on the currently scheduled date of the hearing, Friday, August 16, 2016. While surfing the Internet, the judge sees that the lawyer is listed as hosting an upcoming golf tournament on August 16, 2016.

Question

Can the court use the information you found while surfing the Internet to deny the motion for a continuance?

1  -  Yes
2  -  No

Authorities

Code of Conduct for United States Judges, Canon 3A(4)

ABA Model Code 2.9(C) & Commentary [6]

Fed.R.Evid. 201(b) (Judicial Notice)

*Kiniti-Wairimu v. Holder*, 312 Fed. Appx. 907 (9th Cir. Feb. 23, 2009) (unpublished opinion) (Immigration judge violated petitioner’s due process rights by doing independent Internet research and using it to make credibility determination)


Cynthia Gray, *The Temptations of Technology*, 31 Judicial Conduct Reporter 1 (Summer 2009)

John Warde writes a legal blog for his law firm. He regularly writes short commentaries regarding utility law and regulatory compliance. His recent blog discussed his brilliant work for a client. As touted in the blog, the client had made some colossal blunders, but with some keen legal maneuvering, Warde saved the client millions of dollars. In truth, Warde probably saved his client a few thousand dollars, but it was a savings nonetheless.

In a second blog entry, Warde dissects a recent decision by Judge Harvey. Warde notes that the judge was off base in his analysis of the case and seems to have a hard time handling certain types of matter.

Finally, Warde posts a blog analysis relating to an issue in one of his upcoming cases. Warde is fairly confident that one of the judge’s law clerks may read the blog if the law clerk does any Internet research on the case.

**Question:**

Does Warde’s conduct violate any ethical rules or are his blogs protected by the First Amendment?

1. Yes, blog violates ethical rules
2. No, Warde is protected by the First Amendment

**Authorities**

Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath, 10 Tips for Avoiding Ethical Lapses When Using Social Media, [http://www.americanbar.org/publications/blt/2014/01/03_harvey.html](http://www.americanbar.org/publications/blt/2014/01/03_harvey.html)

Iowa Rule of Professional Conduct 32:4.1 (truthfulness in statements to others)

Iowa Rule of Professional Conduct 32:1.6 (confidentiality of information)

Iowa Rule of Professional Conduct 32:3.5(a) (improperly influencing judge)

ABA Formal Opinion No. 10-457 (posting information regarding clients on website)

ABA Formal Opinion No. 10-457 and 8.4 (false and misleading statements)
Hypo #6B

[Bench Blogging?]

Is a judge allowed to blog?

1  -  Yes
2  -  No

Authorities

Hypo #7

[Rate Your Judge]

One of Megan Flinn’s favorite activities is to go on Avvo LinkedIn and other websites that evaluate attorneys and judges. She regularly poses as someone else and gives herself top rankings. She then rates, and asks her friends to rate, her opposing counsel and the judges before whom she appears. For judges who don’t rule her way, she skewers them. For judges who rule in her favor, she showers them with praise. As for other lawyers, Flinn gives them favorable ratings if they send business to her. Otherwise, they get failing marks.

Has Flinn acted ethically?

 Authorities

Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath, 10 Tips for Avoiding Ethical Lapses When Using Social Media, http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

South Carolina Ethics Opinion 09-10 (rules for use of Avvo and LinkedIn)
Hypo #8

[No Good Deed Goes Unpunished]

Laurie Flevinson has a client who is threatening to bring a malpractice claim, ethics complaint, and allegations of ineffective assistance of counsel. Flevinson has a file full of privileged and confidential information that shows she acted entirely properly in handling the case.

Flevinson wants to provide the confidential information to her insurance provider. Is it proper to do so?

1 - Yes
2 - No

Must she take any special steps before making such disclosures?

Authorities

Iowa Ethics Opinion 15-03 (July 15, 2015) (disclosure of confidential information)
Hypo #9

[Beware of E-mail]

You are involved in a contentious case when, suddenly, you receive a copy of an email that appears to be a confidential memorandum between opposing counsel and his client. Evidently, your adversary does not realize he has accidentally included you on the routing information.

