NAVIGATING THE ETHICAL THICKET OF SOCIAL MEDIA

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1. AN OVERVIEW OF THE ETHICAL ISSUES

When more than half of all in-house counsel report using social media for news and information, when 81-year old Rupert Murdoch uses Twitter, when the fastest growing cohort on Facebook consists of those over 50, when the Association of Corporate Counsel has a user group on LinkedIn, and when bloggers regularly break important stories and appear on television and radio news broadcasts, there can be no doubt that social media permeates society. No lawyer can afford to ignore social media.3

Lawyers and law firms are increasingly using social media to build their reputations, to inform their current clients, and to reach potential new clients. A look at recent publications addressing lawyers shows that attorneys are being told that they “must” be on social media. Law Technology News has an article entitled “8 Ways to Meet Your Professional Goals Using Social Media” and urges lawyers to “develop your personal brand.”4 Reputation.com5 has a product to “boost your online visibility,” and

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1 A portion of this paper consists of adaptions of, inclusions from, and extracts from the author’s prior publications, including: “Ouch! Getting Bit Ethically And Professionally By The Interrelationship Of Technology And Ethics,” a presentation being given September 23, 2012 in Las Vegas to the State Bar of Nevada; “What's So Unethical About Social Media? How To Avoid Getting Cornered,” ABA Real Property Section 23rd Annual Spring Symposia (May 2012, New York); “The Social Media Thicket: Surviving and Thriving in the Tangled, Thorny Issues,” ABA Real Property “Probate and Property” Journal, Spring 2012; “The Social Media Thicket For Mississippi Lawyers: Surviving And Thriving In An Ethical Tangled Web,” a presentation for the Mississippi College School of Law, Jackson, Mississippi (February 24, 2012), to be published in an upcoming edition of the Mississippi College Law Review; and “The Social Media Thicket: Surviving and Thriving in a Tangled Web and the Ethical Issues this Raises for Lawyers,” ACREL/ALI-ABA WEBINAR, produced in conjunction with the American College of Real Estate Lawyers, September 14, 2011

2 The author is not licensed to practice law in any state except Louisiana; any comments about the laws of any other state are simply those of an outsider from a civil law (not common law) state who will willingly acknowledge that his thoughts about common law may not be shared by common law lawyers or judges.


4 See http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202545271394&slreturn=1, (last visited 3/19/12).

5 www.reputation.com
the National Law Journal reports that the “average lawyer pays the company $2,000 a year to attempt to influence the list or hits that come up when his or her name is punched into search engines.”

Can the use of social media create ethical problems for attorneys? Can lawyers inadvertently back themselves into ethical corners? There are many Internet resources on ethics and professionalism that may provide a source for research and links to a number of useful sites.

This paper considers several examples, all of which are based on or stem from real events. These examples create professionalism issues as well as ethical issues. The purpose of these examples is not to scare anyone into abandoning social media; rather, the purpose is to make us more aware of the issues involved and to think through why and how we use social media. Further, the purpose of this paper is not to answer questions but to pose them so that we all may consider them in more detail, particularly as various states’ Rules of Professional Conduct and other ethical formulations may have been adopted, adapted, and interpreted.

Use of social media by lawyers triggers a number of potential ethical and professionalism concerns, including:

- Can the use of social media by an attorney constitute the practice of law?
- What are the inadvertent “unlawful practice of law” issues if your social media postings are viewed in a state where you are not licensed to practice?
- Can the use of social media lead to inadvertent attorney-client relationships?
- When does use of social media constitute advertising?
- Can the use of social media lead to sanctions for litigators, and what are the First Amendment issues of the use of social media vs. a lawyer’s obligations as an officer of the court?
- Who has “ownership” of social media information when a lawyer leaves a firm?

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2. **CAN THE USE OF SOCIAL MEDIA BY AN ATTORNEY CONSTITUTE THE PRACTICE OF LAW?**

   a. **THE CASE OF THE TECH-SAVVY LAWYER**

   Lucy Lawyer has a Facebook page linked to her Twitter account and her blog. She updates items daily. She posts her thoughts on recent cases, on legal issues, and even has a section of each post entitled “Practical Tips” where she gives specific advice related to the issues about which she is posting.

   Lucy recently had a post on foreclosure issues, the problems lenders have encountered in cases, and how borrowers have stopped foreclosure proceedings. Included in her “Practical Tips” section is this statement:

   > Always check the public records. If the entity that is suing you is not listed on the public records as the owner of your note, you can have a claim against them on numerous theories, including fraud on the court, misrepresentation, and, perhaps, even RICO!

   Is Lucy’s post something that would constitute the “practice of law”?

   What if Lucy’s post also had a “sample pleading” section that readers could use to draft oppositions to foreclosures?

   b. **DISCUSSION ABOUT “THE CASE OF THE TECH-SAVVY LAWYER”**

   The ABA Model Rules of Professional Conduct (“RPC”) do not define the practice of law. Because lawyers are licensed in each state, one must look to each state’s statutes and court rules to determine what constitutes the practice of law. Louisiana has both statutory rules on unlawful practice\(^\text{10}\) as well as provisions in Rule 5.5 concerning practice by out-of-state lawyers here.\(^\text{11}\)

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\(^{10}\) See La. R.S. 37:212 defining the practice of law, and R.S. 37:213 prohibiting the unlawful practice of law.

