EMERGING ISSUES IN ETHICS FOR LAWYERS AND SOCIAL MEDIA

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The use of technology has and remains an issue of ongoing, even if slow, interpretation by lawyers and the courts. To highlight, in *Riley v. California*, 573 U.S. 1161 (2014), the Supreme Court once again touched upon the tension between technology and society and what one considers a reasonable expectation of privacy and deemed to be objectively reasonable. Leaving behind the issue of privacy in phone booths, *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court addressed the question of whether a search incident to an arrest warranted the seizure and review of a mobile phone and all of the concomitant information it may hold. With unanimity, the Supreme Court concluded that it did not. In so doing, the Supreme Court noted, interestingly, that:

- 75% of smart phone users reported being within five feet of their phones most of the time
- 12% of smart phone users admitted using their phones in the shower
- More than 90% of cell phone users "keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."[2]

Obviously, such findings would have been impossible ten years ago. Yet, the current medium of choice is not the issue, whether it be personal computers, cloud storage or mobile phones. Instead, the statistics matter in the sense that the use of ever advancing technology affects how lawyers service clients, how they practice law and what clients expect from attorneys.

In this lies social media, the usage of which is massive and ubiquitous—the mere statement of such is yawn provoking. Still: "The average person will spend 5 years of his or her

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[2] In *Packingham v. North Carolina*, 582 U.S. __, 137 S. Ct. 1730 (2017), the Supreme Court reversed the conviction of a sex offender found guilty of violating a North Carolina statute broadly banning use of social media by convicted sex offenders. The Supreme Court noted that "A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." In rejecting the overly broad prohibition, the Supreme Court acknowledged the importance of social media in our society: "Social media allows users to gain access to information and communicate with one another on any subject that might come to mind. With one broad stroke, North Carolina bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."

life on social media – more time than they will spend eating, socializing, and grooming. As people continue to spend more time on social media, that number will only increase."[3] In the context of a United States population of 327 million as of July 2018,[4] consider the following (unsourced statistics) as of 2018 of active users of popular social media platforms:

- Facebook: 2.32 billion
- LinkedIn: 590 million
- Twitter: 326 million
- Instagram: 1 billion
- Snapchat: 300 million

According to Kristin Warner, FirePath Communications, regarding the effect of social media:

- 83%: online reviews influence consumers' perception of an organization
- 35%: have vented online—26% to express dissatisfaction; 23% to share companies they like
- **73%: believe what they read online is true**

Embracing Technology

Notwithstanding rapidly advancing changes in the delivery of legal services, ethics regulators have cautiously deliberated modifications to the rules with much attention paid to applying existing rules to new technology applications. Such caution can seem lagging and stagnant. *See* Am. Bar Ass's Standing Committee on Ethics and Professional Responsibility, Formal Opinion 477 (May 11, 2017) (concluding that a lawyer may generally transmit information relating to the representation of a client over the internet without violating the Model Rules provided that the lawyer undertakes reasonable efforts to prevent unauthorized or inadvertent access).

Yet, mandating technology for technology's sake may be similarly unnecessary. For example, the ongoing focus on technology has led to review and amendment of the ethics rules in Virginia with the unremarkable addition in Comment 6 to Rule 1.1, Competence, that "Attention should be paid to the benefits and risks associated with relevant technology."[5] More understandable is the attention focused especially on maintaining the confidentiality of

[3] Kristine Herhold, "How People Use Social Media in 2018" (https://themanifest.com/social-media/how-people-use-social-media-2018).
[4] United States Census Bureau (https://www.census.gov/quickfacts/fact/table/US/PST045217).
[5] The proposed changes to the rules with respect to technology took effect March 1, 2016. In the Appendix is additional commentary from the Virginia State Bar's Standing Committee on Legal Ethics providing support for the rule changes.

client information with the inclusion of Rule 1.6(d) providing that: "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." The Comments clarify further that:

> [19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, 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).
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> [19a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.
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> [20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm.[6] See Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of

[6] As an aside, it is remarkable that the question of "reasonableness" in adjudging security practices is in any manner based upon the size of a law firm. Does a larger firm have a greater or lesser burden? Is the impact of a loss of a client's confidential information in any manner diminished because it occurred in a solo attorney's practice? While an argument could be

personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods[7] for protecting client confidential information, addressing such practices as:

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;
(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;
(c) Procedures addressing security measures for access of third parties to stored information;
(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

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made that a security intrusion may be more attractive at a larger firm under the assumption that it holds more data, one could counter and suggest that, as size now matters when it comes to the relative importance of client confidential information, it may be easier to hack into a small firm's computer network. And, of course, a smaller boutique firm may specialize in an area of law provoking heightened concern as to the confidentiality of the information it contains as with patent prosecution, divorce counsel and healthcare issues to name but a few.

[7] It is somewhat odd for the comments to itemize a listing of practices as it relates to the handling of technology. While perhaps reassuring to practitioners who follow such practices (and it should), it is concerning that they may be seen as *the* standard or, on the other side, to argue that such compliance operates as a safe harbor.