You should:

1  -  Buy a lottery ticket because today is your lucky day
2  -  Read the email, but not use the information in your case
3  -  Delete the email
4  -  Inform opposing counsel of the mistake
5  -  None of the above

Does it matter that your adversary never took steps to encrypt or otherwise protect communications with his client?

Authorities

Iowa Ethics Opinion 15-02 (January 28, 2015) (inadvertent disclosures of emails)

Iowa Ethics Opinion 15-01 (January 28, 2015) (confidentiality and emails)
Hypo #10

[Warning Shot]

You are at your wit’s ends. Opposing counsel has played fast and loose with discovery, constantly harasses your witnesses, and has used heated rhetoric in speaking to the media about your case. You are considering sending a note to opposing counsel threatening to report him to the Bar authorities for discipline if he does not stop this behavior.

Would it be ethical to send such a note?

Authorities

Iowa Ethics Opinion 15-02 (January 28, 2015) (threatening attorney discipline)
Hypo #11
[“Of Counsel”]

Catherine Crownie has been a Super Lawyer for years in your community. She is finally moving toward retirement and has decided to work “of counsel” to two or three health care firms in town.

Is it permissible for Crownie to be Of Counsel to more than one firm?

Authorities
Iowa Ethics Opinion 13-01 (July 9, 2013) (rules for “of counsel”)
Hypo #12

[Mentor-Mentee]

Ryan Kuperman is a great mentor to young lawyers and law students interested in a career in mass torts and class actions. As it turns out, two of Kuperman’s mentees are summer associates in another firm.

To what extent can Kuperman’s mentees ask him about their work for their summer firms?

Authorities

Iowa Ethics Opinion 13-04 (August 27, 2013) (mentor-mentee rules)
Hypo #13

[Cheaper by the Dozen]

Steve Marzo is overwhelmed in his law practice. He doesn’t really want to commit to hiring new associates, but he could use some additional help. He decides to hire several contract lawyers. These contract lawyers regularly provide assistance to other lawyers who handle insurance coverage cases.

What ethical responsibilities come with the hiring of a contract lawyer?

Authorities

Iowa Ethics Opinion 13-03 (August 27, 2013) (contract lawyers)
**Additional Authorities**

**JUDICIAL ETHICS AND ETHICAL ISSUES IN USE OF SOCIAL MEDIA**

Link to the Committee’s Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees (April 2010):


Code of Judicial Conduct, Canon 2: Appearance of Impropriety

Code of Judicial Conduct, Canon 3A(4): Ex Parte Communications

Code of Judicial Conduct, Canon 3C: Disqualification if Impartiality Reasonably Questioned


So. Carolina Ethics Advisory Op. 11-05 (“daily deal” website)

2011 Formal Ethics Opinion 10 (group coupon websites)

New York State Bar Op. 897 (use of “daily deal” websites)


Hunter v. Virginia State Bar (Feb. 2013) (attorney blog posts)

**LINKEDIN AND BLOGGING (IMPLICATIONS OF SOCIAL NETWORKING)**

1. **Our Linked-in Judiciary.** The original article by Robert J. Amborgi, where he reveals which judges are on LinkedIn, and then discusses possible ethical pitfalls associated with this kind of networking:  

2. **Judicial Education on a Shoe String: (Suggestion #10) Join an Online Networking Group.** This Case-in-Point article supports social networking among judges because it can enhance public understanding of the judiciary; it also provides a vehicle (just as the bankruptcy discussion forum does) for judges to help each other with challenges involving caseloads and media contact:  
3. **Judges All Atwitter Over New Media: Social Networking Caveats for Judges and All Professionals.** Judge Susan Criss suggests that social networking will enhance the jobs of legal professionals and allow them to do these job better.


4. **Social Networks Help Judges Do Their Duty.** This article points to three different judges who provide examples of how social networking helps them do their job better. One judge claims it helps in determining whether or not to grant continuances to lawyers and to monitor their (the lawyers’) interaction with witnesses and parties. Another judge says that social networking allows her to supervise the activities of juvenile offenders, while another judge asserts that networking often produces evidence about clients’ behavior to aid in rulings and sentencing.