R.S. 37:212 provides:

§212. "Practice of law" defined

A. The practice of law means and includes:

1. In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with pending or prospective proceedings before any court of record in this state; or
2. For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;
   
   a. The advising or counseling of another as to secular law;
   
   b. In behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document, or instrument affecting or relating to secular rights;
(c) The doing of any act, in behalf of another, tending to obtain or secure for the other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(d) Certifying or giving opinions, or rendering a title opinion as a basis of any title insurance report or title insurance policy as provided in R.S. 22:512(17), as it relates to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.

B. Nothing in this Section prohibits any person from attending to and caring for his own business, claims, or demands; or from preparing abstracts of title; or from insuring titles to property, movable or immovable, or an interest therein, or a privilege and encumbrance thereon, but every title insurance contract relating to immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law. Nothing in this Section prohibits any person from performing, as a notary public, any act necessary or incidental to the exercise of the powers and functions of the office of notary public, as those powers are delineated in Louisiana Revised Statutes of 1950, Title 35, Section 1, et seq.

C. Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting or defending any claim, not exceeding five thousand dollars, on its own behalf in the courts of limited jurisdiction or on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.

D. Nothing in Article V, Section 24, of the Constitution of Louisiana or this Section shall prohibit justices or judges from performing all acts necessary or incumbent to the authorized exercise of duties as judge advocates or legal officers.

R.S. 37:213 provides:

213. Persons, professional associations, professional corporations, and limited liability companies entitled to practice law; penalty for unlawful practice

A. No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state, no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 8 of Title 12 of the Revised Statutes, and no partnership or limited liability company except one formed for the practice of law and composed of such natural persons, corporations, voluntary associations, or limited liability companies, all of whom are duly and regularly licensed and admitted to the practice of law, shall:

(1) Practice law.
(2) Furnish attorneys or counsel or an attorney and counsel to render legal services.
(3) Hold himself or itself out to the public as being entitled to practice law.
(4) Render or furnish legal services or advice.
(5) Assume to be an attorney at law or counselor at law.
(6) Assume, use, or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles in such manner as to convey the impression that he is a practitioner of law.
(7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts, or maintains an office of any kind for the practice of law.

B. This Section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law from furnishing an attorney at law to give free assistance to persons without means.
C. Any natural person who violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.

D. Any partnership, corporation, or voluntary association which violates this Section shall be fined not more than five thousand dollars. Every officer, trustee, director, agent, or employee of a corporation or voluntary association who, directly or indirectly, engages in any act violating any provision of this Section or assists the corporation or voluntary association in the performance of any such violation is subject to the penalties prescribed in this Section for violations by a natural person.

11 La. Rule 5.5 states:

(a) A lawyer shall not practice law [in a jurisdiction] in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission and that are provided by an attorney who has received a limited license to practice law pursuant to La. S. Ct. Rule XVII, § 14; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e)(1) A lawyer shall not:

(i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or

(ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, or an attorney
While many cases deal with attempted unlawful practice of law issues from the standpoint of non-lawyers attempting to represent others in court, fewer cases deal with transactional law issues. Nonetheless, it is instructive to look at a sampling of opinions on transactional law.

For example, Rhode Island’s Bar has issued a report indicating that a non-lawyer who advertised on the internet as a “low cost paralegal” for document preparation had engaged in the unlawful practice of law.\(^{12}\)

\(^{12}\) See: *In re Low Cost Paralegal Services*, 19 A.3d 1229 (R.I. 2011). Among the findings were that “Low Cost Paralegal Services and Dominique M. Salazar a/k/a Michelle Salazar have engaged in the
Massachusetts has held that certain matters involving real estate closing and transactional work constitute the practice of law. This rule is broadly accepted in other states. See, for example, opinions in Arkansas, Ohio, Delaware, and South Carolina.
Lucy’s posting about the issue itself may not trigger “unlawful practice” under these cases, because she is not engaged in a closing, and because individuals have a right to represent themselves pro se in legal proceedings.

On the other hand, are Lucy’s “Practical Tips” an attempt to “ghost-write” pleadings for a potential pro se litigant?

Some courts have looked askance at this, indicating that “ghostwriting” pleadings may be sanctionable. Some state bar associations have banned “ghostwriting” pleadings and letters. For example, West Virginia has an ethics opinion distinguishing between ghostwriting pleadings, which is deemed inappropriate, with assisting a client in real estate closing the unauthorized practice of law? Based on our review of the evidence and arguments presented to us, we hold that it is not the unauthorized practice of law for a layperson to conduct a real estate closing for another party.”