Far from aspirational, the rules mandate savviness with technology that approaches that ascribed to protection of client property and trust funds (Rule 1.15). Hackers are infiltrating professional firms, seeking (and ransoming) client information. *See Storm v. Paytime, Inc*., 90 F. Supp. 3d 359, 360 (M.D. Pa. 2015) ("There are only two types of companies left in the United States according to data security experts: 'those that have been hacked and those that don't know they've been hacked.'"). It will be expected that firms (both large and small) will face greater scrutiny from an ethical or disciplinary context with respect to use and negligence with technology. How does one handle the attorney who uses public internet access on an airplane? The attorney whose laptop is stolen from her car? And, of course, the myriad opportunities for human error, such as providing information in a phishing scam.

Practice Note: The bottom line with respect to technology issues is that heightened scrutiny is being given to competence and confidentiality issues arising out of technology concerns. Even absent an express mandate, it is clear that (1) the intent of the rules is expressed in the comments noted above, and (2) ignorance of technology protocols and advances is done at your jeopardy.

Confidentiality

Attorneys generally understand the sensitivity surrounding preservation of the attorney-client privilege. For example, don't talk about your client's issues (or even the identity of your clients). But do the clients understand it? And how easily it can be lost? In a society that is bound to (and preoccupied with) social media, both lawyers and clients face challenges in addressing every day communications as they have the potential to waive (or breach) the privilege of confidentiality.

A Summary of Client Counseling Topics.

In counseling clients, several points should be made at the outset of the representation (and throughout the representation):

First, make absolutely certain that any social media is preserved.[8]

Second, remind them that what is posted will be discoverable. It is not enough to advise the client "don't talk to others about your case." Educate them about the discovery process and encourage them to desist from social media usage.

[8] The preservation for such media is implicated by Rules 1.2, 3.4, and 8.3. Regarding preservation, *see,* J. O'Keefe & J. Johnson, "Social Media and Discovery—New Tools, Same Rules," 22 THE JOURNAL OF CIVIL LITIGATION, 523, 528-530 (discussing courts' treatment of social media); Sharon Nelson, *et al., The Legal Implications of Social Networking*, 22 REGENT U.L. REV. 1, 13 (2010) ("It should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.").

Third, have them check the privacy settings of the social media. Even if what is shared is discoverable, it does not need to be made public.

Fourth, request that your client not use the technology resources of an employer (or anyone else) when communicating with you (unless you represent the employer!). Don't get in to a situation where you have to defend a potential waiver of the privilege.

Confronting Innate Lawyer Skepticism Related to Technology.

The legal profession has been suspicious about the confidentiality implications of electronic communication almost since that communication began to proliferate. But that natural skepticism has led to thoughtful (even if self-obvious) deliberation as to handling technology.[9] Some examples:

- Early Iowa Bar opinions (95-30 and 96-1) required, initially, encrypting email to prevent unintended recipients from reading them. The later opinion required the client's consent to email or password protection.

- In Virginia Legal Ethics Opinion 1791, the Standing Committee on Legal Ethics clarified that that "the attorney in the hypothetical is not precluded by the ethics rules from providing legal services to his clients via electronic communication so long as the content and caliber of those services otherwise comport with the duties of competence and communication." Appropriately, the focus is on lawyer competence and communication, *not* proximity.

- Rule 1.1 states that a "lawyer shall provide competent representation to a client." What is competent representation? The "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." As the Committee noted, whether an attorney provides competent legal services "depends on the content, not the method of communication." Indeed, the duty of communication is addressed by Rule 1.4, which requires that a lawyer keep a client informed about the status of a matter and to insure that a client can make informed decisions. Again, the focus is not on the method of communication: "In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*."

As encryption concerns faded through a growing security consensus that email was (or could be) secure, concerns about access arose:

i. Use of wireless hotspots at hotels and restaurants

[9] As an aside, it does appear that opinions and commentary related to the inadvertent transmission of confidential information received *by facsimile* have died down even as the analogous references to information obtained by email continue though at a diminished rate.

ii. Use of servers the security of which is unknown to the lawyer using it
iii. Use of email by clients whose security protections may not be the same as those of the lawyer
iv. Sending email to a client at her work address may make that information accessible by the client's employer—but it was (and is) a mixed bag.

    1. *Holmes v. Petrovich Development Co., LLC*, 191 Cal. App. 4th 1047 (Cal. Ct. App. 2011) – emails to lawyer from plaintiff employee, using defendant employer's computer, lost their attorney-client privilege.

    2. *But In re Asia Global Crossing, Ltd*, 322 B.R. 247 (Bankr. S.D. N.Y. 2005) (holding that use of company's email system does not "without more" destroy privilege).

    3. This is an ongoing issue with courts deciding the question differently and in the context of the underlying facts as opposed to a rigid rule.

v. Security concerns for mobile devices

    1. Should the required standard for ensuring confidentiality be "absolute" or "reasonable"? How can you tell if your security is "reasonable"? 18 U.S.C. § 2510, et seq – Electronic Communications Privacy Act – protects mobile phones to the same extent as land-line phones

    2. What about lost or stolen tablets, phones?

Cloud Computing

According to the National Institute for Standards and Technology, "[c]loud computing is a model for enabling convenient, on-demand network access to a pool of configurable computing resources . . . that can be rapidly provisioned and released with minimal management effort or service provider interaction." Generally, cloud computing is based upon the use of remote servers on the Internet to do data processing and storage.