5. **Bench Blogging:** Where should judges, lawyers and court personnel draw the line when it comes to blogging and other communications on the Web? The Do’s and Don’ts for blogging judges.


6. **Judge reprimanded for discussing case on Facebook.** A judge in North Carolina discussed a case with an attorney on Facebook, which resulted in a new trial granted to the defendant, disqualification of the judge, and a reprimand by the Judicial Standards Commission. This first link is the actual story from a North Carolina newspaper. The second link is the public reprimand by the JSC with the facts stating how the judge compromised ethical standards:


7. **John Schwartz, For Judges on Facebook, Friendship Has Limits,** N.Y. Times (Dec. 11, 2009). This article discusses Florida’s Judicial Ethics Advisory Committee’s decision to recommend against judges “friending” on Facebook because it creates an appearance of impropriety. In particular, when judges “friend” lawyers who may appear before them, it creates the appearance of a conflict of interest because it “reasonably conveys to others the impression that these lawyer ‘friends’ are in a special position to influence the judge.”
8. William Glaberson, *Judge is Censured for Efforts to Secure a Pay Raise*, N.Y. Times (Dec. 29, 2009). This article discusses New York’s discipline of a judge for sending a mass e-mail message to other judges suggesting that refusing to handle certain kinds of cases was “a tactic” and “a weapon” that could help pry a pay increase out of states’ legislators (“those clowns”) in Albany.

**GOOGLE AND OTHER WEB SEARCH CASES**

*Search Engines Take the Stand:* This article discusses cases where judges used Google searches to issue their opinions or rulings. Objections to such actions are also discussed:

http://news.cnet.com/2100-1032_3-5211658.html

*Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?* The ABA’s evaluation of judges using Web searches to discover additional facts, as well as to check alleged facts, that have influenced past court decisions. Proposed amendments to the current Model Code of Conduct are discussed which would prohibit judges from conducting independent Web searches pertinent to the case. (It appears that the suggestions for prohibition of Web search by judges were not implemented.)


(This link does not open directly. To access, you’ll need to Google “judicial ethics and the internet”; the very first result is the article. It is authored by David H. Tennant and Laurie M. Seal

*Dennis Kennedy, Broadening Search: New Tools, Approaches Raise the Question: Is Google Enough, ABA Journal, at 28 (November 2009).* This article offers additional types of search engines and techniques that may be helpful when doing Internet research.
10 Tips for Avoiding Ethical Lapses When Using Social Media

Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath

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You may be among the thousands of legal professionals flocking to social media sites like LinkedIn, Facebook, Twitter, or Google+ to expand your professional presence in the emerging digital frontier. If so, have you paused to consider how the ethics rules apply to your online activities? You should. Some of the ethical constraints that apply to your social media usage as a legal professional may surprise you. Moreover, legal ethics regulators across the country are beginning to pay close attention to what legal professionals are doing with social media, how they are doing it, and why they are doing it. The result is a patchwork quilt of ethics opinions and rule changes intended to clarify how the rules of professional conduct apply to social media activities.

This article provides 10 tips for avoiding ethical lapses while using social media as a legal professional. The authors cite primarily to the ABA Model Rules of Professional Conduct (RPC) and select ethics opinions from various states. In addition to considering the general information in this article, you should carefully review the ethics rules and ethics opinions adopted by the specific jurisdiction(s) in which you are licensed and in which your law firm maintains an office.

1. Social Media Profiles and Posts May Constitute Legal Advertising

Many lawyers – including judges and in-house counsel – may not think of their social media profiles and posts as constituting legal advertisements. After all, legal advertising is limited to glossy brochures, highway billboards, bus benches, late-night television commercials, and the back of the phonebook, right? Wrong. In many jurisdictions, lawyer and law firm websites are
deemed to be advertisements. Because social media profiles (including blogs, Facebook pages, and LinkedIn profiles) are by their nature websites, they too may constitute advertisements.

For example, the Florida Supreme Court recently overhauled that state’s advertising rules to make clear that lawyer and law firm websites (including social networking and video sharing sites) are subject to many of the restrictions applicable to other traditional forms of lawyer advertising. Similarly, California Ethics Opinion 2012-186 concluded that the lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.

