ETHICAL CONSIDERATIONS IN THE USE OF SOCIAL MEDIA BY LAWYERS AND LAW FIRMS

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INTRODUCTION

Before incorporating social media and Internet advertising into a marketing plan, lawyers and law firms must consider the ethical ramifications of social and professional networking online. Ethics rules regarding confidentiality, conflicts of interest, advertising and solicitation, pretexting, professionalism and civility, and nonlawyer staff supervision are all implicated when a lawyer embarks on a social media campaign.

Nothing in this presentation is intended to discourage you from incorporating the Internet and its vast array of communications and networking options as part of your personal and professional life. The online community has quickly become part of our everyday existence and interaction with the world around us. It allows us to obtain and share information, communicate with colleagues and clients across the globe, from anywhere, at any time. There is nothing inherently wrong with a lawyer participating in online social and professional networks or adopting Internet-based technology in the lawyer's practice of law. However, the requirements and restrictions placed on our activities in the real world do not change when we enter the virtual world. This program is designed as a reminder of those limitations and obligations and to alert you to some traps that could result in ethical trouble for lawyers in ways that are not of concern to lay people using the Internet.

GENERAL CONSIDERATIONS

Once you have become familiar with the various networking, marketing, and communication options available to you on the Internet, you must then ask yourself which of those tools would be useful to you in your law practice and what ethical precautions should be taken to avoid the risks created by those forms of online activity. Before addressing particular risk areas involved in Internet networking, one must examine a few general considerations.

First, it is important that you understand the technology and how it works. You don't have to be a computer genius – nor do you have to understand the technical ways that software and the Internet work. But you do need to understand where and how and to whom your Internet posts are disseminated. Talk with a media consultant familiar with the technology. Marketing and media professionals understand the ways in which information that you post on the Internet will be accessed and used. Of course, you

cannot delegate decision-making to such professionals. Always keep in mind that such consultants are not likely to have any training or education in legal ethics. Although they present a valuable resource for you for information about the technology itself, it is up to you to determine whether the proposed activity conforms with your ethical and professional obligations.

Second, remember that nothing you do online is private, regardless of so-called privacy settings. You have no control over the download, printing, or dissemination of your online posts once they are made. Even if you attempt to delete or disable an online profile, photo, or comment, the digital record will most likely continue to exist.

Third, set policies for yourself and your staff requiring the separation of online personal life from professional activities and marketing on the Internet. Online communication is an extremely casual way to interact with other people. It can lull you into a casualness that you would ordinarily never consider when communicating with clients or colleagues in person, on the telephone, or by mail. In addition, promotion of your law firm or your legal services through your personal online profiles can and will subject those personal pages to ethical scrutiny.

Finally, even if you do keep your personal business and professional business separate online, remember that you are always a lawyer, twenty-four hours a day, seven days a week. Whatever you do online, even if it is of a purely personal nature, reflects on you as a lawyer and on the legal profession.

CONFIDENTIALITY

In addition to these general principles, there are some specific risk areas for lawyers who participate in social media and other Internet communication. The primary concern for lawyers who engage in online activities, or who have staff that do so, is client confidentiality. With the advent of any new form of communication, we are concerned about the risk to confidential information. Lawyers, courts and bar associations all grappled with the impact new technologies like fax machines, mobile phones, and email might have on our ability to maintain the most important tenet of our profession – keeping client information confidential. Just as happened with faxing, talking on cell phones, and sending electronic mail messages, we are now having to think through the ethical implications of social media, professional networking, blogging, and chatting online. What information can we post? Who has access to our online activity? What information are our clients sharing online? What are our nonlawyer staff doing on the Internet – at work and at home?

As with any inquiry regarding client confidentiality, determining the limitations on our online activity must begin with the Rules of Professional Conduct. Rule 1.6 says that all information related to the representation of a client is confidential. Regardless of the

source of the information, regardless of who else knows the information, and regardless of whether or not the information is in the public record – it is confidential. The question then is not whether the information you seek to share online is confidential, but rather whether or not it can be divulged under the exceptions to the rule that says you may not share it. Those exceptions include disclosure necessary to handle the representation, preventing the client from committing a criminal act, preventing reasonably certain death or substantial bodily injury, preventing crime or fraud by a client likely to result in substantial financial or property losses, getting legal advice about or defend charges alleging civil, criminal, or ethical responsibility of the lawyer, or complying with other law or a court order.