What kinds of security protections, then, are reasonable? From a legal standpoint, cloud computing is protected from unauthorized access by Electronic Communications Privacy Act. *U.S. v. Councilman*, 245 F. Supp. 2d 319 (D. Mas. 2003), *aff'd*, 373 F.3d 197 (1st Cir. 2004), 418 F.3d 67 (1st Cir. 2005) (ECPA protects on-line electronic storage of data as well as electronic communications). Yet, the ethical requirements may be subject to discussion still. In comparing ABA Model Rule 1.6 with Virginia Rule 1.6 for treatment of cloud computing requirements:

a. ABA Model Rule 1.6(c) provides: "(c) 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."

b. Virginia Rule 1.6(b)(6) permits a lawyer to disclose "information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential."

c. Virginia Legal Ethics Opinion 1872 (2013), which addresses issues related to the "virtual law office" permits cloud computing, but notes that "When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination."

Concerns Related to Websites/Lawyer Social Media Platforms

The reasons for lawyer websites are obvious. But how they are used provokes ethical review. Putting aside so-called "brochure" sites, interactive websites can be:

- A tool to get cases.
- A tool to provide information for the public.
- A tool to promote the firm's lawyers.
- A tool to participate in public discourse.
- A tool for formation online of an attorney-client relationship?

An advancing issue is the use by attorneys and firms of artificial intelligence in the delivery of legal services.[10] Technology permits the delivery of legal services without direct interaction of lawyers, as with, for example, chat bots. The "DoNotPay" chatbot application, for example, assists in helping fight parking tickets. At lawpath.com.au, a user can communicate to

[10] *See generally* Lauri Donahue, "A Primer on Using Artificial Intelligence in the Legal Profession" Harvard J. of L. & Tech (Jan. 3, 2018) https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession.

develop simplified legal documents, including a privacy policy. The use of such artificial intelligence offers unprecedented opportunities for closing the gap on the provision of affordable legal services, but raises ethical concerns,[11] such as:

- Competence. Is the right legal service being provided? Can the bot provide the necessary diagnostic services to determine the service needed? Rule 1.1.
- Supervision. How does one supervise an autonomous user generated interaction in the provision of legal services? Rule 5.3.
- Confidentiality. Can the interactions be deemed confidential? Rule 1.6.
- Conflicts. When an unscreened client utilizes legal services "provided" by an artificial intelligence hosted by a lawyer, how can you insure the absence of a conflict? Imagine learning during litigation over a company's privacy policy that a firm chatbot prepared it?
- Unauthorized practice of law. Artificial intelligence providing legal services can be viewed as facilitating the practice of law without a license to do so.

Consider the following hypothetical, originally related to use with a firm's interactive website:

> *Law firm has a website that that permits prospective clients fill out an online form outlining the details of their accidents. In return for which, the site advertises that the firm will provide a free evaluation of the claim. A prospective client (and the driver) describes an accident involving a two-car collision, including the fact that he had two glasses of wine in the hour before he drove. A conflicts check reveals that the firm represents a passenger that was in his car at the time of the accident.*

By inviting the submission of information from prospective clients, the firm risks the formation of an attorney-client relationship, at least with respect to providing a case evaluation. Virginia Legal Ethics Opinion 1842. Specifically, with respect to a visitor to the law firm's web page, the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information by e-mail to the firm using the e-mail address

[11] Dennis Garcia, "Perspective: 'Chat Bots' Provide Opportunity to the Legal Profession" (May 16, 2018) ("Imagine a bot providing personalized assistance to enable individuals to navigate through the intricacies of local court procedures or to help someone, who cannot afford a lawyer, file the appropriate legal documentation to seek expungement of a prior conviction on his/her own. Using bots in this fashion coupled with easy-to-use and readily accessible communication platforms like Skype — which can translate foreign languages to better serve our growing diverse population— offers compelling opportunities to reimagine legal aid.") https://www.americanbar.org/groups/professional_responsibility/events_cle/44thnatl_conf/44thprogram_materials/ethics_issues_in_lawyers_use/.

posted on the firm's website. The person is using mere contact information provided by the firm on its website and does not have a reasonable expectation that the information will be kept confidential. On the other hand, if the law firm's website invites the visitor to submit information by e-mail to the law firm for evaluation then there will be a limited lawyer-client relationship for purposes of Rules 1.6, 1.7, and 1.9. The law firm may be disqualified under those circumstances if it also represents the client adverse to the website visitor. *See* Rule 1.18.

Here, another wrinkle exists: the firm represents the passenger. Because the firm cannot use the information it learned from the driver to his detriment or to share it with an adverse party, the firm would be materially limited in its representation of his passenger. Accordingly, not only could the firm not represent the driver, but it must withdraw from representing the passenger under Rule 1.7, unless it can meet the requirements of Rule 1.18.

As a practical matter, receiving information from a prospective client before running a conflicts check is extremely problematic from both an ethical and risk management standpoint. To the extent prospective clients can provide you with information through your website, at a minimum, you should include a prominent disclaimer explaining that the submission of information in no manner creates an attorney-client relationship and that the firm has no duty to maintain its confidentiality. *See* ABA Formal Opinion 10-457.

Is a Lawyer's Use of Social Media Ethically Mandated?