\[18\] See the discussion in \textit{Couch v. Jabe}, 2010 WL 1416730 (W.D.Va. Apr 08, 2010): “The court notes that plaintiff states in a footnote that he ‘asked counsel for Prison Legal News to draft this motion on his behalf. They are Steven Rosenfield and Jeffrey Fogel . . . . [ Plaintiff ] then revised counsel’s draft motion.’ (Mot.(no.28) n. 1.) Although plaintiff’s footnote may have saved counsel from violating an ethical duty of candor, Virginia Legal Ethics Opinion No. 1592 (1994), “ghostwriting” motions for a pro se plaintiff is contrary to the spirit of the Federal Rules of Civil Procedure and the privilege of liberal construction afforded to pro se litigants. See Fed.R.Civ.P. 11(a), (b). See also \textit{Duran v. Carris}, 238 F.3d 1268, 1272-73 (10th Cir.2001); \textit{Ellis v. Maine}, 448 F.2d 1325, 1328 (1st Cir.1971); \textit{Johnson v. Bd. of County Comm'r's}, 868 F.Supp. 1226, 1230-32 (D.Co. Nov.17, 1994); \textit{Klein v. H.N. Whitney, Goadby & Co.}, 341 F.Supp. 699, 702-03 (S.D.N.Y. Nov.22, 1971); \textit{Klein v. Spear, Leeds & Kellogg}, 309 F.Supp. 341, 342-43 (S.D.N.Y. Jan.20, 1970) (discussing ghostwriting and duty of candor). “When appropriate, the court can make an additional inquiry in order to determine whether [ Rule 11 ] sanctions should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court.” Fed.R.Civ.P. 11 advisory committee's note. For future reference, if an attorney wishes to notify the court of parallel proceedings after a pro se party contacts him or her, counsel is encouraged to file a letter with the court instead of drafting pleadings. Further inquiry by the undersigned into plaintiff's allegations is presently unnecessary. However, any additional instances or allegations of ghostwriting would be appropriately adjudicated.”

\textbf{Authors note:} The \textit{Johnson} case, discussed in the quotation above, was affirmed in part, although the appellate court disclaimed the reasoning of the district court on other parts of this case when it eventually went on appeal. See \textit{Johnson v. Board of County Com'r's for County of Fremont}, 85 F.3d 489 (10th Cir. 1996). The appellate court, however, did not specifically disapprove of the district court’s following statement:

Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.

What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.* * * Such an evasion of the obligations imposed upon counsel by statute, code and rule is ipso facto lacking in candor.”
filling out forms, which is deemed appropriate under certain circumstances. The states that have issued opinions on this are split, with some banning the practice, some limiting the practice, and others agreeing it is permissible. It has been reported that the online supplier of legal forms, “LegalZoom,” has entered into a settlement of a case in Missouri which accused it of engaging in the unlawful practice of law. On the other hand, the ABA has issued an ethics opinion indicating that ghostwriting is perfectly acceptable and does not violate the RPC.

19 See West Virginia L.E.O. 2010-01, “Ghostwriting or Undisclosed Representation: What is Permissible and What is Not Permissible,” stating, in part, that “attorneys who write letters or other documents on behalf of an individual do not have to disclose their identities if the letter or document is not intended to be filed with a tribunal, or authorship is not otherwise required by law” (emphasis supplied).


“There have been a number of state bar ethics opinions that pre-date the ABA Formal Opinion. As discussed and cited in New Jersey Advisory Committee on Professional Ethics Opinion 713 (2008), some of these opinions do not require disclosure. See, Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 502 (1999); Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 483 (1995) and State Bar of Arizona Comm. on the Rules of Professional Conduct Op. 05-06 (2005).


21 See the report found at: http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle/

and


22 ABA Formal Opinion 07-446, “Undisclosed Legal Assistance to Pro Se Litigants” (2007) (a lawyer can furnish ghostwriting assistance without disclosing to the court or to the opposing party under certain circumstances): “Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c). In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation.”
3. **INADVERTENT UNLAWFUL PRACTICE OF LAW ISSUES IF YOUR SOCIAL MEDIA POSTINGS ARE VIEWED IN A STATE WHERE YOU ARE NOT LICENSED TO PRACTICE**

   **a. THE CASE OF THE BROADLY-READ LAWYER**

   What if Lucy Lawyer (who made the postings described above) is licensed in State A, but her postings are broadly read across the country? Is Lucy engaged in the unlawful practice of law in States B, C, and D?

   **b. DISCUSSION ON THE CASE OF THE BROADLY-READ LAWYER**

   As can be seen by the materials in Section 2, above, what constitutes the practice of law varies from state-to-state. Even if Lucy’s activities are perfectly acceptable in State A, they may not be in States B, C, or D.⁴

   For example, at least one Florida court has held that selling legal forms is acceptable and does not constitute the unlawful practice of law.⁵ On the other hand, courts have found there to be a distinction between merely supplying a form and helping someone fill out a form (even if the assistance is electronic and on-line) – the latter (in some states) may constitute the unlawful practice of law.⁶

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⁵ See: **Florida Bar v. Brumbaugh**, 355 So.2d 1186, 1194 (Fla.1978):

   “We hold that Ms. Brumbaugh, and others in similar situations, may sell printed material purporting to explain legal practice and procedure to the public in general and she may sell sample legal forms.... In addition, Ms. Brumbaugh may advertise her business activities of providing secretarial and notary services and selling legal forms and general printed information. However, Marilyn Brumbaugh must not, in conjunction with her business, engage in advising clients as to the various remedies available to them, or otherwise assist them in preparing those forms necessary for a dissolution proceeding.”

⁶ See, e.g., **Janson v. LegalZoom.com, Inc.**, --- F.Supp.2d ----, 2011 WL 3320500 (W.D.Mo. 8/2/11):

   In its Motion for Summary Judgment, Defendant LegalZoom argues that, as a matter of law, it did not engage in the unauthorized practice of law in Missouri. Thus, the Court must decide whether a reasonable juror could conclude that LegalZoom did engage in the unauthorized practice of law, as it has been defined by the Missouri Supreme Court. See First Escrow, 840 S.W.2d at 843 n. 7 (“the General Assembly may only assist the judiciary by providing penalties for the unauthorized practice of law, the ultimate definition of which is always within the province of this Court”); Eisel, 230 S.W.3d at 338–39 (reaffirming that “[t]he judiciary is necessarily the sole arbiter of what constitutes the practice of law,” and finding no conflict between § 484.020 and the Missouri judiciary’s regulation of the practice of law).