It is difficult to imagine circumstances in which a tweet, Facebook status post, or blog entry would satisfy any of these exceptions. That doesn't mean that you are prohibited from discussing your cases online, you simply must obtain your client's consent before you do so. Of course, you would not comment to a newspaper reporter about a products liability trial you are preparing for or do an interview on the TV news about a client's divorce case without gaining your client's consent. So, too, are you required to get consent before taking that information to the web.

There are several things to remember when it comes to posting information about your cases online. First, all client information is confidential. You must obtain your client's informed consent before posting anything about the client's case. Even hypothetical or anonymous posts about client matters can subject you to discipline for revealing client information. Also, a general consent is not good enough to protect you. Don't attempt to use a blanket consent in your initial fee agreement or some other document. If you want to post client information, obtain your client's specific consent to the substance and location of the post first. And finally, keep in mind that even with consent, it might not be in your client's best interest to discuss his case in your online community. There might be times where a client consents to your revealing information about his case in your blog, electronic newsletter, or other online medium, but such a revelation might not be in the client's best interests. You must always consider the potential impact of exposure of the client's legal matter online to the interests of that client – particularly with regard to posts that are subject to public comment,

CONFLICTS OF INTEREST

A second ethical concern facing lawyers who use social media and other online networking activities is the potential for conflicts of interest. In order to determine the extent of this potential problem, you need to take a good look at who is in your network. This includes friends on social media sites like Facebook, fellow listserve members, and people linked to your profile on professional networking sites like LinkedIn. Does your network include judges or judicial law clerks? Other lawyers, including opposing

counsel? What about your clients? Each of these possibilities presents potential problems for you.

Consider first whether judges and/or their law clerks should be included in your online network. A personal or professional relationship between a judge and a lawyer might or might not create a conflict of interest that disqualifies the judge from hearing the lawyer's cases. An online connection between the two is not likely to create a conflict in and of itself. A judge is required by the Code of Judicial Conduct to examine his or her relationships with lawyers and litigants to determine the circumstances under which those relationships must be disclosed and under which the judge must recuse from the case. Disqualifying relationships might or might not include friendships or other links online. However, the accessibility of information about those relationships online gives rise to an increasing number of challenges to a judge's integrity and impartiality. Remember that judges are required to avoid even the appearance of impropriety. In the current climate of general distrust for the government and specific criticism of the justice system and its lawyers and judges, we all need to consider the message that we are sending to the public and to litigants regarding our integrity. You can bet that litigants and opposing counsel are going to Google you and the judge prior to, during, or after the trial. Discovery of an undisclosed online relationship is quickly becoming grounds for appeals and post-conviction relief applications. Of course, in such cases appellate courts will carefully review the facts to determine whether the online networking relationship created a conflict or required disclosure or recusal, but even if the lawyer is successful in arguing that it did not, the lawyer's client and the judicial system will bear the burden in expense and time in having such issues considered.

In addition to issues of disqualification and recusal, online relationships with judges before whom you and your clients are likely to appear create significant risk of allegations of ex parte communication.

What about including other lawyers in your online networks? What if your lawyer friend is also opposing counsel in a case? These relationships do not ordinarily create conflicts of interest, but can cause your clients to misunderstand your intentions and commitment. It is not necessary that you exclude lawyers who oppose you from your online groups and networks. However, you should keep in mind that everything you and your lawyer friends do online is potentially public knowledge. You should be cautious and consider what your clients might think.

The final issue regarding conflicts and people in your online networks is whether you should include your clients. The answer to that question depends entirely on the nature of your practice and the nature of the online tool you are using to create a network. Some online networks are designed for professional relationships. In addition, many companies – including law firms – are using social media as an opportunity to promote

their businesses. If you blog on Twitter or maintain a fan page on Facebook, you don't control who views, shares, or comments on your posts. Your clients can follow your posts if they want to. In addition, professional networks such as LinkedIn and firm profiles on social media sites are designed for client participation. Regardless of whether it is a professional network deliberately set up for your clients to participate in or it is a decision on your part to bring your clients into your social or personal online community, you must be concerned with the potential for ethical problems.

