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The Social Media Thicket for Mississippi Lawyers: Surviving and Thriving in an Ethical Tangled Web

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THE SOCIAL MEDIA THICKET FOR MISSISSIPPI LAWYERS: SURVIVING AND THRIVING IN AN ETHICAL TANGLED WEB*

*Michael H. Rubin**

I. 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 are those over fifty, 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.

Lawyers and law firms are increasingly using social media today to build their reputations, to inform their current clients, and to reach potential new clients.

Can the use of social media create ethical problems for attorneys? Can lawyers inadvertently back themselves into ethical corners? This Paper considers several examples, all of which are based on or stem from real events. 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 these rules may have been adopted, adapted, and interpreted in Mississippi as well as other states.

Use of social media by lawyers triggers a number of potential ethical 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?

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* A portion of this Paper consists of extracts from the author's prior publications, including: *The Social Media Thicket: Surviving and Thriving in the Tangled, Thorny Issues*, 26 Prob. & Prop. J. 62 (2012); 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.

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?

II. 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. Mississippi defines the practice of law as "any person holding himself out as a practicing attorney or occupying any position in which he may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law."[1]

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.

1. MISS. CODE ANN. § 73-3-120 (2012).

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.[2]

Massachusetts has held that certain matters involving real estate closing and transactional work constitute the practice of law.[3] This rule is broadly accepted in other states. See, for example, opinions in Arkansas,[4] Ohio,[5] Delaware,[6] and South Carolina.[7]

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2. *See In re* Low Cost Paralegal Servs., 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 unauthorized practice of law in Rhode Island in violation of G.L. 1956 § 11–27–12 by falsely holding itself/herself out to Rhode Islanders, through internet advertising targeting Rhode Island, as competent and qualified to prepare legal documents for uncontested divorce and to assist with a child support problem, which conduct constitutes "the practice of law" as defined in § 11–27–2(4). *Id.* at 1230.

3. *See* Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs., 946 N.E.2d 665, 671 (Mass. 2011):

> Nevertheless, we conclude that the closing or settlement of the types of real estate transactions described in the record require not only the presence but the substantive participation of an attorney on behalf of the mortgage lender, and that certain services connected with real property conveyances constitute the practice of law in Massachusetts.

4. *See, e.g.*, Creekmore v. Izard, 367 S.W.2d 419, 423–24 (Ark. 1963) (preparation of deeds, mortgages, and bills of sale constitutes the practice of law); *see also* Pope Cnty. Bar Ass'n v. Suggs, 624 S.W.2d 828, 830–31 (Ark. 1981).

5. *See* Disciplinary Counsel v. Foreclosure Alternatives, Inc., 940 N.E.2d 971, 976 (Ohio 2010):

> Based upon the facts in this case, we have no difficulty concluding that FAI, Alexakis, and Lance Trester engaged in the unauthorized practice of law. The general business plan adopted by FAI as well as the specific handling of the Chandler matter and the foreclosure against the second homeowner demonstrate that FAI, Alexakis, and Lance Trester (1) gave advice to homeowners in the context of pending or threatened foreclosure proceedings, in particular, advice concerning whether to continue making mortgage payments and the wisdom of legal alternatives such as bankruptcy, (2) made representations to creditors on behalf of homeowners facing foreclosure, and (3) evaluated for and with homeowners the terms and conditions of settlement in the foreclosure proceedings.

6. See, e.g., Nieves v. All Star Title, Inc., 2010 WL 4227057, at *1 (Del. Super. Ct. Oct. 22, 2010), *aff'd*, 21 A.3d 597 (Del. 2011), discussing the decision in *In re* Mid-Atlantic Settlement Servs., Inc., 755 A.2d 389, 389 (Del. 2000):

> . . .which adopted the conclusions of the Board on the Unauthorized Practice of Law that real estate settlements constitute the practice of law, and that the closing of a loan secured by Delaware real estate generally must be conducted by a Delaware attorney. All Star moved to dismiss Nieves' Complaint for failure to state a claim upon which relief could be granted. Specifically, All Star denied that Nieves' Complaint established that it had breached any legally-recognized duty or caused him cognizable damages. All Star also adopted the position that Nieves' suit constituted an attempt to secure private enforcement of this state's rules against the unauthorized practice of law.