Given the omnipresence of social media, can lawyers practice law ethically without understanding and, yes, using social media? The answer is a guarded "yes, but." As noted, attorneys must be cognizant of technology resources. While the exact nature of one's practice drives consideration of the issue, there are a number of areas where ignorance is not acceptable.

For example, consider advising clients. Generally, a lawyer needs to advise her client with respect to the use and preservation of social media during and throughout the representation. A cautionary tale involved a matter in which a lawyer ultimately had his law license suspended for five years after he advised his client to "clean up" his FaceBook account, which included a photograph of the plaintiff holding a beer and wearing a t-shirt exclaiming "I ♥ HOT MOMS" shortly after the death of his wife. The lawyer was representing a plaintiff in a lawsuit brought against a driver who allegedly caused the death of his wife. Shortly after the defense filed discovery requests for screen shots and other information from the plaintiff's FaceBook page, the lawyer instructed his paralegal to tell the client to delete certain photos. The defense lawyers recovered the deleted photos before trial, and the lawyer was brought before the state bar disciplinary board for violation of ethical rules governing candor toward the tribunal, fairness to opposing party and counsel, and misconduct (even as the plaintiff won at trial). *Lester v. Allied Concrete*, 285 Va. 295, 736 S.E.2d 699 (Va. 2013) (sanctions awarded

for attempted spoliation of Face Book postings and lawyer suspended). *See* NYCLA Op. 745 (2013) (opining that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including Rules 3.1, 3.3 and 3.4.1)

Consider also the investigation of witnesses. By way of example, a deposition is taken of a witness in an upcoming trial in which it is learned that she engages in social media. Assuming that the witness' sites are not available publicly, can you "friend" her or have a paralegal do so? While Virginia has not formally weighed in on the issue,

While Virginia has not "formally" weighed in on the issue, [12] the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 concluded that such an investigation would constitute unethical pre-texting. Specifically, a paralegal seeking access to the witness' social media pages would be doing so under false pretenses, i.e. to find out information about the witness without revealing the true nature of the inquiry. To do so would be in violation of Rule 4.1 (making a false statement of fact to a third-person), Rule 8.4 (misconduct to engage in conduct involving dishonesty), and Rule 5.3 (responsibility for non-lawyer assistants). It is my expectation that Virginia State Bar would agree.

This opinion is not without its detractors who would contend that the disciplinary authorities have not caught up to the technology (just as they failed to do with the revolution in media with respect to lawyer advertising). Think of the private investigator sitting in the proverbial window-tinted van, videotaping a person claiming a disability, who is mowing the lawn—clearly that is acceptable. The Philadelphia Bar rejected the videotaping analogy, noting that: "The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker." The question raised is whether the bar, one, and society, two, really believe that you have a reasonable expectation of privacy at a social media site?

Similarly, the Association of the Bar of the City of New York Committee on Legal Ethics issued its Formal Opinion 2010-2, concluding that a lawyer may not attempt to gain access to a social networking website under false pretenses. In doing so, the NYC opinion assumes that the lawyer is engaging in trickery and reasons that:

> The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to

[12] Despite the absence of a legal ethics opinion directly addressing the question, it is understood that Virginia would likely fall down on the side of the impermissibility of deceptive conduct in obtaining information.

deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the 'virtual' world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a 'friend request' falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a 'friend request' or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder's 'channel' and view all of her digital postings. By making the 'friend request' or a request for access to a YouTube 'channel,' the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the 'virtual' inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to 'open the door' to strangers, social networking users often do just that with a click of the mouse.

The distinction to be made with the NYC opinion is that it assumes that the access is gained by "trickery." The door is open to the so-called "truthful 'friending' of unrepresented parties" and witnesses. And, in New York, a lawyer may "friend" or "follow" an unrepresented person provided the attorney uses his actual name and accurate profile, but is not required to disclose his intended use or purpose in connecting with that person. 2014 NYSBA Guidelines No. 3B; NYC Bar Ass'n Op. 2010-02 (disclosure of role, purpose or intended use not required). *But see* N.H. Bar Ass'n Ethics Comm. Adv. Op. 2012-13/05(2012); San Diego Co. Bar Ass'n Legal Ethics Comm. op. 2011-2(2011); Phila. Bar Ass'n Prof. Guidance Comm. Op. 2009-2(2009); Sedona Conference Primer on Social Media at 57.

And as to jurors? Rule 3.5 (a) provides that "A lawyer shall not **before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as**

permitted by law." It is understood, then, that attorneys may research jurors on social media as long as no communication occurs. *See* NYCBA Op. 2012-2. And lawyers may search jurors' social media sites provided there is no contact or communication and lawyer does not try to "friend" or follow jurors. *See* NYCLA Op. 743.

While dictated by context and circumstance, it is fair to suggest that a lawyer's use of social media is ethically mandated. *See* N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation").