Consider the risks of inadvertent disclosure of confidential information by the client through a post or comment on your profile. When we log on to a social media site or a professional networking site or even a listserve or chat room, we get a false sense of intimacy and privacy. We tend to post in a casual and conversational way, sometimes losing sight of the fact that others are reading and watching. A post by a client thanking you for a great job in that deposition today, could easily devolve into an online discussion of the merits of the client's legal matter. And if you are not constantly monitoring your page, confidential information posted by the client could sit there for all to see.

You should also consider whether, by creating a firm profile page, you have not simply given yourself something else that you must check regularly – like your fax machine, your email, your regular mail, your voice mail, and your phone messages. Although Facebook has both messaging and chatting functions, have you noticed how some people use the status and comment feature to engage in conversations? If you have a client who is inclined to do that, are you regularly checking your firm page for questions or important information from her? Have you made it clear that Facebook is not an appropriate way to communicate with you? What if your client is unhappy with your services and shares that on your firm wall? What if your client posts a comment on your profile page that your receptionist was rude when she called your office? Again, there is no doubt that professional and social networking sites are an excellent opportunity for you to market your services and share general information with your clients, just keep in mind the potential of inconvenient or even inappropriate client interaction.

You should also consider whether an online connection with clients changes their perception of your relationship. If your online community includes friends, family, colleagues, and clients, a sense of true friendship can develop in the minds of your clients. While this might not necessarily be a bad thing, consider potential disadvantages. If your client is a friend, will he expect special attention be paid to his case? Will he have a heightened expectation of responsiveness from you? Will he presume that he can get a reduced fee? Will he feel comfortable enough to joke with you, criticize you, be sarcastic with you, preach to you, solicit business from you, or seek a more social relationship with you? Once the line between client and friend is

blurred, it is more easily crossed. Once crossed, damage to the attorney client relationship can't really be undone.

ADVERTISING

If an online posts is a communication regarding the lawyer or lawyer's services, that post is subject to the ethical requirements and restrictions related to advertising. In a general sense, all communications regarding a lawyer or a lawyer's services are restricted by the Rules of Professional Conduct. Therefore, anything that you post online about yourself or your law practice is subject to certain ethical limitations. Communications regarding a lawyer or a lawyer's services that are part of an active quest for clients – such as advertising and solicitation – are subject to even more restrictions. Therefore, anything that you post online about yourself or your law practice that is designed to or is likely to garner business for you as a lawyer is subject to the advertising and solicitation portions of the rules.

There are five sections in the Rules of Professional Conduct that involve communications regarding a lawyer or a lawyer's services. Rule 7.1 includes general and specific restrictions applicable to all such communications. Rule 7.2 involves what we more commonly think of as advertising, such as TV, newspaper, phone book, or websites. Rule 7.3 contains the restrictions on solicitation of individual prospective clients. Rule 7.4 is a general limitation on what you can and cannot say about your practice areas. And Rule 7.5 deals with your firm name, geographical limitations on your law practice, and your firm letterhead.

Rule 7.1 applies to all of your communication about yourself and your law practice. This, of course, includes statements you make or include on your blog, listserve, chatroom, social media, or professional network posts. Regardless of the medium, anything you say or post about yourself or your law firm is limited by Rule 7.1.

Rule 7.1 generally prohibits any such communication if it is false, deceptive, misleading, or unfair. Specifically, the rule identifies five kinds of statements that are presumed to violate the rule. Those include statements that are technically true, yet misleading; statements that create unjustified expectations about the results you can achieve or that imply you can achieve results by unethical means; comparative statements that cannot be factually substantiated; testimonial statements; and use of nicknames or trade names that imply an ability to obtain results.

First, you can make a statement about yourself that is truthful, but still violate this rule. If the statement is misleading in a material way or if it omits a fact that makes it misleading it is prohibited. Some examples of ways that this rule can be violated online in addition to outright lying, include overstating your experience in a particular practice area in a blog post or fudging on an online resume on a professional networking site.

