THE LEGAL ETHICS OF SOCIAL MEDIA

PRESENTATION TO THE
GEORGE MASON AMERICAN INN OF COURT

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1. AN INTRODUCTION TO SOCIAL MEDIA

1.1 Blogging

A blog is a Web site where an author publishes articles that are catalogued in chronological order. There are legal blogs on every conceivable subject, from admiralty to zoning. Lawyers have flocked to blogs in huge numbers as a cost-effective way to demonstrate expertise in their practice areas and build an online reputation. About 45% of the 200 largest law firms in the United States are blogging, up 43% from a year ago, and several of these law firms publish multiple blogs relating to their various practice areas. The number of blogs published by lawyers in firms of all sizes is beyond count.

The growing popularity of lawyers blogging as a business development practice is due to three things: first, it's free, so the return on investment for any business developed is gigantic; second, most lawyers are strong writers who are passionate about their practice areas, so publishing a blog often comes naturally; and third, blogging can be fun—a combination that is hard to beat.

► ***Some Blogs To Check Out from the 2009 ABA Journal Blawg 100***

http://Abovethelaw.com
The Wall Street Journal's Law Blog: http://blogs.wsj.com/law/
American Lawyer's AmLaw Daily: http://amlawdaily.typepad.com/amlawdaily/
http://Legalblogwatch.typepad.com/
http://Lawshucks.com: Life in and after BigLaw
National Review Online's Bench Memos: www.nationalreview.com/bench-memos
Law & Disorder, covering the evolving arena of Internet law:
http://arstechnica.com/tech-policy

1.2 LinkedIn

LinkedIn, a professional networking Web site, is like a Web-based Rolodex, only far more powerful. Users create profiles, which contain job descriptions, contact information, or even references from clients or colleagues. They then exchange these profiles with the other members of their professional network ("linking in" to one another) so that when each user logs into the site, she can see the profile of everyone in her network. Setting up a profile and using LinkedIn is free and easy, so lawyers have been joining in droves.

In April 2008, there were 118,000 lawyers using LinkedIn; two months later there were 216,000. The growth curve is incredibly steep and shows no sign of slowing down. In September 2010, the site will see an estimated 50 million unique visitors.

1.3 Facebook

Begun in February 2004 as a website for Harvard students to connect with one another, Facebook has become the proverbial 900-pound gorilla of social networking. With well over 500 million users and climbing fast (particularly among people in their 30s and 40s), Facebook is the primary interface for internet users to connect and interact with the people, businesses, causes, nonprofit organizations, and other entities they care most about. Facebook allows the creation of

individual user accounts, fan pages and group pages, all connected through networks of "friends."

Law firms (and forward-thinking bar associations) have begun to curate presences on Facebook as another avenue for employees, clients, and other interested parties to connect and keep up with what's going on. Creating a Facebook presence is free and requires little technological know-how to build a professional-looking fan page or group. But, even with (constantly changing) privacy settings, lawyers should be cautious when using such sites in a personal capacity or as a marketing or professional platform.

2. ETHICAL CONCERNS SURROUNDING SOCIAL MEDIA

2.1 Overview

Regardless of your practice area, online connections are fraught with the same ethical pitfalls as in-person interaction with potential clients and others. With the volume of communication made possible by social networking sites, these ethical risks are only magnified:

- Commenting on pending trials or revealing specific case results without a disclaimer.
- Recklessly criticizing judges or other attorneys, or giving that impression.
- Revealing privileged or confidential information.
- Exposing the law firm to claims of defamation or harassment.
- Sending messages that appear to be legal advice, which can create unintended attorney-client relationships.
- Violating ethics rules against solicitation of legal work.
- Practicing law in a jurisdiction where you are not licensed.
- Receiving messages that contain malware or illegal materials.

2.2 Commenting on Pending Trials

On August 11, 2010, a suburban Detroit juror, Hadley Jons, wrote on Facebook that the defendant in her resisting arrest trial was guilty. The only problem was that the trial wasn't over; in fact, the defense hadn't even presented its case. Nonetheless, Jons, 20, announced that it was "gonna be fun to tell the defendant they're guilty."

The post was discovered by defense lawyer Saleema Sheikh's son while checking jurors' names on the Internet. Jons was removed from the jury and charged with contempt. What's more, Sheikh was asking for jail time, "nothing major, a few hours or overnight," she said. "This is the jury system. People need to know how important it is."

Instead, Macomb County Circuit Judge Diane Druzinski gave the juror a new writing assignment: a five-page essay on the Constitutional right to a fair trial under the Sixth Amendment, plus a $250 fine for violating her oath.