7. *See* Wachovia Bank, N.A. v. Coffey, 698 S.E.2d 244, 247–48 (S.C. Ct. App. 2010):

> As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney. *See* State v. Buyers Serv. Co., 357 S.E.2d 15, 18–19 (S.C. 1987) (holding that a commercial title company's employment of attorneys to review mortgage loan closing documents did not save the company's preparation of those documents from constituting the unauthorized practice of law and that the closings should be conducted only under an attorney's supervision), *modified*, 585 S.E.2d 773 (S.C. 2003); *see also* Doe Law Firm v. Richardson, 636 S.E.2d 866, 868 (S.C. 2006) (citing *Buyers* and *McMaster*) (clarifying that a lender may prepare legal documents for use in financing or refinancing a real property loan as long as an independent attorney reviews them and makes any corrections necessary to ensure their compliance with the law and reaffirming that mortgage loan closings should be conducted only under an attorney's supervision).

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 "ghostwrite" pleadings for a potential pro se litigant?

Some courts have looked askance at this, indicating that "ghostwriting" pleadings may be sanctionable.[8] 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 filling out forms, which is

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However, in Countrywide Home Loans, Inc. v. Ky. Bar Ass'n, 113 S.W.3d 105, 121 (Ky. 2003), the Kentucky Supreme Court declared:

> We are asked today to decide an issue of first impression in this state. It is an issue of much less breadth than the evidence adduced by the parties would suggest: Is conducting a 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.

8. *See* Couch v. Jabe, No. 7:09-cv-00434, 2010 WL 1416730, at *1 n.1 (W.D. Va. Apr. 8, 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 counsels' 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 Duran v. Carris*, 238 F.3d 1268, 1272–73 (10th Cir. 2001); *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971); *Johnson v. Bd. of Cnty. Comm'rs*, 868 F. Supp. 1226, 1230–32 (D. Co. Nov. 17, 1994); *Klein v. H.N. Whitney. Goadby & Co.*, 341 F. Supp. 699, 702–03 (S.D.N.Y. Nov. 22, 1971); *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.

Author's note: The *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* Johnson v. Bd. of Cnty. Comm'rs, Cnty. of Fremont, 85 F.3d 489, 494 (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, Fed. 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 Fed. 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.

Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231–32 (D. Co. 1994) (quoting Ellis v. Maine, 448 F.2d 1325, 1328 (1st. Cir. 1971)).

deemed appropriate under certain circumstances.[9] 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.[10] It has been reported that the online supplier of legal forms, LegalZoom, has entered into a settlement of a case in Missouri, where LegalZoom was accused of engaging in the unlawful practice of law.[11] On the other hand, the ABA has issued an ethics opinion indicating that ghostwriting is perfectly acceptable and does not violate the RPC.[12]

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9. See W. Va. Legal Ethics Op. 2010-01, *Ghostwriting or Undisclosed Representation: What is Permissible and What is Not Permissible*, at 4 (2010), 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 added). *Available at* www.wvodc.org/pdf/lei/ghostwriting.pdf.

10. *See* Peter Geraghty, *Ghostwriting*, YOUR ABA (March 2011), http://www.americanbar.org/publications/youraba/201103article11.html (last visited Apr. 13, 2012):

> There have been a number of state bar ethics opinions that pre-date the ABA Formal Opinion. As discussed and cited in N.J. Advisory Committee on Prof'l Ethics Op. 713 (2008), some of these opinions do not require disclosure. *See* L.A. Cnty. Bar Ass'n Prof'l Responsibility and Ethics Comm. Op. 502 (1999); L.A. Cnty. Bar Ass'n Prof'l Responsibility and Ethics Comm. Op. 483 (1995) and State Bar of Ariz. Comm. on the Rules of Prof'l Conduct Op. 05-06 (2005).
>
> Other opinions have found that ghostwriting is unethical per se. *See* Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct Op. 94–35 (1995); Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct Op. 96–31 (1997); Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics Op. 1987–2 (1987); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 613 (1990).
>
> Still other opinions find that there is a duty to disclose when the lawyer's assistance is extensive, substantial or significant. *See* Alaska Bar Ass'n Ethics Comm. Op. 93–1 (1993); Conn. Bar Ass'n Comm. on Prof'l Ethics Op. 98–5 (1998); Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 1994–2 (1994); Fla. State Bar Ass'n Comm. on Prof'l Ethics Op. 79–7 (2000); Mass. Bar Ass'n Comm. on Prof'l Ethics Op. 98–1 (1998); N.H. Bar Ass'n Ethics Comm., *Unbundled Services — Assisting the Pro se Litigant* (1999); Ky. Bar Ass'n Op. E–343 (1991); Utah State Bar Ethics Comm. Op. 74 (1981).