Virginia Attorney Advertising Rules

The Supreme Court of Virginia approved changes to Virginia's advertising rules effective July 1, 2017. The changes make Virginia's rules simpler and better reflect modern digital communication, as opposed to printed and televised advertising that constituted much of what the existing rules were drafted to regulate. The rules also recognize that courts have increasingly recognized First Amendment limitations to how much speech can be regulated by lawyer licensing agencies including state bars.[13]

Indeed, guidance for the changes relied in part on the Association of Professional Responsibility Lawyer's "2015 Report of the Committee on Lawyer Advertising Regulation," which noted in its executive summary that:

> The rules of professional conduct governing lawyer advertising in effect in most jurisdictions are outdated and unworkable in the current legal environment and fail to achieve their stated objectives. The trend toward greater regulation in response to diverse forms of electronic media advertising too often results in overly restrictive and inconsistent rules that are under-enforced and, in some cases, are constitutionally unsustainable under the Supreme Court's *Central Hudson* test.[14] Moreover, anticompetitive concerns, as well as First Amendment

[13] *See, e.g., Hunter v. Virginia State Bar,* 285 Va. 485, 504, 744 S.E.2d 611, 620 (2013) ("The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment.").

[14] In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the United States Supreme Court laid out a four-part test for determining when restrictions on

> issues, globalization of the practice of law, and rapid technology changes compel a realignment of the balance between the professional responsibility rules and the constitutional right of lawyers to communicate with the public.

In its petition to the Virginia Supreme Court explaining the proposed changes, the Virginia State Bar offered that:

> The polestar of the proposed revised rules is a focus, albeit not exclusively, on the prohibition or restriction of any advertising or communication about a lawyer's services that is false or misleading, as broadly defined in the rule. False or misleading commercial speech is not constitutionally protected and harms the public.

Specifically, highlights of the changes are:

- Rule 7.1's requirements requiring certain disclaimers in advertising are deleted. The new rule contains a simple prohibition against "false or misleading" communications.

- Comment 4 to Rule 7.1 permits a lawyer to communicate her specialization in a field of practice if she is specialized by her "experience, specialized training, or education, or is certified by a named professional entity."

- Rule 7.3 preserves the requirement that lawyers mark as "advertising material" their envelopes or electronic communications unless the recipient is a lawyer, or has a familial, personal, or prior professional relationship with the lawyer, or the recipient is a person who had prior contact with the lawyer, or if the lawyer's communication is pursuant to a court-ordered class action notification.

- Rule 7.4, describing when and how a lawyer can communicate his field of practice and certification, is deleted. New Rule 7.1's general bar against false or misleading communications will govern instead.

- Likewise, Rule 7.5, governing lawyer and firm names and letterheads is deleted. Again, Rule 7.1's general proscription against "false or misleading" communications replaces this lengthy rule.

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commercial speech violated the First Amendment of the United States Constitution, considering (1) whether the expression is protected by the First Amendment such that it concerns lawful activity as opposed to being misleading, (2) whether the asserted governmental interest is substantial; (3) does the regulation directly advance the governmental interest asserted; and (4) is the regulation more extensive than is necessary to serve that interest such that there must be a "reasonable fit" between the government's ends and the means for achieving those ends?

In response to the changes to the advertising rules, the Virginia State Bar's Standing Committee on Legal Ethics withdrew a number of opinions (understanding that the withdrawal should not be deemed necessarily as a change in the reasoning underlying the decisions) as of April 3, 2018, including 1029 (advertisement of legal corporation), 1119 (use of actors/nonclients in television commercial), 1297 (propriety of using self-laudatory statements in radio advertisement "if you use our services, you will get the best legal minds . . . getting you the biggest winnings,"), and 1321 (improper use of language in advertisement including that the attorney "knows personal injury so well that the state supreme court has upheld his cases even when other attorneys and insurance companies said it couldn't be done.").[15]

On April 20, 2018, the Supreme Court of Virginia approved LEO 1750, which had been updated by the Standing Committee on Legal Ethics to incorporate the 2017 changes to the advertising rules. A compendium opinion, LEO 1750 addresses a number of issues related to lawyer advertising and solicitation, making clear the focus on avoiding misleading or deceptive statements. One concern is how to ethically communicate litigation results in a manner that is often devoid of the full context of the proceeding and, yet, prevent a "reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters." The Committee noted:

> The 2017 amendments to Rule 7.1 shifted the focus from a mandatory disclaimer with a number of technical requirements for language and placement to an assessment of whether a particular statement is misleading, and if so, whether there is a disclaimer or additional information that would put the statement in the proper context and avoid any misleading implications. Rule 7.1 no longer requires a specific disclaimer to precede any statement of case results, although Comment 2 does clarify that the inclusion of "an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public."
>
> For example, the [] statement of a "one million dollar verdict" obtained after a two million dollar settlement offer was refused would need to include the full context in order not to be misleading. Nor would the boilerplate disclaimer language previously required by Rule 7.1 be sufficient to avoid the misleading implication The communication would have to state the fact that a two million

[15] Previously, the Committee withdrew 821 (addressing advertisements); 856 (solicitation of employment with free estate planning seminars); 862 (solicitation letter); 926 (lawyer referral services); 1290 (use of non-lawyer employee for soliciting prospective clients); 1348 (with respect to lawyer referral service and the propriety of non-lawyer screening calls and referring potential claims for attorney members); 1543 (attorney paying "referral" service for "exclusive rights" to all prospective clients in four counties); and 1689 (attorney participation in referral service (legal-friend) that offers legal referrals to members at discount).

dollar settlement offer was made prior to the trial in which the one million dollar verdict was obtained. Another example of a misleading statement of case results would be a statement that a lawyer obtained an $8 million jury verdict in a medical malpractice case, when the court reduced the award to the statutory cap of $2.25 million. A lawyer advertising such a result must include the fact that the award was reduced by the court.