Rule 3.6 Trial Publicity

(a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.
(b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.

In Detroit, it was a lawyer who discovered a juror's online comments about a pending criminal trial. The opposite is equally alarming: an attorney simply cannot discuss an ongoing matter when jurors can so easily discover and be influenced by such comments. A March, 2009 New York Times article title by John Schwartz says it all: "As Jurors Turn to the Web, Mistrials are Popping Up."

Rule 3.6 specifically prohibits statements "disseminated by means of public communication that…will have a substantial likelihood of interfering with the fairness of the trial by a jury." Blogs posts, tweets, and Facebook status updates are just such means of public communication. Lawyers and jurors alike have become increasingly savvy Internet users: there is not doubt that if a lawyer posts it, the jury will find it.

► *When the judge is checking up on you…*

Susan Criss, a Galveston County, Texas trial court judge who spoke about social networking mishaps at the American Bar Association's annual conference last year, uses social networking to connect with voters…and to keep tabs on the attorneys who appear before her.

Last year, after a prosecutor was granted a weeklong continuance to attend a funeral, Judge Criss checked the lawyer's Facebook page. Criss found pictures of the lawyer drinking and partying throughout the week. When the prosecutor returned, Judge Criss called her on this behavior. Not surprisingly, a second request—this time for a month's continuance—was denied. For her part, the prosecutor saw fit to "defriend" the judge.

More recently, Criss said, another prosecutor posted crime scene photos on her Facebook page, along with commentary from law enforcement about the crime. Again, Criss was baffled. "Y'all are not thinking one bit about the fact that when you're asked to provide discovery to the other side in litigation…this is going to count," she said.

> Criss reported to the ABA: "I see a lot of venting about judges. I see a lot of personal information being posted, like, 'Let's go get drunk tonight' or 'Let's go meet at the bar.'…You see these things and say, 'What are you thinking?'" The upside, she says, is that "I'm starting to see a lot more lawyers using common sense…They're reading about people getting caught, and they're seeing the consequences."

Keep in mind, too, that with judges, lawyers, and jurors all using the same social networking forums, the risk of *ex parte* communications, intentional or otherwise, becomes especially acute. Casual or not, *ex parte* communications about a pending case may well violate ethics rules.

RULE 3.5 Impartiality And Decorum Of The Tribunal

(a) A lawyer shall not:
(1) before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law;
(2) after discharge of the jury from further consideration of a case:
(i) ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service;
(ii) communicate with a member of that jury if the communication is prohibited by law or court order; or
(iii) communicate with a member of that jury if the juror has made known to the lawyer a desire not to communicate; or
(3) conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.
(b) All restrictions imposed by paragraph (a) upon a lawyer also apply to communications with or investigations of members of the immediate family or household of a juror or a member of a venire.
…
(e) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending…

2.3 Pretexting

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law

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Before beginning a jury trial, many attorneys are turning to social networking sites as an invaluable research tool into the suitability of citizens on the jury list. Judges are increasingly checking probationer's web pages for evidence of drug and alcohol violations. But, diligent research becomes an ethical violation when this passive collection of available information leads to more active online investigations. A defense attorney or investigator, for example, cannot "friend" a prosecution witnesses in an attempt to glean impeachment evidence.

Virginia Rule 8.4(c) prohibits the "dishonesty, fraud, deceit or misrepresentation" required to pretextually "friend" someone online only to garner information useful to a client or harmful to the opposition. And, under Rule 8.4(a) a lawyer cannot use another person to circumvent the Rules, so paralegals and investigators must also be careful how much they dig online.

► With "friends" like these. . . .

Last year, the Philadelphia Bar Association's ethics committee declared unethical a lawyer's plan to collect information about an adverse litigation witness by hiring an investigator to gain access to the witness's personal online social networking profiles (Philadelphia Bar Ass'n Professional Guidance Comm., Op. 2009-02, March 2009).

Employing a third party to befriend an adversarial witness through an online social network in order to obtain access to the witness's personal pages clearly constitutes unethical deception, the committee said, because the plan involves concealing "the highly material fact" that any information collected from those pages would later be used to impeach the witness. The committee concluded that the proposed course of conduct would violate Pennsylvania Rules of Professional Conduct 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 4.1(a) (knowingly making false statements of material fact to third person) and 8.4(a) (violating Rules through acts of another). And, the attorney was held accountable for the investigator's conduct under Rule 5.3(c)(1), which makes lawyers responsible for behavior the lawyer "orders" or "ratifies."