2. Avoid Making False or Misleading Statements

The ethical prohibition against making false or misleading statements pervades many of the ABA Model Rules, including RPC 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), 7.1 (Communication Concerning a Lawyer’s Services), 7.4 (Communication of Fields of Practice and Specialization), and 8.4 (Misconduct), as well as the analogous state ethics rules. ABA Formal Opinion 10-457 concluded that lawyer websites must comply with the ABA Model Rules that prohibit false or misleading statements. The same obligation extends to social media websites.

South Carolina Ethics Opinion 12-03, for example, concluded that lawyers may not participate in websites designed to allow non-lawyer users to post legal questions where the website describes the attorneys answering those questions as “experts.” Similarly, New York State Ethics Opinion 972 concluded that a lawyer may not list his or her practice areas under the heading “specialties” on a social media site unless the lawyer is appropriately certified as a specialist – and law firms may not do so at all.

Although most legal professionals are already appropriately sensitive to these restrictions, some social media activities may nevertheless give rise to unanticipated ethical lapses. A common example occurs when a lawyer creates a social media account and completes a profile without realizing that the social media platform will brand the lawyer to the public as an “expert” or a “specialist” or as having legal “expertise” or “specialties.” Under RPC 7.4 and equivalent state ethics rules, lawyers are generally prohibited from claiming to be a “specialist” in the law. The ethics rules in many states extend this restriction to use of terms like “expert” or “expertise.” Nevertheless, many professional social networking platforms (e.g., LinkedIn and Avvo) may invite lawyers to identify “specialties” or “expertise” in their profiles, or the sites may by default identify and actively promote a lawyer to other users as an “expert” or “specialist” in the law. This is problematic because the lawyer completing his or her profile cannot always remove or avoid these labels.

3. Avoid Making Prohibited Solicitations

Solicitations by a lawyer or a law firm offering to provide legal services and motivated by pecuniary gain are restricted under RPC 7.3 and equivalent state ethics rules. Some, but not all, state analogues recognize limited exceptions for communications to other lawyers, family
members, close personal friends, persons with whom the lawyer has a prior professional relationship, and/or persons who have specifically requested information from the lawyer.

By its very design, social media allows users to communicate with each other or the public at-large through one or more means. The rules prohibiting solicitations force legal professionals to evaluate—before sending any public or private social media communication to any other user—whom the intended recipient is and why the lawyer or law firm is communicating with that particular person. For example, a Facebook “friend request” or LinkedIn “invitation” that offers to provide legal services to a non-lawyer with whom the sending lawyer does not have an existing relationship may very well rise to the level of a prohibited solicitation.

Legal professionals may also unintentionally send prohibited solicitations merely by using certain automatic features of some social media sites that are designed to facilitate convenient connections between users. For instance, LinkedIn provides an option to import e-mail address books to LinkedIn for purposes of sending automatic or batch invitations. This may seem like an efficient option to minimize the time required to locate and connect with everyone you know on LinkedIn. However, sending automatic or batch invitations to everyone identified in your e-mail address book could result in networking invitations being sent to persons who are not lawyers, family members, close personal friends, current or former clients, or others with whom a lawyer may ethically communicate. Moreover, if these recipients do not accept the initial networking invitation, LinkedIn will automatically send two follow up reminders unless the initial invitation is affirmatively withdrawn. Each such reminder would conceivably constitute a separate violation of the rules prohibiting solicitations.

4. Do Not Disclose Privileged or Confidential Information

Social media also creates a potential risk of disclosing (inadvertently or otherwise) privileged or confidential information, including the identities of current or former clients. The duty to protect privileged and confidential client information extends to current clients (RPC 1.6), former clients (RPC 1.9), and prospective clients (RPC 1.18). Consistent with these rules, ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients on websites. In a content-driven environment like social media where users are accustomed to casually commenting on day-to-day activities, including work-related activities, lawyers must be especially careful to avoid posting any information that could conceivably violate confidentiality obligations. This includes the casual use of geo-tagging in social media posts or photos that may inadvertently reveal your geographic location when traveling on confidential client business.