Lawyers who use Twitter may be particularly susceptible to the second part of this rule because text space is so limited in a tweet, you have to be extra cautious about precision so as not to omit facts necessary to make your posts not misleading.

Rule 7.1 also prohibits communications about yourself or your law practice that are likely to create unjustified expectations about results or that imply you can obtain results unethically. The most common violation of this rule is reporting results obtained on behalf of other clients. You need to be very careful about posting your successes – whether you tweet about it, post it as a status on Facebook, or list it on your online resume – it is ordinarily prohibited under the Rules of Professional Conduct because it is likely to create a risk of unjustified expectations of similar results on the part of the prospective client reading your post. The Comment to Rule 7.1(b) does give you some leeway in reporting past results suggesting that truthful reports with an appropriate disclaimer or qualifying language might not be considered a violation. As a practical matter, space limitations on many networking sites – like Twitter and Facebook – might make the inclusion of such disclaimers or qualifying language impossible. If that is the case, you may not post the past result. Even if you do have room for an appropriate disclaimer in your post about your past result, it could violate other provisions of the rules. For example, if you post that you obtained a significant jury verdict, when in reality you assisted at trial by carrying a briefcase and handing up exhibits for lead counsel, your post might violate Rule 7.1(a), which we just discussed. Another example would be a post of a successful settlement without obtaining the client's informed consent as required by Rule 1.6. Remember, even if it is part of the public record, it is still information related to the representation and therefore, subject to the restrictions of client confidentiality.

Rule 7.1 also limits your ability to use comparative language in your online posts. You cannot use statements that compare your services to those of other lawyers unless those statements are factual and truthful. Factual statements of comparison, such as saying that you are the "oldest law firm" or the "first all-female law firm" in your town are only appropriate if they can be proven to be true. Comparative statements that cannot be substantiated, such as "other firms just want to settle your case quickly and move on to the next client" or "we are uniquely qualified to handle all of your labor and employment questions," would be prohibited.

The limitations on client testimonials is particularly problematic for the lawyer who participates in an online community. Although "testimonial" is not defined in the rules, dictionary definitions include "a statement in support of a particular fact or claim" "a personal recommendation" or "a written affirmation of another's character or worth." Remember that Rule 7.1 is not just limited to your law firm advertising. It includes all communications that you make about yourself or your law firm. You may not include statements that other people have made about you or your legal services in your posts

without the disclaimers that are required by Rule 7.1. Of course, other people can say what they want about you. But, once you incorporate those statements into your own advertising, you have violated the prohibition on testimonials. Retweeting a statement containing a testimonial about you without the required disclaimers violates this rule. Including a link in your blog to a newspaper article where a client sings your praises without the required disclaimers violates this rule. Allowing a client to post on your Facebook wall about what a great job you did on his case without the required disclaimers violates this rule. Participating in an online directory that allows public comments about you to post on your profile page without the required disclaimers violates this rule. Again, others are free to say what they want about you – but if you repeat it, repost it, or incorporate it into your online marketing without the required disclaimers, you violate Rule 7.1.

Rule 7.1 also restricts use of nicknames and trade names. You cannot use a nickname or trade name that is misleading or comparative. This would include a website URL, an online persona, a blog or microblog title, or a username that appears with your posts.

In addition to the general restrictions on all communication regarding yourself or your services, the Rules of Professional Conduct contain a number of restrictions on certain categories of communication. The first of those is advertising, addressed in Rule 7.2. Whether the advertising provisions of the Rules apply to your online networking activity depends on the nature, content, and purpose of that activity. Advertising is not limited to traditional media such as radio, television, or newspapers. It includes all written, recorded, and electronic communication. The rules do not specifically define advertising, but refer generally to an "active quest for clients." To determine whether or not your online posts are subject to Rule 7.2, ask yourself whether you are identified as a lawyer: Is the name of your law firm listed? Are you discussing your cases? Is there a call to action – such as "email me if you have questions" or "let me know if I can help you"? Is your law firm contact information included? If the answer to any of those questions is yes, and your post is accessible to the public or a network that includes nonlawyers, then it is subject to the advertising provisions of the rules. That doesn't mean you can't do it, it just means that there are certain limitations and requirements.