Furthermore, when communicating with any person online, whether under a friendly pretext or after appropriate disclosures, attorneys should also bear in mind the dictates of Rules 4.2 and 4.3 for dealing with those represented by counsel or with unrepresented persons.

2.4 Criticism of Judges

Rule 8.2 Judicial Officials

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 or other judicial officer.

Social networking online is designed to provide instant gratification in a casual, conversational setting: you can find an old friend with a three-second search, pour through less-than-flattering photos of a classmate's weekend escapades, or vent your feelings in writing for all to read. Regardless, a lawyer's online exploits are still subject to professional ethics Rules.

Comment 1 to Rule 1.6 explains that reckless criticism of judges and courts "can unfairly undermine public confidence in the administration of justice." In fact, the preamble to the Virginia Rules of Professional Conduct begins by describing lawyers as "public citizen[s] having special responsibility for the quality of justice." Nowhere is a lawyer more visible than he is online. Unethical comments posted on social networking sites will reach more people than any other medium, and stand to do the most damage to public confidence in the judicial system. Comments that go too far could even open up lawyers and their firms to defamation claims.

► *What about the First Amendment?!*

Famed attorney Geoffrey N. Fieger was disciplined for violating Michigan ethics Rules requiring lawyers to conduct themselves with courtesy and civility. During 1999 broadcasts of a radio show Fieger labeled several state appellate judges "jackasses" for overturning a $15 million malpractice verdict, and compared them to Nazis. He also said the judges deserved to be anally violated and invited them to "kiss my ass."

The Attorney Grievance Commission said Fieger's rant violated several Michigan Rules of Professional Conduct, including Rule 3.5(c), which prohibits undignified or discourteous conduct toward a tribunal, and Rule 6.5(a), which requires attorneys to treat all persons involved in the legal process with courtesy and respect. Fieger did not to contest findings that his remarks violated the Rules, and agreed to a public reprimand, with the condition that he could appeal the applicability and constitutionality of the Rules.

Splitting 4-3, the Michigan Supreme Court upheld the sanction, ruling that Fieger's tirade was so immoderate that it brought disrepute on the legal system and was not protected by the First Amendment. See *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 22 Law. Man. Prof. Conduct 387 (Mich. 2006).

► ***Florida attorney Sean Conway*** was disciplined for similar remarks when he blogged about a judge being "an evil, unfair witch." The Florida Supreme Court rejected Conway's argument that his comments were protected by the First Amendment and upheld the disciplinary action. *Fla. Bar v. Conway*, 996 So. 2d 213 (Fla. 2008).

Of course, being overly friendly with a judge is also problematic. Under Rule 8.4(d), it is professional misconduct for a lawyer to "state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." Can you be "friends" with a judge, magistrate, or legislator without giving clients or opponents the wrong impression?

2.5 Confidentiality

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Lawyers must make sure that online postings do not compromise confidentiality without client consent, and non-lawyer staff should be reminded that this duty of confidentiality extends to them as well. Hypothetical or anonymous postings will not necessarily shield an attorney from discipline. And where the lawyer does have permission to comment on a client matter, posting is still prohibited if not in the client's best interest.

Under the Virginia Rules, even the fact that you represent a particular client may be a confidentiality breach under Rule 1.6 if disclosure would embarrass the client or if the client does not want this fact disclosed. In order to advertise or disclose that you represent a particular client, you must be sure to have the client's consent or reasonably believe that disclosure is "impliedly authorized in order to carry out the representation." A lawyer's advertising or marketing campaign does not give the lawyer implied authority to disclose whom he or she represents.

► ***Illinois Public Defender Kristine A. Peshek*** was disciplined by the bar—and lost her job of 19 years—for revealing client confidences related to pending matters on her blog, "The Bardd Before the Bar – Irreverant Adventures in Life, Law, and Indigent Defense" from 2007-2008:

#127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

"Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

2.6 Unintended Relationships

Despite the informal nature of most online social networking, lawyers must consider whether informational advice on a blog or website creates the impression of giving legal advice that will be relied upon by a visitor to the site. Another important consideration is the universal reach of online postings. Your website is not only visited by people in your home jurisdiction, so giving friendly online advice to potential clients in states where you are not licensed can easily amount to the unauthorized practice of law under Rule 5.5.

A simple question to ask yourself is whether the online resource you've created does anything that would create client expectations. But, clear disclaimers can be helpful in resolving this potential problem.

