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Ethical Pitfalls in Social Networking
Seminar Materials

Our activities in Social Networking all have ethical repercussions. The Rules of Professional Conduct are implicated in a host of ways when we engage in Blogging, Tweeting, Facebooking and participating in LinkedIn. The truth is, Social Media/Social Networking is turning the ethics world on its head. There are a host of new problems that attorneys must be concerned with. This text addresses those activities, the Rules that are in play and provides some advice for keeping on the right side of the ethical divide.

Given the fast paced nature of technology itself, there's no way we could possibly resolve all of the pitfalls you'll face, but we can at least alert you to the issues.

1. Competence, Rule 1.1

I realize that it may sound like a completely off the wall statement, but I think there's a realistic argument that social networking can make you a *better* lawyer. That discussion would have to start with a look at Rule 1.1, Competence. It reads,

RULE 1.1 COMPETENCE[1]

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

1 One note about the Rules: As I'm sure you're aware, the overwhelming majority of states in our country have adopted the ABA Model Rules of Professional Responsibility, so I'd like to refer to those Rules throughout this paper. Copyright restriction, however, prohibit me from doing so. As a result, all references in this paper to the "Rules" are actually references to the Delaware Rules of Professional Conduct, which are virtually identical to the ABA Model Rules (at least the as far as the parts that I'm quoting are concerned), but are not subject to the same copyright restrictions. There may be some minor differences in the text, but any difference does not impact the concepts discussed herein.

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Obtaining the requisite "knowledge and skill" through our interaction in social media

Anyone who's spent even a few minutes on line can tell that a tremendous number of lawyers who are active in social networking are simply out there for self promotion-- to "build their brand." In order to make themselves appear credible, these attorneys behave as self-anointed experts in their given legal field. Don't get me wrong, many of our colleagues are genuinely trying to advance the public's knowledge of the law or providing helpful information to other members of the bar, but the "brand builders" among us could be somewhat irritating. However, those lawyers may actually be providing you with a nice benefit.

Consider that one way these brand builders get themselves noticed is by being the first to mention a hot new case. As soon as an interesting holding comes out, this part of the blogosphere jumps all over it because they want to get noticed—they tweet a link to the case, or a link to a news article talking about the case, or a link to their blog where they analyzed the case. You wonder if some of these bloggers are hiding under the robes of the judges- that's how fast they get to things. Like I said, the first person to get the link out there and is known as the person who cracked the story and their message is re-tweeted into cyber-history (which incidentally lasts for about 12 seconds!). The silver lining? Essentially, these attorneys are a research resource for the rest of us.

Use the self-serving nature of those on twitter and other social networking sites to your advantage – identify those people who practice in your area of the law and are proficient bloggers/tweeters and follow them. Let them do the research for you. If they have a blog, subscribe to the RSS feed so you get the information as they post it. Provided that the information is accurate, it's like having a subscription to a new law-notification service—for free!

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That's the rub, though, isn't it? We need to be concerned about the accuracy of the information we're provided. At the very least, however, we receive timely notification that some development in the law has occurred-- then it's our job to research those developments in a thorough manner.

When seen in that light, isn't it true that social networking platforms allow us to maintain a higher level of legal knowledge? In fact, Comment [6] to Rule 1.1 sets forth the mandate that **"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."** We've just seen that social networking can help attorneys keep abreast of changes in the law and practice, thus enhancing their competence. Plus, we're not limited to a passive role. An attorney who is seeking information about any legal development can simply post a question on LinkedIn or a similar platform and they'll soon receive a flurry of answers. Social networking platforms are the latest tools that attorneys can use help to fulfill the mandate set forth in Rule 1.1.

Twitter and blogs may redefine what's expected of us.

Of course there's a negative side. Take, for example, the requirement that we stay abreast of changes in the law as set forth in Comment 6 to Rule 1.1. For years, that's meant reading the case reports in our local bar association newspaper or going to some CLE courses to stay on top of things. However, these days, information about new cases is disseminated by way of social networking. As we discussed above, people in cyberspace actually race to be the first to blog or tweet about the latest hot topic and court holdings. These days you don't have to wait for the snail mail to send your copy of the

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law journal to hear about the latest landmark holding. You can get it through the social networking world. And therein lies the danger.