First, you are responsible for the content of any posts made in your name or on your page. Therefore, you are required to review that content to ensure that it complies with your ethical obligations. Second, you must keep a record of dissemination of the posts. Although you do not need to file that record with the Commission, it does have to be maintained in a format that you can produce to the Office of Disciplinary Counsel if requested in the course of a disciplinary investigation.

Rule 7.2 also requires that you include your name and office address on all written or recorded communications. This is easily done on your firm's Facebook or LinkedIn

profile or in a signature-block style section of your blog. Microblogs such as Twitter are not exempt from this requirement simply because of a lack of space. One solution is to append a short link to your tweets that takes the reader to a website or profile page with the required information. If your address is not the city or town where your cases are actually handled, you need to disclose that location in your posts as well. Finally, if you make any statements in your posts about the types of fees that you charge (such as "no up-front fees" or "you pay nothing unless you win" or "$200 fee for uncontested divorces" you have to explain the costs. In addition any reference to contingency fees must also explain those fees are calculated before or after deduction of costs.

Also found in Rule 7.2 is a prohibition on paying someone to recommend your services. You must carefully review the terms of any online marketing program to ensure that you are not paying for referrals. While you can pay for the costs of advertising and even pay a website or web host per click, you cannot pay based on actual client referrals or pay a membership fee that is tied to referrals of other members to you. If your online network includes mutual referral connections, you need to carefully study this rule. In addition to prohibiting payment for referrals, it prohibits giving anything of value. While mutual referrals between professionals is commonplace and not prohibited, you need to be wary of any *quid pro quo* requirements of your online communities. In addition, if you are seeking clients through your posts who you intend to refer to a colleague, you must disclose your relationship with the colleague and his or her name and address in the post, just as you would have to do on a television commercial or in a newspaper advertisement.

SOLICITATION

While advertising is a communication or broadcast to the public at large or a target group, solicitation is direct communication with an individual. Direct communication or solicitation is governed not only by all of the provisions of Rule 7.1 and 7.2 discussed above, but also by several specific limitations and requirements set forth in Rule 7.3. The first, and most important, of those limitations is a strict prohibition on in-person, live telephone, or real-time electronic contact with prospective clients. The only exceptions to this restriction are when the prospective client is another lawyer, a family member, a close personal friend, or a former client. This is relevant because social media and other online networking websites often have chat features that allow for live electronic communication. Note that the rule specifically includes real-time electronic contact. As a result, you may not use the chat feature in your online community to solicit legal business, unless the prospective client is a lawyer, a member of your family, a close personal friend, or a former client. Remember that just because the people in your Facebook network are called friends, they do not necessarily fall within the close personal friend exception.

Some direct solicitation is permitted by Rule 7.3. A lawyer can use written or recorded communication to solicit prospective clients under some circumstances and subject to certain requirements. This includes traditional direct mail solicitation, but also recorded telephone messages and email messages. Social and professional networking sites present new avenues for written solicitation of prospective clients. Those methods might include posting on the wall of someone in your network, commenting on a status or post, or using other text or instant messaging features.

Although these forms of direct written or recorded solicitation might be permissible under the rules, there are a number of restrictions that must be considered. You may not contact anyone who has made a desire not to be solicited known. You may not use coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence. If the communication is in connection with a personal injury or wrongful death, you may not make contact with the prospective client within thirty days of the incident. If you know or should know that the prospective client is already represented by an attorney in a matter, you cannot contact that person about that matter. Finally, if you know or have reason to believe that the prospective client is likely to be unable to exercise reasonable judgment as a result of a physical, emotional, or mental condition you may not solicit that person's case.