On the other hand, a lawyer who advertises that she has obtained pre-trial dismissal of criminal charges after prevailing on a motion to suppress evidence, when that is a complete and true statement of what happened in the case, may do so without including any disclaimer or limiting language. Similarly, a lawyer may truthfully advertise that he obtained a $5 million settlement following a three-day mediation.

Practice Tip: Notwithstanding the liberalization of advertising restrictions, be careful. The rules governing confidentiality remain. From a risk management standpoint, and to avoid potential litigation (whether involving ethics issues or not), it is strongly suggested that lawyers be mindful in their marketing as to idenitfication of clients without their consent, making conflicts (real or perceived) and creating unrealistic expectations. In addition, lawyers with multijurisdictional practices (or the potential for the same) should be especially mindful that Virginia's advertising standards may be contrary to authorities outside of the state.

Attorney Blogging (In Virginia): A Hypothetical

For many years, Jane has been a very successful, sought after financial advisor. Unfortunately for Jane, the estate of an one of her investment clients is suing her, claiming that she promised that she would invest funds placed with her in a real estate venture that not only enjoyed a great deal of public support, but was expected to offer above market returns. The development deal collapsed in a dramatic and very public fashion. Throughout the civil litigation, you have provided—where appropriate—comments to the press upon inquiry. During the course of a lengthy trial, the plaintiff attacked Jane for her handling of her mother's estate, her alleged philandering husband and various disciplinary actions related to her investment practices. While bruised, Jane prevailed on all counts and immediately leaves for a well-deserved vacation. While there were newspaper accounts of the trial, they were scattered and misleading.

Following the victory, your firm issued a press release noting that "Jane beat all odds and won on all counts with the assistance of" you. Reflecting on the litigation, you prepare a series of blogs, criticizing, in part, a judicial system that would permit such claims to proceed to trial and lambasting the plaintiff's strategy of making public Jane's personal life.

Prior to posting the blogs, the firm's marketing director asks whether you need any permission from anyone. You check, and note that the appeal period has run and confirm that the material in the blogs is not subject to any protective order or confidentiality provision. In fact, everything you wrote comes from what was raised at trial and, in some cases, the pleadings, press reports and trial transcripts.

May you post the blogs related to Jane's trial? Yes, but you (probably) shouldn't.

Under Rule 1.6(a), "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation. . . ." Thus, the obligation of confidentiality is broader than that which is protected by the attorney-client privilege and includes matters that may be publicly known or accessible, but would be seen as confidential in nature. For example, a client facing a divorce on grounds of adultery would likely prefer that her lawyer not broadcast the circumstances of her domestic relations matter. Is it public, yes. But is it potentially embarrassing or confidential in nature? Yes also.

Comment 3 to the Rule provides that:

> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

However, enforcement of the ethical rules regarding confidentiality confronts an equally important protection under the First Amendment according to the Virginia Supreme Court. In *Hunter v. Virginia State Bar,* 285 Va. 485, 744 S.E.2d 611 (2013), the Virginia State bar sought to impose discipline on an attorney, in part, related to his blogging about representation of clients in court. The Supreme Court concluded that that:

> The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment.

Notwithsatnding the amendement of the advertising rules, it is not believed that they would change the outcome of the *Hunter* decision. **However**, in ABA Formal Opinion 480 (March 6, 2018), the Standing Committee on Ethics and Lawyer Responsibility concluded that "Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules."[16] The Committee notes that:

> The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record." Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Rule 1.6(a).

Practice Tip: There may be good reason to blog about a particular outcome and, in fact, the client may welcome and consent to it. However, from a practice standpoint, it is suggested that a careful review of any published materials be made with an eye toward making certain that the information enclosed would in no manner embarrass or prejudice the client (e.g., an online employment check) regardless if it is public or not. **Given the multijurisdictional practice of many lawyers and firms, it is a better practice to follow the *ABA Formal Opinion 480***. See attached.

Communication Issues

No one is suggesting that attorneys are posting specific legal advice to specific clients on publicly available social media sites or on even semi-closed sites in which the lawyer (or client) has a restricted number of participants, or "friends" or followers. In Virginia Legal Ethics

[16] The Committee viewed *Hunter* as being limited to its facts per the Supreme Court's statement with respect to the alleged violation of Rule 1.6 that there was "no evidence advanced to support it." Such a reading of the decision is too narrow.

Opinion 1791, the Standing Committee on Legal Ethics clarified that that “the attorney in the hypothetical is not precluded by the ethics rules from providing legal services to his clients via electronic communication so long as the content and caliber of those services otherwise comport with the duties of competence and communication." Appropriately, the focus is on lawyer competence and communication, *not* proximity.

A source of frequent client complaint, a lawyer's duty of communication is set forth in Rule 1.4 of the *Virginia Rules of Professional Conduct*, which provides that:

> (a) A lawyer shall keep a client *reasonably informed* about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make *informed decisions* regarding the representation.
>
> (c) A lawyer shall *inform the client of facts pertinent to the matter* and of communications from another party that may significantly affect settlement or resolution of the matter.