The more social media becomes part of the rubric of our daily practice, the greater the likelihood that it will turn from something that attorneys want to do, to something that we must do. I can envision a disciplinary hearing or an argument in a legal malpractice case where the plaintiff is trying to establish whether a lawyer "should have known" about a new development in the law and they bring out evidence from the social networking world. "Hey," the savvy lawyer will argue, "if all of these people on Twitter were talking about this development for 6 months, you should have known about it."

Thus, the increased availability of information may be an interesting, useful tool today, but the more prevalent it becomes, the greater the likelihood it will transform into an expectation. Will social networking become considered part of the bare minimum investigation that a "competent" attorney performs. Could it lead the establishment of a "duty to tweet?" Will the commentary to the ethics rules in the future include a recommendation that attorneys "check the chatter" as a prerequisite to being properly thorough? It may seem far fetched, but it's not so crazy. It's happening in other areas of business—today it's common practice for an employer to Google you or check out a prospective employee's Facebook pages as part of the interview process. That didn't exist a few short years ago.

<u>Can we help another lawyer in an emergency situation via social networks?</u>

Rule 1.1, Comment [3] states, **In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or**

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consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

I can envision situations where lawyers in emergency situations run to Twitter or to LinkedIn to obtain desperately needed information from colleagues who might be more knowledgeable than them. The emergent nature can be fulfilled in this medium, given the real-time nature of the Internet and the vast number of experts who may be logged on at a given time.

The question, however, is whether you want to be responsible for advising that attorney without having the opportunity to provide adequate supervision or follow up. Think about it-- in the person-to-person world, you'd give advice to a colleague and you could follow up with that person to see how things work out. However, once you give advice to a person in cyberspace, you may never see or hear from them again...until there's a problem! And I think we can all agree that if that attorney's head is on the ethical chopping block, he's going to do anything he can to get out of trouble, including throwing you under the cyber-bus.

This is a great illustration of the problem lawyers have with “buffers” in the virtual world. For some reason, there's a buffer that exists between us and the people with whom we're interacting in social networking. Maybe it's because we don't see them in front of us, or whatever, but something about the medium causes us to let our guard down and take certain risks that we wouldn't necessarily take otherwise. Which leads me to a discussion of confidentiality...

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2. Confidentiality, Rules 1.6 and 1.9

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosures is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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I haven't seen many grievances alleging a breach of confidentiality during my time on the ethics committee. I think that it's going to change, however, given the prevalence of social networking.

Social networking is quickly becoming the primary mode of conversation for our clients. Chances are that our clients will be trying to use that medium to communicate with you as well. The problem, of course, is that posting information on a social networking site-- even on a client's Facebook "Wall" for example, is still out there all for the world to see. Remember that the lawyer's duty to retain confidential information about a client is not altered just because we are dealing with a new medium.

I realize that it seems almost ridiculous to mention the idea that lawyers should not use social media as a means of communication with our clients, but I promise you that it's not. Remember, social media causes us to let our guard down-- being reminded of these pitfalls is, therefore, essential.

Also, it's very tempting to tell "war stories" in any context, but social networking seems to make them even more attractive. Be mindful, however, of the restriction in Rule 1.9, our "Duties to Former Clients."

3. Unauthorized Practice of Law, Rule 5.5

Pertinent Rules:

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW
(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

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

The actions we take in social networking situations sometimes rise to the level of practicing law. For instance, we could be answering a question on Facebook and, in doing so, inadvertently provide advice to a potential client. In addition, there are some some hidden dangers associated with the unauthorized practice of law that lurk beneath the surface. Here are some issues about which to be aware.

It's so easy to unwittingly establish a lawyer-client relationship in the social networking world that it's scary. Just think about the basic, law school textbook definition of how that relationship is established: If someone seeks advice and you give advice in circumstances where it's reasonable for a person to rely on that advice, an attorney-client relationship has been created. Each one of us is only a

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few postings, e-mails or chat sessions away from getting into trouble.