There are a few examples of lawyers who found themselves in ethical crosshairs after posting client information online. For example, in In re Skinner, 740 S.E.2d 171 (Ga. 2013), the Georgia Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under that state’s rules) where a lawyer admitted to disclosing information online about a former client in response to negative reviews on consumer websites. In a more extreme example, the Illinois Supreme Court in In re Peshek, M.R. 23794 (Ill. May 18, 2010) suspended an assistant public defender from practice for 60 days for, among other things, blogging about clients and implying in at least one such post that a client may have committed perjury. The
Wisconsin Supreme Court imposed reciprocal discipline on the same attorney for the same misconduct. In re Disciplinary Proceedings Against Peshek, 798 N.W.2d 879 (Wis. 2011).

Interestingly, the Virginia Supreme Court held in Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013), that confidentiality obligations have limits when weighed against a lawyer’s First Amendment protections. Specifically, the court held that although a lawyer’s blog posts were commercial speech, the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients’ consent where (1) the information related to closed cases and (2) the information was publicly available from court records and, therefore, the lawyer was free, like any other citizen, to disclose what actually transpired in the courtroom.

5. Do Not Assume You Can “Friend” Judges

In the offline world, it is inevitable that lawyers and judges will meet, network, and sometimes even become personal friends. These real-world professional and personal relationships are, of course, subject to ethical constraints. So, too, are online interactions between lawyers and judges through social media (e.g., becoming Facebook “friends” or LinkedIn connections) subject to ethical constraints.

Different jurisdictions have adopted different standards for judges to follow. ABA Formal Opinion 462 recently concluded that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct and consider his or her ethical obligations on a case-by-case (and connection-by-connection) basis. Several states have adopted similar views, including Connecticut (Op. 2013-06), Kentucky (Op. JE-119), Maryland (Op. 2012-07), New York (Op. 13-39, 08-176), Ohio (Op. 2010-7), South Carolina (Op. 17-2009), and Tennessee (Op. 12-01).

In contrast, states like California (Op. 66), Florida, Massachusetts (Op. 2011-6), and Oklahoma (Op. 2011-3) have adopted a more restrictive view. Florida Ethics Opinion 2009-20, for example, concluded that a judge cannot friend lawyers on Facebook who may appear before the judge because doing so suggests that the lawyer is in a special position to influence the judge. Florida Ethics Opinion 2012-12 subsequently extended the same rationale to judges using LinkedIn and the more recent Opinion 2013-14 further cautioned judges about the risks of using Twitter. Consistent with these ethics opinions, a Florida court held that a trial judge presiding over a criminal case was required to recuse himself because the judge was Facebook friends with the prosecutor. See Domville v. State, 103 So. 3d 184 (Fla. 4th DCA 2012).

6. Avoid Communications with Represented Parties

Under RPC 4.2 and equivalent state ethics rules, a lawyer is forbidden from communicating with a person whom the lawyer knows to be represented by counsel without first obtaining consent from the represented person’s lawyer. Under RPC 8.4(a) and similar state rules, this prohibition extends to any agents (secretaries, paralegals, private investigators, etc.) who may act on the lawyer’s behalf.
These bright-line restrictions effectively prohibit lawyers and their agents from engaging in social media communications with persons whom the lawyer knows to be represented by counsel. This means that a lawyer may not send Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties’ private social media content. In the corporate context, San Diego County Bar Association Opinion 2011-2 concluded that high-ranking employees of a corporation should be treated as represented parties and, therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content.

On the other hand, viewing publicly accessible social media content that does not precipitate communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game. That was the conclusion reached by Oregon Ethics Opinions 2013-189 and 2005-164, which analogized viewing public social media content to reading a magazine article or a published book.

7. Be Cautious When Communicating with Unrepresented Third Parties

Underlying RPC 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct), and similar state ethics rules is concern for protecting third parties against abusive lawyer conduct. In a social media context, these rules require lawyers to be cautious in online interactions with unrepresented third parties. Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a litigation matter. As with represented parties, publicly viewable social media content is generally fair game. If, however, the information sought is safely nestled behind the third party’s privacy settings, ethical constraints may limit the lawyer’s options for obtaining it.