More tricky than creating unintended client relationships is stumbling into confidentiality and conflict issues. Virginia State Bar LEO 1842 explains that communications with web site users are governed by the same Rules as any other communication with potential clients. The opinion discusses a typical hypothetical: A law firm's "passive website" lists contact information for each of the firms attorneys, and one of the firm's domestic attorneys receives and reads an unsolicited email from a woman describing the demise of her marriage including her affair with another man. When the attorney realizes she already represents the husband in this matter, what can the attorney do with the information she has learned from this email? Does she owe any duty to keep the wife's secret?

The Committee concluded that the attorney owes no duty to the wife, since her detailed email was unsolicited and because the wife used "mere contact information provided by the law firm

on its website," which does not create a "reasonable expectation that the information contained in the email will be kept confidential."

Key to this analysis is (1) whether the firm's website "creates a reasonable belief that the law firm is specifically inviting or soliciting the communication of confidential information" and (2) "whether it is reasonable for the person providing the information to expect that it will be maintained as confidential."

The Opinion's next hypothetical firm runs afoul of this test by including a form on it's website that specifically asks potential clients to share the details of their claims in exchange for an evaluation of the case. When a firm receives information via these communications, even where the firm declines to represent the potential client, Rule 1.6 imposes a duty of confidentiality with respect to any information gleaned from the form.

Just as with a live interview of a prospective client, a lawyer has a duty to protect the confidences of prospective clients who submit information via the firm's website. What's more, Rule 1.7(a)(2) imposes a material limitation conflict on the lawyer, who will not be able to represent any adverse parties due to the duty of confidentiality owed to the potential client who contacted him online.

The Committee's simple solution? A "click-through" disclaimer that requires website visitors to agree to disclaimer terms before being allowed to submit any information through an online form. A lawyer should clearly inform online visitors that no attorney-client relationship will result from this communication and that the lawyer cannot guarantee that information shared via the website will be kept confidential.

2.7 Violations of Advertising Rules

Rule 7.1 Communications Concerning A Lawyer's Services
Rule 7.2 Advertising
Rule 7.3 Direct Contact With Prospective Clients
And Recommendation Of Professional Employment
Rule 7.4 Communication Of Fields Of Practice And Certification
Rule 7.5 Firm Names And Letterheads

2.7.1 Advertising Generally

Advertising rules can be tricky, regardless of the medium, so lawyers should review Virginia Rules 7.1 and 7.2 to make sure all statements or claims they make, be it on a website or incorporated into a blog post, Twitter or Facebook message, or LinkedIn page, are in compliance with advertising rules. Also, consider Virginia LEO 1750 Advertising, Compendium Opinion. Internet media used to promote legal services often contain celebrity endorsements, client testimonials, specific case results, specialization claims or comparative statements, all subject to the Rules.

Rule 7.2 gives comprehensive guidelines for advertising materials produced in any format. The Rule specifically includes references to "electronic communications," "electronic media advertisement," and "e-mail communication." An e-mail sent "to promote employment for a fee," for example, must include the identification "ADVERTISING MATERIAL," as would any letter. And e-mails must give recipients instructions on how to opt-out of future advertising.

Importantly, under Rule 7.2(e) all advertising "shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content." This is not a problem when designing a firm website or blog page, but may severely limit a lawyer's ability to use applications like Twitter, which only supports short, casual messages of up to 140 characters.

► Don't mess with my "tweets". . . .

A second federal lawsuit challenging the constitutionality of Louisiana's new lawyer advertising Rules was filed November 24, 2008, by an attorney who claims that the mandatory Rules will stifle evolving forms of lawyer speech on the Internet (*Wolfe v. Louisiana Attorney Disciplinary Bd.*, E.D. La., No. 08-4994, filed November 24, 2008).

The suit claims that the Louisiana Rules will unfairly restrict lawyers' modern modes of communication such as blog posts and online discourse, and it charges that the Rules will make it difficult or impossible for law firms to place small Internet text ads with Google and other Internet services. The challenged provisions should be struck down as contrary to the First Amendment and the Due Process Clause of the Fourteenth Amendment, the complaint contends. For example, the bar's requirement that an ad identify the name and address of the lawyer responsible for its content would unduly burden on a "tweet" or message via Twitter because of its 140-character limitation. Wolfe noted that text ads provide only a small space for the advertiser to deliver its message—sometimes no more than 30 or 60 characters. If an attorney is required to provide a name and address, this would virtually eliminate the attorney's ability to say anything else in the ad, he said.