If the mere existence of that problem wasn't enough, consider the idea that the conversation you may be having with the person on the other end of the modem may not be from your jurisdiction! Not only could you have a new client (and not realize it), but you also could be practicing law in a jurisdiction where you're not licensed. I'd say that qualifies as a "pitfall."

Something to think about: this idea of being able to "transport knowledge across state lines," as I like to put it, may give some ammunition to the proponents of liberalizing the rules regarding multi-jurisdictional practice. It also lends credibility to the argument that we need some sort of federally mandated ethics code that can govern cyberspace, like the FCC in the case of radio and TV.

Some other concerns in this area: As I mentioned above, it's common for attorneys to seek information in specialized areas of knowledge via LinkedIn "Answers" and other similar services. Be careful, however, when you're doling out such information. It's not difficult to foresee a situation where one unwittingly assists a lay person in the unauthorized practice of law, or an attorney who's licensed in another jurisdiction from practicing law in violation of Rule 5.5(b).

Finally, this pitfall may be a bit of a stretch, but it should be mentioned nonetheless. Could you have a problem if you focus your networking in one particular region where you're not licensed? What if you engage in persistent social networking that's directed to a particular area by consistently addressing legal issues that are germane to a particular geographical location where you're not licensed? Say, for example, if you have a New York based health care practice, but you continually comment on issues related to the Massachusetts system. Could you end up establishing a "systematic and continuous presence" in that jurisdiction for the practice of law, in violation of 5.5(b)(1)? I

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understand that the rule talks about having an "office" in the jurisdiction and probably contemplated a physical presence, but this could be a genuine concern given the way information is passed around in the social networking world.

4. *Marketing and Solicitation, Rule 7*

Pertinent Rules:

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES
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.

RULE 7.2 ADVERTISING
(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.
(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not- for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and
(3) pay for a law practice in accordance with Rule 1.17.
(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS
(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, or 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

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(2) the solicitation involves coercion, duress or harassment.
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION
(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
(2) the name of the certifying organization is clearly identified in the communication.

The 7 Not-So-Deadly Sins of Rule 7: Here are some concerns, many of which don't have clear answers...

1. Does anyone really know when we're "advertising" anymore? Rule 7.2, and the Ethics 2000 amendment.

The manner in which attorneys are permitted to advertise is set forth pretty clearly in the rules. The old Rule 7.2, before the revisions in 2002, referred to, "public media, such as a telephone directory, legal directory,newspaper or other periodical, outdoor advertising, radio or television...communication." Today, as you can see from the rule quoted above, advertising includes,

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"recorded or electronic communication, including public media," Rule 7.2(a).

Query: Is a blog advertising? Seems like a gray area. Most of them are certainly self-serving--you may intend to disseminate useful information, but very often they're designed to attract attention to your practice. Are these blog postings, "electronic communications" per the rule? You don't actively send a blog posting to someone else, but you do make it available in cyberspace. Maybe it's more analogous to a billboard ad and, therefore, considered, "public media?"

If blogging is considered a form of advertising, then everything we write in our legal blogs may be governed by the requirements of Rule 7.1. We must make sure that we don't make any false or misleading statements about ourselves or our practice. Who ever thought that our blogs would be subject to the ethics rules?

I'm quite concerned that every self serving posting on the Internet can arguably fall into the definition of advertising. If that were the case, then just about everything we say on LinkedIn, for example, would be in play. After all, the whole purpose of the site is to promote your business.

2. If we know we're advertising, how do we comply? Rule 7.2(c)

Rule 7.2(c) requires that the advertising communication includes your address and the name of an attorney in your office. Consider this: If every posting you place on the Internet can be considered a communication covered by 7.2(a), then you need to include the identifying information mandated by 7.2(c) on every electronic comment/posting you make. Also, what about Google Ads or ads you place on Facebook? None of those ads have the requisite identifying information. Is it enough that the viewer can follow a link back to a page where this information is listed?