Of the jurisdictions that have addressed this issue, the consensus appears to be that a lawyer may not attempt to gain access to non-public social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias. For example, ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to circumvent social media users’ privacy settings to reach non-public information. Ethics opinions by other bar associations, including the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), have gone one step further and concluded that lawyers must affirmatively disclose their reasons for communicating with the third party.

8. Beware of Inadvertently Creating Attorney-Client Relationships

An attorney-client relationship may be formed through electronic communications, including social media communications. ABA Formal Opinion 10-457 recognized that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under RPC 1.18. The interactive nature of social media (e.g., inviting and responding to comments to a blog post, engaging in Twitter conversations, or responding to legal questions posted by users on a message
board or a law firm’s Facebook page) creates a real risk of inadvertently forming attorney-client relationships with non-lawyers, especially when the objective purpose of the communication from the consumer’s perspective is to consult with the lawyer about the possibility of forming a lawyer-client relationship regarding a specific matter or legal need. Of course, if an attorney-client relationship attaches, so, too, do the attendant obligations to maintain the confidentiality of client information and to avoid conflicts of interest.

Depending upon the ethics rules in the jurisdiction(s) where the communication takes place, use of appropriate disclaimers in a lawyer’s or a law firm’s social media profile or in connection with specific posts may help avoid inadvertently creating attorney-client relationships, so long as the lawyer’s or law firm’s online conduct is consistent with the disclaimer. In that respect, South Carolina Ethics Opinion 12-03 concluded that “[a]ttempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice is patently unfair and misleading to laypersons.”

9. Beware of Potential Unauthorized Practice Violations

A public social media post (like a public Tweet) knows no geographic boundaries. Public social media content is accessible to everyone on the planet who has an Internet connection. If legal professionals elect to interact with non-lawyer social media users, then they must be mindful that their activities may be subject not only to the ethics rules of the jurisdictions in which they are licensed, but also potentially the ethics rules in any jurisdiction where the recipient(s) of any communication is(are) located. Under RPC 5.5 and similar state ethics rules, lawyers are not permitted to practice law in jurisdictions where they are not admitted to practice. Moreover, under RPC 8.5 and analogous state rules, a lawyer may be disciplined in any jurisdiction where he or she is admitted to practice (irrespective of where the conduct at issue takes place) or in any jurisdiction where he or she provides or offers to provide legal services. It is prudent, therefore, for lawyers to avoid online activities that could be construed as the unauthorized practice of law in any jurisdiction(s) where the lawyer is not admitted to practice.

10. Tread Cautiously with Testimonials, Endorsements, and Ratings

Many social media platforms like LinkedIn and Avvo heavily promote the use of testimonials, endorsements, and ratings (either by peers or consumers). These features are typically designed by social media companies with one-size-fits-all functionality and little or no attention given to variations in state ethics rules. Some jurisdictions prohibit or severely restrict lawyers’ use of testimonials and endorsements. They may also require testimonials and endorsements to be accompanied by specific disclaimers. South Carolina Ethics Opinion 09-10, for example, provides that (1) lawyers cannot solicit or allow publication of testimonials on websites and (2) lawyers cannot solicit or allow publication of endorsements unless presented in a way that would not be misleading or likely to create unjustified expectations. The opinion also concluded that lawyers who claim their profiles on social media sites like LinkedIn and Avvo (which include functions for endorsements, testimonials, and ratings) are responsible for conforming all of the information on their profiles to the ethics rules.
Lawyers must, therefore, pay careful attention to whether their use of any endorsement, testimonial, or rating features of a social networking site is capable of complying with the ethics rules that apply in the state(s) where they are licensed. If not, then the lawyer may have no choice but to remove that content from his or her profile.

**Conclusion**

Despite the risks associated with using social media as a legal professional, the unprecedented opportunities this revolutionary technology brings to the legal profession to, among other things, promote greater competency, foster community, and educate the public about the law and the availability of legal services justify the effort necessary to learn how to use the technology in an ethical manner. E-mail technology likely had its early detractors and, yet, virtually all lawyers are now highly dependent on e-mail in their daily law practice. Ten years from now, we may similarly view social media as an essential tool for the practice of law.