11. *Agreement Reached in Mo. Suit Against LegalZoom*, SOUTHEAST MISSOURIAN (Aug. 23, 2011), http://www.semissourian.com/story/1755328.html?response=no:

> A proposed settlement has been reached in a federal class-action lawsuit against LegalZoom Inc., the online vendor of legal forms and documents. The lawsuit had been scheduled go to trial Monday in U.S. District Court in Jefferson City. But California-based LegalZoom has announced an agreement in principle to settle the lawsuit that claimed the company wasn't licensed to provide legal services in Missouri. LegalZoom says it contains no admission of wrongdoing and lets the company continue offering services to Missouri residents with certain changes.

12. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07–446 (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.

III. 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 Part II 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.[13]

For example, at least one Florida court has held that selling legal forms is acceptable and does not constitute the unlawful practice of law.[14] 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.[15]

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13. *See, e.g.*, Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 Hofstra L. Rev. 811, 812 (2002).

14. *See, e.g.*, Fla. 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.

15. *See, e.g.*, Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1062–63 (W.D. Mo. 2011):

> 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 concedes 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 uncontroverted 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 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*.

IV. INADVERTENT ATTORNEY-CLIENT RELATIONSHIPS

A. *The Case of the Too-Fast-to-Respond Lawyer*

Arnie Attorney is a prolific user of Facebook, LinkedIn, Twitter, PartnerUp,[16] Ryze,[17] Networking for Professionals,[18] Jase,[19] and Ziggs.[20]

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 do not comply with the rules.[21] Has Arnie formed an attorney-client relationship with Concerned Homeowner?

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.[22]

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.]

16. http://www.partnerup.com/.

17. http://www.ryze.com/.

18. http://networkingforprofessionals.com/.

19. http://www.jasezone.com/.

20. http://www.ziggs.com/.

21. *See* Mortgage Assistance Relief Services, 16 C.F.R. § 322 (2010); *see also FTC Issues Final Rule to Protect Struggling Homeowners from Mortgage Relief Scams*, FTC (Nov. 19, 2010), http://www.ftc.gov/opa/2010/11/mars.shtm.

22. Cydney Tune & Marley Degner, *Blogging and Social Networking: Current Legal Issues, in* INFORMATION TECHNOLOGY LAW INSTITUTE 2009: WEB 2.0 AND THE FUTURE OF MOBILE COMPUTING: PRIVACY, BLOGS, DATA BREACHES, ADVERTISING, AND PORTABLE INFORMATION SYSTEMS 113(2009):

> 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.

Articles have cautioned about how the Internet can lead to inadvertent attorney-client relationships.[23]

Can Arnie prevent an inadvertent attorney-client relationship if he puts a disclaimer in every posting?[24] RPC 1.2 states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent";[25] "informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."[26] 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.[27] ABA Model Rule 1.6 and Mississippi Rule 1.6 are essentially the same. Once an attorney-client relationship has been formed, the duty of confidentiality attaches. The comment to Mississippi Rule 1.6 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."[28]

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

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23. *See, e.g.*, Carrie Pixler & Lori A. Higuera, *Social Media: Ethical Challenges Create Need for Law Firm Policies*, 47 ARIZ. ATTORNEY 34, 35 (2011); Abigail S. Crouse & Michael C. Flom, *Social Media for Lawyers*, 67 BENCH AND B. OF MINN. 16, 17 (2010); Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 168 (1999); Ann Massie Nelson, *Internet Communication Raises Questions about Attorney-Client Relationship: Is a Visitor to Your Firm's Homepage Your Client? Possibly*, 69 WIS. LAW 25, 25 (1996).

24. *See supra* note 22 and accompanying text.

25. MODEL RULES OF PROF'L CONDUCT R.1.2(c) (2011).

26. *Id.* R. 1.0(e)

27. For more on this, see Andrea Utecht & Abraham C. Reich, 2 SUCCESSFUL PARTNERING BETWEEN INSIDE & OUTSIDE COUNSEL, § 31:20 n.10 (2011):

> *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 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 L.A. County Bar Ass'n Prof'l Responsibility and Ethics Comm. Op. No. 514 (2005).

28. MISS. RULES OF PROF'L CONDUCT R. 1.6 cmt. (2011).

lawyer does not previously have a "close personal or prior professional relationship."[29] Also, see the comments elsewhere in this Paper about the Mississippi advertising rules.

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. Note, however, that the Mississippi versions of Rule 1.7 and 1.9 differ substantially from the ABA Model Rules.

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?[30]

V. 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!

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29. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2011).