The remaining portions of Rule 7.3 involve specific form and content requirements for direct written or recorded communication. Some of those are particularly relevant to electronic communications made to others in an online community. One is the requirement that the front of every page of a written solicitation must be marked with the words "advertising material" in all caps and in prominent type. Because posts, comments, and text messages don't technically have separate pages, to comply with this rule, you should begin the message with the all caps "advertising material" disclaimer. In addition to the "advertising material" disclaimer, there are three other disclaimers that must be copied verbatim in the communication. This presents a particular problem for the lawyer who wants to solicit using social media and professional network connections. Instant message, comments, and posts are designed to be brief and accessible. However, even though it might be awkward, these disclaimers are not optional. The next requirement calls into question the propriety of soliciting clients in your online community in any way other than a private email message. That portion of the rule requires that the envelope containing a direct solicitation cannot reveal the nature of the prospective client's legal problem. Of course, there is no envelope for a post or comment on an online profile. Clearly the purpose of the rule is to protect the privacy of the prospective client. If you post a solicitation in any fashion in an online community other than sending a private message, you are potentially revealing the nature of the prospective client's legal problem. A lawyer who solicits a prospective client online must disclose the source of information about the

potential client's legal problems. You are required to tell the prospective client in the written or recorded communication information about how you learned that he might be in need of your services. Finally, if someone other than you will be handling the case for the prospective client, you must disclose that information in the message.

Further complicating matters for the lawyer who wants to use social media and other online networking for direct solicitation of legal business is the required record of dissemination found in Rule 7.3. Just like advertisements under Rule 7.2, copies of written and recorded solicitation and a record of dissemination must be kept for two years. The record must include basis for the lawyer's belief that the potential client was in need of legal services and the factual basis for all statements made in the message or post.

ADDITIONAL ADVERTISING REQUIREMENTS

Finally, there are a number of general considerations to keep in mind when using social media, blogs, listserves, and professional networks to market your law practice. They include the prohibition on use of any forms of certain words if you are not certified by the Supreme Court as specialist in a particular practice area. Those words are certified, expert, specialist, or authority. You are permitted to relay information regarding your areas of practice, but any such statements must be strictly factual. Also, you can't use a firm name or trade name that implies a connection with a government agency or public or charitable legal services organization. And, you may not imply that you practice in a partnership when in fact you do not.

As you can see attempting to use online communities to promote yourself as a lawyer and solicit legal business is an ethical minefield. If you choose to take this route, you need to have a complete understanding of the rules related to communication regarding legal services. This has just been a cursory review of a group of complex rules and regulations. For a more in depth look at those rules, you should consider attending the South Carolina Bar's Legal Ethics and Practice Program Advertising School. This program is offered two times each year for CLE credit and offers a comprehensive discussion of lawyer advertising, including online marketing.

PRETEXTING AND OTHER INVESTIGATION AND LITIGATION ISSUES

In addition to using online networking sites to bring in new clients, lawyers are also using those resources on behalf of existing clients. Courts and ethics advisory committees across the country are starting to see questions about lawyers using social media and the Internet in general to gather information about opposing parties, witnesses, and jurors. On one hand, the standard of care might now require lawyers in certain types of cases to include Google or other Internet searches as part of the investigation on behalf of the client. Such searches are likely to reveal information

about the players in a legal matter that is of use to lawyers in representing their clients, including information, photographs, and statements posted on social media sites. On the other hand, the same ethical limitations on old-fashioned investigation apply to cyber-sleuthing. For example, a lawyer may not use pretext to gain information from someone online or to gain access to someone's online network. Of course, a lawyer may not use a nonlawyer to do what she herself is prohibited from doing.

Pretexting is the employment of an effort or strategy intended to conceal something. Dissembling is using a false appearance for disguise or concealment or disguising your real nature or motives. This would include creating a false persona or identity online to become a member of someone's online network. For example, you could not seek friend an opposing party or witness in a pending legal matter by misrepresenting who you are or what your reasons are for making the request. It goes without saying that you cannot your investigator or paralegal do so on your behalf.

There are three bases for a finding that misrepresenting your identity or your motives to gain information or access to information. The first is Rule 4.1 of the Rules of Professional Conduct. That rule says that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person. The Comment to that rule states that a lawyer is required to be truthful when dealing with others on a client's behalf. It goes on to say that a misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. In addition, misrepresentations can occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. In other words, neither you nor your investigator can lie to or deliberately mislead someone in order to obtain information from them. That would include using a ruse or a false identity to join someone's online network or to view their posts.

The second basis in the rules that prohibits such misrepresentations is found in two subsections of Rule 8.4. Subsection (d) prohibits engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and subsection (e) prohibits engaging in conduct that is prejudicial to the administration of justice.