Emphasis added.

Aside from the clear mandate to communicate, the rules do not proscribe how to communicate, only that the "how" is adequate. So, for example, the Standing Committee on Legal Ethics concluded that:

> Each of the three paragraphs of Rule 1.4 outlines content areas of communication, rather than the method of communication. The rule focuses on communicating the status of the matter, information necessary for informed decision-making, and pertinent facts in the matter. The rule in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is what information was transmitted, not how.

LEO 1791.

Still, anecdotally, risk management professionals and bar counsel have shown concern and resistance to more fluid and relaxed means of communications as with texting. Indeed, in the context of considering a “virtual law office,” the Standing Committee confirmed LEO 1791 and the critical nature of "what information was transmitted, not how." Yet:

> On the other hand, one of the aspects of communication required by Rule 1.4 is that a lawyer must “explain a matter to the extent reasonably necessary to

> permit the client to make informed decisions regarding the representation." Use of the word "explain" necessarily implies that the lawyer must take some steps beyond merely providing information to make sure that the client actually is in a position to make informed decisions.

LEO 1872. And while there may not be a direct social media in communicating information to a client in a public forum (as opposed to a closed network or one-on-one secure transmission): "A lawyer may not simply upload information to an Internet portal and assume that her duty of communication is fulfilled without some confirmation from the client that he has received and understands the information provided." *Id.*

Judicial Use of Social Media

ABA Formal Opinion 462 provides that: "A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant portions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity or impartiality, or create an appearance of impropriety."[17]

While very dated, as of 2012, only 46.3% of judges use social media and, the overwhelming majority of social media sites used by judges were[18]: 86.3% Facebook; 32.8% LinkedIn. In response to the question: "Judges can use social media profile sites, such as Facebook in their professional lives without compromising professional conduct codes of ethics."[19]

- 45.4% disagreed or strongly disagreed
- 19% strongly agreed—over double from 2010

Yet: the disagreement over use of social media drops to 34.3% in response to the statement: "Judges can use social media profile sites, such as Facebook, in their personal lives without compromising professional conduct codes of ethics."[20]

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[17] *See, e.g.,* Opinion 17-2009 (S.C. Advisory Comm. On Standards of Judicial Conduct) (concluding that a judge may be a member of Facebook and "friends" with law enforcement officials as long as they do not discuss anything related to the judge's work); Opinion 2010-7 (Oh. Bd. Of Comm'rs on Grievances and Discipline 2010) (addressing whether a judge and a lawyer can be "friends" on a social networking site). *See also* A. Wilson, "*Let's Be Cautious Friends: The Ethical Implications of Social Networking for Members of the Judiciary,*" 7 Wash. J.L. Tech. & Arts 225 (2012) (http://digital.law.washington.edu/dspace-law/handle/1733.1/1112).

[18] 2012 CCPIO New Media Survey.

[19] *Id.*

[20] *Id.*

Unfortunately, there are many accounts addressing problems with electronic media use by judges. Here are a few examples, confirming that judges are not immune to inappropriate use of social media:

Publicly Accessible Pornography.

In the middle of an obscenity trial being heard by designation by Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, the *Los Angeles Times* reported on his possession of pornography, which was accessible through a website (http://alex.kozinski.com) that Judge Kozinski was unaware could be viewed by the public. After recusing himself from the trial and self-reporting the incident, a federal court ethics panel concluded:

> We find that the Judge's possession of sexually explicit offensive material combined with his carelessness in failing to safeguard his sphere of privacy was judicially imprudent. Moreover, once the Judge became aware in 2007 that offensive material could be accessed by members of the public, his inattention to the need for prompt corrective action amounted to a disregard of a serious risk of public embarrassment. We join with the Special Committee in admonishing the Judge that his conduct exhibiting poor judgment with respect to this material created a public controversy that can reasonably be seen as having resulted in embarrassment to the institution of the federal judiciary. We determine that the Judge's acknowledgment of responsibility together with other corrective action, his apology, and our admonishment, combined with the public dissemination of this opinion, properly conclude this proceeding.[21]

Hostile Comments by Substitute Judge.

On a MySpace page, a Nevada substitute judge and criminal defense attorney noted for his personal interests: "Breaking my foot off in a prosecutor's ass…and improving my ability to break my foot off in a prosecutor's ass." Other interest included: "anything related to NFL, video games, sex." The attorney lost his position with the North Las Vegas Justice Court.[22]

Facebook Contacts with a Defendant.

According to news accounts, a judge in Georgia initiated a contact via Facebook with a defendant ostensibly because he was thinking of finding a new person give him a haircut and understood her work at a hair salon. While she responded to indicate that she did not cut hair, they agreed later to meet and she asked for money for rent. In other emails, they discussed strategy in her case and a drug case involving one of her friends. The judge signed an order

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[21] In re Complaint of Judicial Misconduct, Judicial Council of the Third Circuit (June 5, 2009) (http://www2.ca3.uscourts.gov/opinarch/089050p.pdf).