30. *See* Christine D. Petruzzell, *Don't Go Blindly Into That Law Blog*, 250 N.J. LAW. 80, 82 (2008):

> 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."
>
> 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."

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.
> www.bulldoglawyer.com.

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 Model Rules of Professional Conduct permit Internet advertising,[31] the ABA Rules do not specifically address the form or contents of such advertising, other than prohibiting false and deceptive advertising[32] and prohibiting direct electronic communications with potential clients under limited circumstances.[33]

The Mississippi Supreme Court has noted the tension between allowing lawyers to advertise while prohibiting unlawful solicitation of clients[34]

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31. MODEL RULES OF PROF'L CONDUCT R. 7.2(a) (2011): "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."

32. *Id.* R. 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."

33. *Id.* R. 7.3(a)–(b) (emphasis added):

> (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.

34. *Mississippi Bar v. Turnage*, 919 So. 2d 36, 40–41 (Miss. 2005):

> This Court has previously stated that "[s]olicitation has never been recognized as beneficial to the profession or to the client. It has the potential for creating litigation, creating fraudulent claims, and turning our profession from one of service to one of profit. Solicitation can result in a diminished status for the lawyer and be harmful to the profession's reputation." *Emil v. Miss. Bar*, 690 So. 2d 301, 327 (Miss. 1997). Notwithstanding this clear statement of potential harm, this Court found that Emil's multiple acts of solicitation, without more, would warrant only a public reprimand. FN8. These concerns should apply equally to prohibit paying others to locate prospective clients, recommend a lawyer's services, and obtain those prospective clients' signatures on professional service agreements.
>
> . . . .
>
> FN8. Writing for the majority in Emil, Presiding Justice Sullivan wisely noted the dilemma caused by case law allowing lawyers to advertise for clients while at the same time continuing to hold that solicitation is a violation of the Rules of Professional Conduct, stating that "[t]he Bar's official position on solicitation is difficult in light of the Bar's position on advertising." 690 So. 2d at 327.

and has revoked the pro hac status of an out-of-state lawyer who had advertised on Mississippi television for clients.[35]

Mississippi's version of Rule 7.2 differs substantially from the ABA Model Rule. It begins by defining advertising as "an active quest for clients involving a public or non-public communication," which includes "computer-accessed communications."[36] The comments to Mississippi Rule 7.2 indicate that the advertising restrictions apply to a lawyer's presence on the web.[37] If a lawyer's web posting (be it a Facebook posting, a tweet, or a blog) is held to be an advertisement, then Mississippi Rule 7.2 not only regulates the permissible communications that may be made, but it also requires that the law firm submit copies to the Office General Counsel of the Mississippi Bar Association for prior evaluation under the provisions of Mississippi Rule 7.5.[38] While "static" or "passive" Internet web pages appear to be exempt from the prior submission rule,[39] nothing in the rule seems to exempt postings on Facebook or LinkedIn, tweets on Twitter, or blogs.

Mississippi is not the only state to regulate advertising on websites. Numerous state bars and state courts also regulate advertising and firm websites. 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

35. *See In re* Williamson, 838 So. 2d 226, 229 (Miss. 2002).

36. MISS. RULES OF PROF'L CONDUCT R. 7.2 (2011).

37. The comment to Rule 7.2 provides, in part:

> One developing area of communications to which the rules relating to communications about lawyers' services are intended to apply is computer-accessed communications. For purposes of this rule, "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.

38. MISS. RULES OF PROF'L CONDUCT R. 7.2(h).

39. *See id.* R. 7.5(b)(8); *see also* Miss. Bar Ethics Op. No. 252 (April 22, 2005). For a discussion of what constitutes a "passive" website for jurisdictional purposes, see *Eldred v. Fleming*, 56 So. 3d 432 (La. Ct. App. 2011).

jurisdictions."[40] Each state's rules are distinct,[41] 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,[42] Louisiana,[43] Virginia,[44] and Florida.[45] New 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.[46] In addition, some states have indicated that a URL itself may constitute a violation of the advertising rules.[47]

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40. See Cal. Bar Standing Comm. on Prof'l Responsibility & Conduct Formal Op. No. 2001–155, which includes this statement:

> 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, 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.

41. *See, e.g.*, Adam R. Bialek, Paris A. Gunther & Scott M. Smedresman, *Attorney Web Sites: Ethical Issues Are Only the Beginning*, 81 N.Y. ST. B.J. 10 (2009).