   Plaintiffs argue that the Missouri Supreme Court has declared on multiple occasions that a non-lawyer may not charge a fee for their legal document preparation service. Defendant responds that its customers—rather than LegalZoom itself—complete the standardized legal documents by entering their information via the online questionnaire to fill the document's blanks, which it concede that customers never see. While the parties dispute the proper characterization of the underlying facts, there is no dispute regarding how LegalZoom's legal document service functions.

   It is uncontroversial that Defendant LegalZoom's website performs two distinct functions. First, the website offers blank legal forms that customers may download, print, and fill in themselves. Plaintiffs make no claim regarding these blank forms. Indeed, this function is analogous to the “do-it-yourself” kit in Thompson containing blank forms and general instructions regarding how those forms should be completed.
4. **INADVERTENT ATTORNEY-CLIENT RELATIONSHIPS**

   a. **THE CASE OF THE TOO-FAST-TO-RESPOND LAWYER**

   Arnie Attorney is a prolific user of Facebook, Linked-In, Twitter, PartnerUp, Ryze, Networking for Professionals, Jase, and Ziggs.

   Arnie rapidly responds to any queries or comments and prides himself on his fast turnaround and 24/365 availability. He wants to build his brand as an attorney to as many people as possible.

   Arnie gets the following query on one of the sites he maintains:

   “My house is in foreclosure. A guy I know promised that he could stop the foreclosure for a $1,000 fee. I paid the fee and the foreclosure is continuing. Any ideas on what I can do now?

   Concerned Homeowner”

   Arnie quickly responds with information about the FTC rule on loan modifications and the liability of those who don’t comply with the rules.

   Has Arnie formed an attorney-client relationship with Concerned Homeowner?

   by the customer. Such a “do-it-yourself” kit puts the legal forms into the hands of the customers, facilitating the right to pro se representation.

   It is the second function of LegalZoom's website that goes beyond mere general instruction. LegalZoom's internet portal is not like the “do-it-yourself” divorce kit in Thompson. Rather, LegalZoom's internet portal service is based on the opposite notion: we'll do it for you. Although the named Plaintiffs never believed that they were receiving legal advice while using the LegalZoom website, LegalZoom's advertisements shed some light on the manner in which LegalZoom takes legal problems out of its customers' hands. While stating that it is not a “law firm” (yet “provide[s] self-help services”), LegalZoom reassures consumers that “we'll prepare your legal documents,” and that “LegalZoom takes over” once customers “answer a few simple online questions.” [Doc. # 119 at 51–52.]

26 http://www.partnerup.com/
27 http://www.ryze.com/
28 http://networkingforprofessionals.com/
29 http://www.jasezone.com/
30 http://www.ziggs.com/
b. Discussion on the Case of the Too-Fast-To-Respond Lawyer

The general rule is that the attorney-client relationship is formed by looking at what the client believed, not what the lawyer intended. 32

Articles have cautioned about how the internet can lead to inadvertent attorney-client relationships. 33

Can Arnie prevent an inadvertent attorney/client relationship if he puts a disclaimer in every posting? 34 RPC 1.2 states: “A lawyer may limit the objectives of the representation if the client consents after consultation, and “consultation” means “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” Can Arnie even craft an appropriate disclaimer? If he does, does it undermine his marketing efforts? Does it make his posting less likely to be read?

Moreover, if Arnie has created an attorney-client relationship, he now has at least five additional problems.

First, his “public” posting of advice to Concerned Homeowner may have created a breach in Arnie’s duty of confidentiality to the client. 35 See ABA Model Rule 1.6.


“In general, courts and other disciplinary bodies have found that an attorney-client relationship exists when the client reasonably relies on the advice of the attorney. The test focuses on the client's subjective perceptions and beliefs. Attorneys must take care that undesired attorney-client relationships are not unwittingly formed by blogging or maintaining a profile on a social networking site.

Attorney blogs and social networking profiles should contain a disclaimer, making it clear that information provided on the blog or social networking site is not intended to create an attorney-client relationship. Disclaimers of any and all liability that might arise from the contents of the blog or social networking profile could also be used. However, such provisions may not be enforceable unless a user affirmatively accepts the terms. Disclaimers are also likely to be unenforceable if they are inconsistent with the subsequent conduct of the parties.”


34 For more on this, see the quotation at footnote 32, above.

35 For more on this, see: Andrea Utecht and Abraham C. Reich, “Successful Partnering Between Inside and Outside Counsel,” Chapter 31, footnote 10:

See, e.g., Cal. State Bar Comm. on Prof'l Responsibility and Conduct Op. No. 2005-168 (when lawyer maintains a web site allowing visitors who are seeking legal advice a means of communicating with him, lawyer owes a duty of confidentiality to the visitors unless a disclaimer exists in sufficiently plain terms to defeat visitors' reasonable belief that the lawyer is consulting confidentially with the visitor); Nev. Comm. on Ethics and Prof'l Responsibility, Op. 32 (Mar. 25, 2005) (attorney/client relationship may be created by
This Rule cautions that a “fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”

Second, Arnie’s posting may have violated rules on contacts with prospective clients. ABA Model Rule 7.3 prohibits “real-time electronic contact” to “solicit professional employment” from someone with whom the lawyer does not previously have a “close personal or prior professional relationship.” While Louisiana does not have Rule 7.3, it does have provisions in Rule 7.4 concerning “direct solicitation” that can be triggered by electronic communications, for Louisiana Rule 7.6 concerns electronic communications.

a unilateral act in response to an advertisement or e-mail to an attorney’s website); and S.D. State Bar Ethics Op. 2002-2 (April 22, 2002) (e-mail from prospective client can create attorney/client relationship).