The third ethical requirement that prevents lawyers from using pretext or dissembling to get information on the internet that they would not ordinarily have access to is found in the Lawyers' Oath. When you took the oath, you promised to employ only such means as are consistent with trust and honor and the principles of professionalism. In addition, you specifically vowed to never seek to mislead an opposing party by a false statement of fact or law. Remember that lawyers who violate the oath of office are subject to discipline even if there was no violation of the Rules of Professional Conduct. You need to find a way to obtain the information that you need without lying or misleading.

PROFESSIONALISM AND CIVILITY

The Lawyer's Oath is also relevant to considerations of professionalism and civility. For whatever reason, people are more likely to behave in an inappropriate manner online than they are in person. Electronic communication is risky for humans. We rely significantly on nonverbal cues in conversations with each other. Facial expression and body language assist us in understanding each other. Even on the telephone, we get signals from tone of voice, volume, and speech pattern. When we communicate electronically, those nonverbal indicators of emotion, meaning, and intent are eliminated. When reading an online post or electronic message, you often can't tell if a person is joking or serious or being ironic or sarcastic. It is difficult to discern anger, frustration, sadness, and other emotions. For that reason we are at risk of being misinterpreted when we relay our thoughts, ideas, and feelings online.

As mentioned above, the casual, conversational nature of online communication presents a risk for lawyers bound by professionalism and civility. An electronic exchange of information can quickly devolve into a war of words that you are likely to regret later. Perhaps it is the physical activity of hammering out a message or post on our keyboards that gives us a sense of instant gratification. Once you post something online, even if you can delete or retract it, it is out there and the damage is done. And don't forget the risk of misdirection with communication online. Many social media and professional networking sites have functions for general distribution to your entire network and specific messages to individuals in the network. Get it wrong and you could potentially share private or personal or confidential information to your whole Internet community inadvertently. And even if you get it right, there is no limitation on the ability of members of your group to share your posts outside the group. This is particularly true with listserves. This concept of a group of people with something in common sharing questions, thoughts, and discussions through email posts was really the first form of social media. Even with listserve rules prohibiting sharing posts outside the group, your posts are not private. In fact, as lawyers, we have an ethical obligation to report other lawyers who engage in misconduct involving dishonesty or lack of fitness. That obligation would override any online group or community rules about privacy should a lawyer member post information that calls that into question. The twenty-four hour, seven day a week availability of online communication creates an environment that puts us at risk of violating our professionalism and civility obligations. We can be photographed, taped, or quoted any time, any where with an instant post for the entire world to access. In addition, we can post or comment on a blog or social site no matter where we are or what we are doing. If nothing else, you run the risk of being in a hurry and posting something incomplete or inappropriate.

Most of what you do online in a social and personal setting is not of much concern to disciplinary authorities. It is when your activity crosses the line into your professional

life – whether it involves clients, judges, or other members of the bar, or whether it constitutes misconduct or illegal activity – that you are subject to discipline. For example, a portion of the lawyer's oath is a pledge of fairness, integrity, and civility to opposing parties and counsel in all communications. Another portion is a promise of respect and courtesy to judges and judicial employees. Conduct online that violates these standards will result in disciplinary action.

Even if your online conduct is unrelated to your practice of law and not in violation of any rules or ethical requirements, it is important to keep in mind that you represent our profession in all that you do, even when you are not in the office or in court. The rules of professional conduct and the lawyer's oath are the floor of your professional obligations. You should always aspire to the highest standards of conduct, even beyond what the rules require, not because you fear discipline, but because you take pride in your profession and want your conduct to reflect well on it.

STAFF SUPERVISION

No social media discussion is complete without addressing issues related to the online activities of your nonlawyer staff and lawyer employees. There are several provisions of the Rules of Professional Conduct that require that you pay close attention to the online conduct of those you employ, whether they are at work or at home.