42. State Bar of Ariz. Ethics Op. 97–04 (1997).

43. LA. RULES OF PROF'L CONDUCT R. 7.6 (2011).

44. VA. RULES OF PROF'L CONDUCT R. 7.2 (2011).

45. FLA. BAR R. 4–7.4 to 7.8 (2012).

46. *See* N.J. Comm. on Attorney Adver. Op. 43, 1–2 (June 2011), *available at* http://www.elawyeringredux.com/New%20Jersey%20Total%20Attorneys%20Decision.pdf. 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."

47. *See* James M. McCauley, *Ethics: Managing Today's New Internet Risks*, 2003 WL 23924287, at *1–2 (March 6, 2003) (footnotes omitted). This article states:

> 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.

The federal courts have gotten involved, and there are two decisions in the last eighteen months from the Second[48] and Fifth Circuits[49] 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.[50]

VI. 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.

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." Thus, for example, a domain names such as "divorcesquickandcheap.com" or "personalinjuryspecialists.com" would violate the cited rules.

48. Alexander v. Cahill, 598 F.3d 79, 92–95 (2d Cir. 2010).

49. Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212 (5th Cir. 2011).

50. *See* Leigh Jones, *Will Law Firm Blogs Be Regulated as Advertising?*, NAT'L L.J. (October 11, 2006), http://www.law.com/jsp/article.jsp?id=1160471119300. Also see Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 LOY. U. CHI. L.J. 221 (2009), which cites, among other sources, Sarah Hale, *Lawyers at the Keyboard: Is Blogging Advertising and If So, How Should It Be Regulated?*, 20 GEO. J. LEGAL ETHICS 669 (2007); Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835 (2007); Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 RICH. J.L. & TECH. 5 (2007); and Justin Krypel, *A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs*, 14 MICH. TELECOMM. & TECH. L. REV. 457 (2008).

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?

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.[51] Courts have sanctioned and disbarred lawyers for improperly accusing a judge of incompetence and bias.[52]

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.[53] Lawyers, however, have a duty under RPC 8.2 not to make false

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51. Chambers v. Nasco, Inc., 501 U.S. 32, 33 (1991).

52. See *In re Evans*, 801 F.2d 703, 706 (4th Cir. 1986), where a lawyer was disbarred for criticizing a judge without investigating the basis of the charge, stating 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:

> 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.

Id.

53. *See, e.g.*, Fieger v. Thomas, 872 F. Supp. 377, 385 (E.D. Mich. 1994) (quoting Standing Comm. on Discipline v. Yagman, 856 F. Supp. 1384, 1395 (C.D. Cal. 1994)) (emphasis in original):

> 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.

or reckless statements about a judge,[54] and courts have tended to enforce Rule 8.2 sanctions even when the lawyer has claimed that his or her activities or words were protected by the First Amendment.[55] 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,[56] 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.[57]

For example, lawyers have been sanctioned for language used in their court filings, including unfounded allegations of ex parte contacts,[58] for statements accusing courts of ignoring the law to achieve a result,[59] for

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54. MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (2011):

> 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.

55. *See, e.g.*, Bd. of Prof'l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1013–16 (Wyo. 2009); Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 512–15 (Conn. 2006).

56. *See, e.g.*, *In re* Pyle, 156 P.3d 1231, 1242 (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.

57. *See In re* Cobb, 838 N.E.2d 1197, 1210–11 (Mass. 2005):

> The Supreme Court has said that it 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*, observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. 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. *Id.* at 1074, 111 S.Ct. 2720.

58. See, e.g., *Davidson*, 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 judge] or those in his office. Because opposing counsel is with the law firm [ ], Petitioner believes that favoritism was at play here.

205 P.3d at 1012–13 (emphasis removed).

59. See *In re Wilkins*, 777 N.E.2d 714, 715–716 (Ind. 2002), *modified*, 782 N.E.2d 985 (Ind. 2003), where an appellate lawyer stated in a brief:

statements in a letter that a judge is "an embarrassment to this community,"[60] and for Internet postings containing unfounded accusations against a judge.[61]

VII. "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."[62] Thus, many authors on the subject look to general copyright law.[63]

Therefore, questions that arise include:

- 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?

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).

60. *Notopoulos*, 890 A.2d at 512 n.4.

61. *See* Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281, 1289–90 (Pa. 2006).

62. Lisa M. Brownlee, ASSETS & FINANCE: AUDITS AND VALUATION OF INTELLECTUAL PROPERTY § 5:85 (2011).

63. *See* Jon M. Garon, *Wiki Authorship, Social Media and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95 (2010).

- 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?

VIII. CONCLUSION

Lawyers who are not using social media are being left behind as more and more people employ this media 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 that might apply.