- Changes in technology have also complicated this issue. For instance, several opinions have considered attorney postings on listservs, N.M. Ad. Op. 2001-1 and Los Angeles County Bar Assoc. Prof'l Responsibility and Ethics Comm. Op. No. 514 (2005).

36 Louisiana Rule 7.4 provides (emphasis supplied):

 Rule 7.4. Direct Contact With Prospective Clients

(a) Solicitation. Except as provided in subdivision (b) of this Rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior lawyer-client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer’s request or on the lawyer’s behalf or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer’s behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this Rule. The term “solicit” includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (c) of Rule 7.6. For the purposes of this Rule 7.4, the phrase “prior lawyer-client relationship” shall not include relationships in which the client was an unnamed member of a class action.

(b) Written Communication Sent on an Unsolicited Basis.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer’s behalf or on behalf of the lawyer’s firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication;

(B) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

(C) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(D) the communication contains a false, misleading or deceptive statement or claim or is improper under subdivision (c)(1) of Rule 7.2; or
(E) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(2) Unsolicited written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(A) Unsolicited written communications to a prospective client are subject to the requirements of Rule 7.2.

(B) In instances where there is no family or prior lawyer-client relationship, a lawyer shall not initiate any form of targeted solicitation, whether a written or recorded communication, of a person or persons known to need legal services of a particular kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment unless such communication complies with the requirements set forth below and is not otherwise in violation of these Rules:

(i) Such communication shall state clearly the name of at least one member in good standing of the Association responsible for its content.

(ii) The top of each page of such written communication and the lower left corner of the face of the envelope in which the written communication is enclosed shall be plainly marked “ADVERTISEMENT” in print size at least as large as the largest print used in the written communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the “ADVERTISEMENT” mark shall appear above the address panel of the brochure or pamphlet and on the inside of the brochure or pamphlet. Written communications solicited by clients or prospective clients, or written communications sent only to other lawyers need not contain the “ADVERTISEMENT” mark.

(C) Unsolicited written communications mailed to prospective clients shall not resemble a legal pleading, notice, contract or other legal document and shall not be sent by registered mail, certified mail or other forms of restricted delivery.

(D) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, any unsolicited written communication concerning a specific matter shall include a statement so advising the client.

(E) Any unsolicited written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member of that person shall disclose how the lawyer obtained the information prompting the communication.

(F) An unsolicited written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client’s legal problem.

37 La. Rule 7.6 states (emphasis supplied):


(a) Definition. For purposes of these Rules, “computer-accessed communications” are defined as information regarding a lawyer’s or law firm’s services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer’s or law firm’s services that appears on World Wide Web search engine screens and elsewhere.
Third, Arnie’s response to Concerned Homeowner may have triggered a conflict of interest. Without knowing exactly who the Concerned Homeowner is, who the lender is, or who else might have an interest in the property, Arnie cannot clear conflicts and thus may have violated Model Rules 1.7 and 1.9.

Fourth, Arnie’s quick response may constitute the unlawful practice of law in the state where the Concerned Homeowner resides, a state where Arnie is not licensed to practice. If Arnie quickly responds to Concerned Homeowner’s query without obtaining more information, how can Arnie know where Concerned Homeowner is domiciled or where the property is located?

Fifth, if Arnie is held to have created attorney-client relationship but has given bad advice, will he be covered by his malpractice insurance?

(b) Internet Presence. All World Wide Web sites and home pages accessed via the Internet that are controlled, sponsored, or authorized by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services:

1. shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;
2. shall disclose one or more bona fide office location(s) of the lawyer or law firm or, in the absence of a bona fide office, the city or town of the lawyer’s primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and
3. are considered to be information provided upon request and, therefore, are otherwise governed by the requirements of Rule 7.9.

(c) Electronic Mail Communications. A lawyer shall not send, or knowingly permit to be sent, on the lawyer’s behalf or on behalf of the lawyer’s firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:

1. the requirements of subdivisions (b)(1), (b)(2)(A), (b)(2)(B)(i), (b)(2)(C), (b)(2)(D), (b)(2)(E) and (b)(2)(F) of Rule 7.4 are met;
2. the communication discloses one or more bona fide office location(s) of the lawyer or lawyers who will actually perform the services advertised or, in the absence of a bona fide office, the city or town of the lawyer’s primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and
3. the subject line of the communication states “LEGAL ADVERTISEMENT”. This is not required for electronic mail communications sent only to other lawyers.

* * *


In New Jersey, this is illustrated by the controversy triggered in early 2007 by the Chubb Group of Insurance Companies, one of the largest carriers of lawyers’ professional liability insurance. Initially, upon learning of a law blog proposed by a New Jersey firm, Chubb declined to provide coverage, stating that “this is not a risk they are interested in undertaking.” Shortly thereafter, Chubb modified its position, stating that it would insure this new form of communication “within select parameters.”
5. WHEN DOES USE OF SOCIAL MEDIA CONSTITUTE ADVERTISING?

a. THE CASE OF THE CLEVER FIRM NAME

Billie “BullDog” Barrister maintains a website for his firm, Barrister, Barrister, and Solicitor. The URL for the website is “Bulldoglawyer.com” and on the front page of the website is this statement:

“You need a fighter on your side in the courtroom. Barrister, Barrister, and Solicitor are bulldog lawyers who’ll fight to protect your rights!”