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3. Is exchanging testimonials giving "value" in exchange for a recommendation in violation of Rule 7.2(b)?

An interesting part of the LinkedIn service is the ability to give "recommendations" to colleagues. There probably isn't any ethical issue if the recommendation is unsolicited, but what about those situations where they are solicited? It's common for a person to offer to recommend a colleague, in exchange for a reciprocal recommendation. In that case, you'd have to believe that there's some value to the recommendation-- if not, why would it be offered or sought? And if there is some value, then it may run afoul of Rule 7.2(b) which prohibits a lawyer from giving anything of value to a person for recommending his services.

Another way recommendations like that can be dangerous is where the recommendation you are given is not accurate. If the "recommender" posts a false or misleading statements about you or your services in their testimonial and you permit it to be displayed on your profile, you could be violating Rule 7.1.

4. Fuzziness regarding the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client. Rule 7.3(a)

Social Networking blurs the definition of when "contact" with another person constitutes the "solicitation" of a prospective client. Like everything in the wonderful world of attorney ethics, each case is highly fact dependent. So what about the fact that you might initiate a conversation with a layperson in a chat room, or via the chat function on Facebook about an issue in your area of expertise-- is that a prohibited solicitation? What if, for example, you posted a comment directly on

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someone else's Facebook wall telling them that you represent them in an appeal of their property taxes? Is that the type of solicitation the rule envisioned?

The First Amendment is always at issue when you talk about restrictions on attorney advertising, but it seems to be making a resurgence with the increased use of social networking. For example, if you practice health care law and you're commenting on the Obama plan, is that solicitation or political speech?

5. A wolf in sheep's clothing: Is your "profile" on LinkedIn really a "website" in disguise? (And therefore subject to Rule 7)

It really can't be argued (and it's already well established) that a website is advertising, so I'm not going to get into that issue at all. I will however, mention a related matter that's not nearly as settled. What about your "profile" on social networking sites such as LinkedIn? People post their name, address area of practice, roster of notable clients, and more. In reality, it's the functional equivalent of a mini-website. If that's the case, then the contents thereof would be subject to all of the rules on attorney advertising.

The same may be said for blogs. Are they really just places for you to post interesting articles, like a newsletter? Heck, if they are, they're advertising. But even so, sometimes a blog isn't just a blog, eh Dr. Freud? As blogs get more sophisticated and include more information, it may be considered a website and a website is advertising.

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6. When touting your achievements can get you in trouble.

Rule 7.1, Comment [3] was a new addition to the Rules in 2002. It doesn't deal with social media in particular, but it's worth reviewing in the context of blogs and testimonials. The comment states, "An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."

What if someone you represented makes an improper comparison of your services that violates the spirit of this rule/comment? Clearly, if you don't say it and you don't know about it, you're in the clear. But what if you happen to see it? What if it's made in the context of a LinkedIn answer that you see, or posted as a comment on your client's Facebook wall that you happen to notice? Are you required to request that the comment be taken down? Does your knowledge of it's existence give you some ownership of it or at least confer some duty on you to make a request that it be removed? I could envision a situation where an attorney runs into a problem if they allow statements made by another to remain posted in cyberspace when the attorney knows that the statements would've been a violation of the rules had they been posted by that attorney.

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7. Being careful about claims of specialization (not just by you- how about those who "recommend" you on LinkedIn?) Rule 7.4

Closely related to the previous issue are claims of specialization. We can all envision a satisfied client shouting your praises for all the world to hear. Well, maybe some of us can expect that more than others, but that's not the point right now. The point is, that social networking changes the situation.

Someone might tell a friend at a cocktail party that you specialize in real estate law and that wouldn't be a problem. After all, it may be a claim of specialization that's prohibited by the rules, but you're not saying it, so you're in the clear. However, take a situation like we discussed above, where the statement is posted on your site, your blog or another website that you frequent. If you see it and knowingly allow the claim of specialization to be perpetuated, you could be running afoul of Rule 7.4.

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