[22] "MySpace Judgment: Guilty," LAS VEGAS REVIEW-JOURNAL (Aug. 13, 2007).

permitting her to be released on her recognizance and the case was later dropped and the judge recused himself from the matter dealing with her friend. Still, the judge resigned from the bench.[23]

Ex Parte Contacts With Counsel/Independent Review

In North Carolina, a judge presided over a child custody and support hearing. During the course of the litigation, the judge and defense counsel became "friends" on Facebook. Defense counsel posted "how do I prove a negative" to which the judge responded "he had two good parents to choose from" and "feels he will be back in court referring to the case not being settled. Defense counsel posted "I have a wise judge." The judge subsequently told other counsel about the Facebook exchange. Later, the defense attorney posted, "I hope I'm in my last day of trial" to which the judge responded "you are in your last day of trial."

In addition, during the trial, the judge had reviewed the website of the defendant to review her photography and poetry, which he admired, but never disclosed to the parties or their counsel that he had done so. However, in announcing his findings, he recited a poem, to which he made minor changes, that he found on the website. Upon motion of a party, the judge disqualified himself and was subsequently publicly reprimanded.[24]

[23] Debra Cassens Weiss, "Ga. Judge Resigns After Questions Raised About Facebook Contacts," AMERICAN BAR ASSOCIATION JOURNAL (Jan. 7, 2010).

[24] *In re R. Carlton Terry, Jr.*, N.C. Judicial Standards Comm'n, No. 08-234.

Appendix:
Virginia State Bar's Standing Committee on Legal Ethics

In connection with its support for changes to Rules 1.1 (competence) and 1.6 (confidentiality), the Virginia State Bar's Standing Committee on Legal Ethics provided the following commentary:

For quite some time now, lawyers and their staff have been compelled to adapt to changes in technology including electronic filing, discovery of electronically stored information, social media and security of electronic communications and storage of client information. Protecting the privacy of medical, financial and personal identification information is required by state and federal law. Federal and Virginia Rules of Procedure impose requirements that require a lawyer to become knowledgeable about technology in order to conduct proper discovery.

The proposed rule changes do not necessarily require that a lawyer become "tech-savvy" or acquire training, skill or experience with information technology. At the same time, lawyers cannot ignore the fact that technology has and will continue to change the practice of law. A lawyer may discharge his or her duty of competence by employing or associating others who have developed the requisite skill and expertise. However, a lawyer may not simply ignore relevant technologies that have become widely accepted by the bar and have become reasonably necessary to represent clients competently and diligently. For some time, courts have found a lawyer deficient in representing a client by failing to discover information that can readily be found by a simple search on the internet. An interesting case is *Munster v. Groce*, 829 N.E.2d 52 (Ind. App. 2005). In *Munster*, a lawyer was chastised for not using Google to locate a non-resident defendant after filing a Long Arm affidavit stating that the defendant's address could not be found. *See also Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010) (imposed an affirmative duty on attorneys to make online investigation of potential juror's prior litigation history a key part of their jury selection process "in light of advances in technology allowing greater access to information."). Trial lawyers should be well aware that their clients' Facebook pages and other social media accounts contain relevant and discoverable evidence that must be preserved and produced pursuant to a lawful discovery request. *Allied Concrete Co. v. Lester*, 285 Va. 295, 302, 736 S.E.2d 699 (2013)(spoliation of evidence charge against plaintiff and plaintiff's counsel; the trial court sanctioned Murray in the amount of $542,000 and Lester in the amount of $180,000 to cover Allied Concrete's attorney's fees and costs in addressing and defending against the misconduct.)

See also N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that

information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case."). Also consider that an American Academy of Matrimonial Lawyers survey pinpoints Facebook as the "unrivaled leader for online divorce evidence" with 66 percent citing it as a primary source.

Twenty years ago, Judge Robert Payne found that a lawyer's performance in representing a client was deficient because the lawyer failed to use appropriate methods to discover that the Supreme Court had granted certiorari from two federal appellate courts on the precise issue critical to his client's defense on charges of "structuring" payments to avoid the reporting requirement of cash payments made to him by his client. Judge Payne observed:

> In the modern environment of law practice, the law changes rapidly and develops in significant ways as a matter of course. One consequence of this modern environment, and of dramatic advancements in technology, is the advent of extensive resources for staying abreast of developments in the law. Numerous legal newspapers, periodicals such as United States Law Week, and on-line services serve this important purpose.

McNamara v. United States, 867 F. Supp. 369, 374 (E.D. Va. 1994). (emphasis added).

The research tools McNamara's defense counsel relied on were out of date. As a result of his lawyer's failure to use newer research methods, McNamara was denied the effective assistance of counsel. The Court observed:

> On the facts of this case, the failure to discover the pendency of Ratzlaf was deficient conduct under Strickland. It was not sufficient to rely solely on the annotations to the United States Code in interpreting the elements of the offense charged. This insufficiency is illustrated by the fact that now, even after the Supreme Court has decided Ratzlaf in direct contradiction of Rogers, the annotations relied on by Donnelly still reflect Rogers as the law in the Fourth Circuit.

These and other examples amply demonstrate how technology has changed the practice of law over time. Accordingly, the rules of conduct that explain the duties lawyers owe to clients should also be amended to keep up with emerging standards. Again, the proposals do not require that a lawyer be personally proficient with technology but the lawyer should implement appropriate technologies essential to represent clients diligently and competently in a digital age. Lawyers can meet this standard in the same manner as other companies and professional service providers do by employing persons that have the requisite skills and expertise in information technology.