There is no indication on Billie’s firm’s homepage of the states in which its lawyers are licensed to practice.

Every one of Billie’s Tweets and Facebook responses has this signature:

Billie “Bulldog” Lawyer, an expert litigator.

Does Billie’s signature line constitute improper advertising? Does the link to his website create any ethical problems? Is the URL itself a violation of any rule?

b. DISCUSSION ON THE CASE OF THE CLEVER FIRM NAME

While the ABA Rules of Professional Conduct permit internet advertising, the ABA Rules do not specifically address the form or contents of such advertising, other

Chubb distinguished between what it described as an “informational blog,” that presents information or provides a forum for the discussion of issues in a neutral way, and an “advisory blog,” by which a law firm offers advice, for example through a question and answer format, and often being interactive, potentially establishing attorney-client relationships that can lead to malpractice suits. Although Chubb stated that its underwriters would evaluate each submission on its own merits, Chubb suggested that it may not provide coverage on what it deemed to be an “advisory blog,” which, by its nature, increases the risk of a malpractice lawsuit against the firm.

Referencing the risks presented by advisory blogs, Chubb noted it is often difficult to perform conflict checks, and that comments/questions are posed by consumers in states where the attorney may not be licensed to practice. In contrast, Chubb noted that informational blogs, which it defined as a forum for discussion of issues in a neutral unbiased way, “pose a minimal level of risk from Chubb's underwriting perspective.”

40 See: Tom Mighell, “Avoiding A Grievance In 140 Characters Or Less: Ethical Issues In Social Media And Online Activities,” 52 The Advocate (Texas) 8 (2010).

41 ABA RPC Rule 7.2(a): “Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.”
than prohibiting false and deceptive advertising and prohibiting direct electronic communications with potential clients under limited circumstances.

A number of states have special rules on advertising that apply to the Internet. See, for example, Louisiana’s Rule 7.6, quoted at footnote 37, above. Nothing in the rule seems to exempt postings on Facebook or Linked-In, tweets on Twitter, or blogs.

Louisiana is only one example of a state which regulates advertising on websites. Numerous state bars and state courts also regulate this as well. In the words of a California Bar Formal Opinion: “There is no certain method or form of notice that provides assurance that an attorney’s Internet web site will not be found to be an advertisement, holding oneself out as available to practice law or the unauthorized practice of law in other jurisdictions. Each state’s rules are distinct, and many state bar associations have issued formal opinions on the use of the internet and advertising. See, for example, state bar advertising rules in Arizona, Virginia, and Florida. New

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42 ABA RPC 7.1: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

43 ABA RPC 7.3: Direct Contact With Prospective Clients (emphasis supplied)

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.

44 See: The State Bar of California Standing Committee on Professional Responsibility And Conduct Formal Opinion No. 2001-155, which includes this statement (emphasis supplied):

This leaves two options for California attorneys who maintain Internet web sites for their law practices. They can choose to use their web site to advertise in multiple jurisdictions. This is not necessarily inappropriate, but it requires that they assure themselves that they are complying with any applicable rules of the different jurisdictions involved, including rules governing the unauthorized practice of law (assuming that there is no inconsistency in the applicable rules that would make this impossible). Alternatively, they can take steps to make clear that they are not advertising in other jurisdictions.

There is no certain method or form of notice that provides assurance that an attorney’s Internet web site will not be found to be an advertisement, holding oneself out as available to practice law or the unauthorized practice of law in other jurisdictions. We make the following suggestions as examples of the kind of statements which, if accurate, might assist in avoiding regulation in other jurisdictions: 1) an explanation of where the attorney is licensed to practice law, 12 2) a description of where the attorney maintains law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney’s web site.


46 State Bar of Arizona Ethics Opinion 97-04: Computer Technology; Internet; Advertising and Solicitation; Confidentiality 04/1997.
Jersey has issued an ethics opinion that a lawyer who participates in a web service that directs potential clients to a local lawyer violates the state bar’s advertising prohibitions.\footnote{49} In addition, some states have indicated that a URL itself may constitute a violation of the advertising rules.\footnote{50}


\footnote{48} See Rules Regulating the Florida Bar, Rules 4-7.4 through 7.8: \url{http://www.floridabar.org/divexe/rrtb.nsf/WContents?OpenView&Start=1&Count=30&Expand=4.8#4.8} (last accessed 9/3/11).

\footnote{49} See: Opinion #43, New Jersey Committee on Advertising (June 2011), found at: \url{http://www.elawyeringredux.com/New%20Jersey%20Total%20Attorneys%20Decision.pdf} (last accessed 01/13/12)

The opinion stated:

The Internet company offers a group of websites concerning bankruptcy. The websites include general information about what debts may be discharged and the difference between a chapter 7 and chapter 13 bankruptcy, and offers to connect visitors to the website (“Users”) with a bankruptcy attorney. Respondents stated that the company takes actions to ensure that its websites have a high ranking on various Internet search engines (“search engine optimization”). The Committee focused on one specific website with which the New Jersey attorneys were participating. Attorneys who participate in this website pay for the exclusive rights to a geographical area, by zip code. When a User seeking an attorney provides his or her zip code and contact information, the website will identify the sole participating attorney for the pertinent geographical area. The website does not inform the User that the search for a bankruptcy attorney is completed the moment he or she inputs a zip code. Rather, the website home page invites the User to “get a free evaluation from a local bankruptcy attorney” by filling out a form. The website states that “step 1 of 5” for the free evaluation is to provide the User’s zip code and select a reason for considering bankruptcy. The website explains that the User must provide the zip code because “the law varies from state to state.”