The first is rule 8.4(a) which says that it is misconduct for a lawyer to knowingly assist or induce someone to violate or attempt to violate the rules. The second is Rule 5.1 which says that you can be held responsible for the conduct of other lawyers who are subject to your supervision. The third is Rule 5.3 that says the same thing about nonlawyer employees. Sometimes, a subordinate lawyer or staff member does something online that violates your professional obligations without you knowing about it. Both Rules 5.1 and 5.3 say that supervising lawyers, managers, and partners are required to make reasonable efforts to ensure that their subordinates – be they lawyers or not – conform their conduct to the rules. If a subordinate violates one of the rules and you have not taken those reasonable steps, you are not subject to discipline for the violation itself, but rather for a failure adequately train and supervise that person. Possible violations might include giving legal advice, noncompliant advertising, improper solicitation, investigative techniques that involve pretext or misrepresentations, disclosure of confidential information about client matters, relationships or connections that create conflicts of interest for you and/or your clients, and of course, lack of professionalism or incivility.

Of significant concern to law firms is the risk involved in giving legal advice online. Rule 5.5 prohibits lawyers from assisting in the unauthorized practice of law. Even if you don't know that your nonlawyer staff are giving out legal advice to their friends on

Facebook or that they are communicating with your clients online about their cases, if you have not ensured that they are properly educated and informed about what constitutes the practice of law, then you can be held professionally liable for failing to adequately supervise them.

Giving legal advice in an online community is a problem for you as a supervisor or partner, even if the employee doing it is a lawyer. If an associate in your firm is giving legal advice online, she could very well be creating an attorney-client relationship with members of her social network. This implicates the firm – and you, potentially – in both malpractice and ethical liability. In addition, the attorney-client relationship gives rise to conflicts of interest with other clients in your law firm. If you don't know about your associate's online legal activities, you cannot avoid those conflicts.

There are four keys to avoiding discipline for failure to adequately supervise a staff person or associate who either intentionally or inadvertently violates the code of conduct through online. First, you need to assert control and make sure that you are actually supervising your employees. This is a significant burden and takes time away from your practice of law, but you must know what is going on in your office. Developing written policies and procedures for the management of your office is a good idea whether your staff is participating in online activities or not. With regard to such activities, many employers choose to prohibit their staff members from participating in certain social media sites. Others require that employees grant access to a supervisor or manager so that their online activity can be monitored. If you are not comfortable with such draconian measures, you should articulate in written policies what areas and topics are off-limits. Employees – both staff and lawyers – should be prohibited from posting comments about clients, matters pending in the office, other employees, or office gossip. Regardless of the policies that you adopt, they should be made clear to your employees so that they know what is expected of them.

You should also consider the non-ethical implications of your employees' online activities. Is your staff behaving in a way that reflects poorly on you and your law firm? Are they engaging in social media activities when they are supposed to be working? Are they running you down or complaining about their co-workers to their friends online? While these problems might not have any discipline implications for you, they can be detrimental to your reputation or to the health of your firm. Draft an acceptable use policy that is fair and reasonable, but that protects first the interests of your clients, then the interests of your firm.

Key to any attempt to ensure that employees comply with your ethical obligations is providing them with a copy of the rules. Do not assume that your staff – or even your

associates – have a good working knowledge of the Rules of Professional Conduct. Those rules are located in your court rules book and can be readily accessed online at the Supreme Court's website at www.sccourts.org under the Legal Community Tab. You should not just give them the rules and let them go figure. In corporate a review of the rules in your new employee orientation program as well as routine training sessions. You should also consider paying for your staff to attend outside seminars on legal ethics.

In addition to providing your employees with access to and education about the rules, you need to make sure that you have an open-door policy about ethical issues. Your employees need to know that they can and should come to you with any ethical concerns that they might have. Open lines of communication will allow you to address problems before they occur or remedy them in a timely fashion afterwards.

Finally, there must be consequences to staff members and lawyer employees who behave inappropriately in their online activities. Those consequences should be thought through in advance rather than determined at a time of crisis. In addition, your policies in this regard should be communicated at the time they are decided so that not only will your employees know what is expected on them, they will know what is going to happen if they fall below the standards set for them. Regardless of your decision regarding the consequence, you must act right away to address the problem when you do discover that someone under your control or supervision has crossed an ethical line in their Internet activities.

CONCLUSION

The ethical complications arising from the advent of social media, blogging, and professional networking online are significant. You should explore these new technologies and use them to enhance your personal and professional lives. But when you do, don't forget that you are a lawyer and you are held to a very high standard of conduct.