\footnote{50} See: Georgetown University Law Center Continuing Legal Education, 16th Advanced Computer and Internet Law Institute 2003 Washington, DC March 6, 2003 “Ethics: Managing Today's New Internet Risks,” 2003 WL 2200274. This article states (footnotes omitted):

“The ethical rules governing a law firm's use of a domain name draw from the rules applicable to the use of “trade names.” Under Rule 7.5(a) a “trade name” used by a private law firm cannot imply a connection with a government agency or with a public or charitable legal services organization. Domain names may be regarded as “professional designations” subject to Rule 7.5 (a). Therefore, it would be improper for a private firm to use the primary domain of “.org” or “.gov.” Instead, a private law firm must use a URL with the “.com” designation. Virginia's Standing Committee on Lawyer Advertising and Solicitation (SCOLAS) has stated that it is misleading and deceptive for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign.

By using the domain name to identify the firm's website, the domain name is a form of public communication regarding the lawyers' services and therefore the domain name is subject to Rule 7.1’s prohibition against false, fraudulent, misleading or deceptive claims or statements. The Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline issued Ethics Opinion 99-4 (June 4, 1999) which specifically addresses domain names. The opinion states that it is not improper for an attorney to use a domain name different from the law firm's actual name, provided that the domain name is not a “false, fraudulent, misleading, deceptive, self-laudatory or unfair statement.” In addition, the domain name cannot “imply special competence or experience.”
The federal courts have gotten involved, and there are two decisions in the last two years from the U.S. Second and Fifth Circuits on what form of regulation of lawyer advertising is permissible.

In addition, there are even indications that a blog by a lawyer may be deemed advertising in some circumstances.

6. POSSIBLE “INAPPROPRIATE” OR EVEN SANCTIONABLE USAGE OF SOCIAL MEDIA IMPACTING LITIGATORS; FIRST AMENDMENT ISSUES VS. A LAWYER'S OBLIGATIONS AS AN OFFICER OF THE COURT

a. THE CASE OF THE DISGRUNTLED LITIGATOR

Billie “BullDog” Barrister is in the midst of a lengthy trial. Judge Aileen Tudor Sentor, at the close of the day’s hearing, issued a ruling that Bulldog is convinced is dead wrong and constitutes obvious reversible error.

Bulldog, on his way out of the courthouse, pauses on the courthouse steps to Tweet (which is linked to his Facebook page):

“Judge Sentor today demonstrated what everyone knows; her rulings will always be overturned on appeal.”

That evening, in his office, Bulldog angrily posts the following statement on his Facebook page:

Judge Sentor issues rulings that are either the result of her ignorance of the law or her incompetence.

Has Bulldog done anything for which he can be sanctioned by the Court? Has he done anything that violates the Rules of Professional Conduct? Are his statements protected by the First Amendment?

Thus, for example, a domain names such as “divorcesquickandcheap.com” or “personalinjury-specialists.com” would violate the cited rules.


52 Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd., 632 F.3d 212 (5th Cir. 1/31/11).


Would the answer to this be any different if Bulldog had put on his Facebook page:

There is a judge in this state who issues rulings that always demonstrate her ignorance of the law or her incompetence. Email me if you want more information.

b. DISCUSSION OF THE CASE OF THE DISGRUNTLED LITIGATOR

Courts clearly have the inherent powers to punish lawyers for behavior that does not violate state or federal statutes or court rules. Courts have sanctioned and disbarred lawyers for improperly accusing a judge of incompetence and bias.

There is always a tension between the “robust debate” that the First Amendment allows and improper criticism of the court by an officer of the court. Lawyers, however, have a duty under RPC 8.2 not to make false or reckless statements about a judge, and courts have tended to enforce Rule 8.2 sanctions even when the lawyer has

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55 See: In re Evans, 801 F.2d 703 (4th Cir.1986), where a lawyer was disbarred for criticizing a judge without investigating the basis of the charge. Evans stated that the “failure to investigate, coupled with his unrelenting reassertion of the charges ... convincingly demonstrates his lack of integrity and fitness to practice law.” Evans also stated: (emphasis supplied):

A court has the inherent authority to disbar or suspend lawyers from practice. In re Snyder, 472 U.S. 634, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985). This authority is derived from the lawyer's role as an officer of the court. Id. Moreover, as an appellate court, we owe substantial deference to the district court in such matters:

On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. Ex parte Burr, 22 U.S. (9 Wheat.) 529, 529-30, 6 L.Ed. 152 (1824). See also, In re: G.L.S., 745 F.2d 856 (4th Cir.1984). In this case, we can only conclude that the district court's disbarment of Evans, based on his violation of the rules of professional conduct, is amply supported by the record and did not exceed the limits of the court's discretion.

Evans' letter, accusing Magistrate Smalkin of incompetence and/or religious and racial bias, was unquestionably undignified, discourteous, and degrading. Moreover, it was written while the Brown case was on appeal to this Court and was thus properly viewed by the district court as an attempt to prejudice the administration of justice in the course of the litigation.

56 See, for example, the statement in Fieger v. Thomas, 872 F.Supp. 377, 385 (E.D. Mich. 1994), quoting with approval from another opinion:

It is a rare and unfortunate day when the judges of this district must sanction an attorney for conduct involving criticism of the bench. Robust debate regarding judicial performance is essential to a vital judiciary. If an attorney, after reasonable inquiry, has comments about a judicial officer's fitness for service, he or she may and should express them publicly. Conversely, baseless factual allegations contribute nothing to judicial accountability and undermine public trust in the courts.

57 ABA RPC 8.2(a):
claimed that his or her activities or words were protected by the First Amendment. 58 Other courts also have found that, as an officer of the court, an attorney’s First Amendment rights may be more limited than the public’s, 59 and the U.S. Supreme Court has cautioned lawyers who have argued that their First Amendment rights may not be circumscribed by their status as attorneys. 60

For example, lawyers have been sanctioned for language used in their court filings, including unfounded allegations of ex parte contacts, 61 for statements accusing courts of ignoring the law to achieve a result, 62 for statements in a letter that a judge is

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

58 See, e.g., Board of Professional Responsibility, Wyoming State Bar v. Davidson, 205 P.3d 1008 (Wyo., 2009); and Notopoulos v. Statewide Grievance Committee, 277 Conn. 218, 890 A.2d 509 (Conn., 2006).

59 See, e.g. In re Pyle, 283 Kan. 807, 821, 156 P.3d 1231 (Kan. 2007):

In re Johnson, 240 Kan. 334, 729 P.2d 1175 (1986), was a contested case in which this court found that Johnson should be disciplined for false, unsupported criticisms and misleading statements about his opponent in a county attorney election campaign. In its discussion of the First Amendment and lawyer speech, this court said:

“A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publicly. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.” Johnson, 240 Kan. at 336, 729 P.2d 1175.

Our Johnson case also stands for the proposition that a lawyer cannot insulate himself or herself from discipline by characterizing questionable statements as opinions.


The Supreme Court has said that “[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.... Even outside the courtroom, a majority of the Court in two separate opinions in the case of In re Sawyer, [360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959),] observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.” Gentile v. State Bar of Nev., 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The Court went on to say that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of” other kinds of speech protected by the First Amendment.

61 See, e.g., Board of Professional Responsibility, Wyoming State Bar v. Davidson, 205 P.3d 1008, 2009 WY 48 (Wyo. 4/7/09, where a lawyer was sanctioned for, among other things, putting the following language into a court filing:

“How can an attorney have gotten a trial date from a judge who was not assigned to the case? That could only be done by having engaged in improper ex parte communications with the court. * * * It is obvious enough that Respondent filed his reassignment motion to achieve a procedural and tactical advantage. Yet no one notified the Petitioner of opposing counsel's communications with [the] Judges . . . at the time those communications occurred much less took any action to determine whether Petitioner would stipulate to the reassignment of the case or to the trial date. * * * It has been rumored that if one is affiliated with [opposing counsel's law firm], favoritism may be accorded her by [the] or those in his office. Because opposing counsel is with the law firm [ ], Petitioner believes that favoritism was at play here.”

62 See: In re Wilkins, 777 N.E.2d 714, 715-716 (Ind. 10/29/02), where an appellate lawyer stated in a brief (and received a sanction, which was reduced on rehearing, 782 N.E.2d 985 (Ind.2003)):
“an embarrassment to this community,” and for internet postings containing unfounded accusations against a judge.

7. “OWNERSHIP” OF SOCIAL MEDIA INFORMATION WHEN A LAWYER LEAVES A FIRM.

a. THE CASE OF THE FIRM-HOPPING LAWYER

Jenn Exer is a hotshot young attorney who has been an outstanding associate. In her first three years of practice she reworked the firm’s blog and made hundreds of postings to it. Some of the postings she wrote were unattributed while others carried her byline. In addition, the firm has a Facebook page and Jenn worked with the firm’s marketing staff on it.

Jenn has now been recruited by and moved to a huge, multi-state firm. She wants to “take” all her blog postings with her and put them on her new firm’s website. She says, “After all, the ones with my byline are mine, right?”

What do you advise Jenn? What would you advise her former law firm?

Would it matter if the firm had a policy that everything a lawyer did in the legal arena while an employee was for the firm? Would it matter if, while she was an associate at the firm, Jenn also maintained her own, private blog where she put additional “legal” postings?

b. DISCUSSION OF THE CASE OF THE FIRM-HOPPING LAWYER

Some have asserted the ownership “of a material in a blog should be assessed no differently from ownership of any other works of authorship.” Thus, many authors on the subject look to general copyright law.

Therefore questions that arise include:

The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.

Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

63 Notopulos v. Statewide Grievance Committee, 277 Conn 218, 890 A.2d 509 (Conn.,2006).
• Did the firm have a rule on access to and use of the blog and its Facebook page?
• What were the expectations of the authors of each posting?
• How can a “poster” to a blog or firm internet site protect his or her interest in what is posted?
• What are the reasonable expectations of the firm and what are the contractual or other obligations it imposes on its employees?

8. CONCLUSION

Lawyers who are not using social media are being left behind as more and more people employ it as their primary means of obtaining information and interacting with others. Lawyers who use social media, however, need to be cautious so that they are not ensnared by the thicket of ethical rules and professionalism concerns that might apply.