2.7.2 Endorsements

In many jurisdictions, rules similar to Virginia's Rules 7.1 and 7.2 regulate endorsements or testimonials about the lawyer's services. LinkedIn allows users to request and give "recommendations"–short laudatory statements about another user or his work that can then be posted on that user's page in the form of a referral. But these comments may be considered "endorsements" subject to Rules 7.1 and 7.2.

A client or colleague who gushes, "He's the best to be found in Arlington!" has in fact posted "false or misleading information" as defined by Rule 7.1(a)(1), and he may inadvertently "create an unjustified expectation about results the lawyer can achieve," prohibited by Rule 7.1(a)(4). A glowing post, such as "I've never seen her lose a case!" may in fact advertise "specific or

cumulative case results, without a disclaimer," discussed in Rule 7.2(a)(3). It's important to remember that whether or not such content is created by the lawyer, it is his or her responsibility to monitor and edit online posts to prevent ethical violations.

► ***South Carolina Ethics Advisory Opinion 09-10 discusses just this.*** *See* http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=678.

According to the opinion, if a lawyer participates in a site that lists information about the lawyer, like AVVO, the lawyer must ensure that all comments from all sources, including prior comments and, by implication anonymous posts, fully comply with the state's rules. If the lawyer cannot keep up with every individual post, he or she must discontinue participation in the site directory.

2.7.3 Direct Solicitation

Virginia's Rule 7.3 regulates direct communication with prospective clients and states "[i]n person communication means face-to-face communication and telephonic communication." Thus, invitations from a lawyer to a prospective client into the lawyer's LinkedIn or Facebook page do not specifically fall within the Rule. However, lawyer solicitation rules vary from state to state, so those licensed in other jurisdictions should review the ethics rules of that particular state to determine whether these forms of communication are subject to regulation.

2.7.4 Referral Services

Ethics rules prevent Virginia lawyers from participating in a lead-sharing organization that bases membership on a commitment to provide referrals—online or otherwise. (Virginia State Bar Standing Comm. on Legal Ethics, Op. 1846, February 2, 2009). Lawyers are forbidden by Rule 7.3(d) and Rule 7.2(c) to give anything of value to a person or organization for recommending them. Participation in such an organization not only involves de facto payment for referrals but also creates potential conflicts of interests and threatens a lawyer's professional independence, the committee found. In fact, ethics panels in at least seven other jurisdictions have reached the same conclusions.

2.7.5 Specialization

Virginia Rule 7.4 allows lawyers to hold themselves out as specialists or experts in a certain field of law, but only if the claim is factually substantiated. Rule 7.4(d) warns against advertising oneself as a *certified* specialist, though, unless the communication includes a required disclaimer: Virginia does not have procedures for approving or certifying specializations. In the casual world of social networking the simple statement, "Sure, I can help you with that. I'm certified in XYZ claims" will run afoul of the Rules, whereas "I've worked in the XYZ field for 25 years—that's all I do," isn't problematic.

2.7.6 Letterhead in the Internet Age

Virginia Rules 7.4 and 7.5 focus on professional notices, letterheads, offices, and signs, but they should also be considered applicable to any Internet communication that includes the firm name, lists its members or states areas of "expertise." Websites need to be carefully scrutinized for compliance with these Rules, the same as printed brochures, letterhead, and business cards. Where a firm employs attorneys who are licensed in multiple jurisdictions, for example, both the firm's letterhead and its website must clearly state the limitations on each lawyer's authority to practice.

2.8 Ethical Breaches by Judges

With the heightened authority of a judgeship comes heightened responsibility, inside and outside the courtroom. And it goes without saying that with the heightened visibility of an online profile comes the heightened risk of ethical breaches. Clearly wary of this, less than 9% of un-elected judges use Facebook, according to a survey conducted by the Conference of Court Public Information Officers.

Ex parte communication is the easiest ethical pitfall for judges and lawyers who are friends outside the courtroom, Virginia prohibits such communications under Rule 3.5(e) and the Canons of Judicial Conduct.

At least one jurisdiction, Florida, considers it judicial misconduct to become online "friends" with lawyers who might appear in a judge's courtroom. The state is particularly concerned that such a public connection might create the impression that these lawyer friends are in a special position to influence the judge. *See* Fla.JEAC Op. 2009-20.

> ► ***Nevada Substitute Judge Jonathan MacArthur***, like most MySpace users, listed his personal interests on his user page. These included "Breaking my foot off in a prosecutor's a##" and "Improving my ability to break my foot off in a prosecutor's a##." Correction: that's *Former* Substitute Judge Jonathan MacArthur.
>
> Last year, a North Carolina judge was reprimanded for "friending" a lawyer involved in a pending suit before the judge. More problematic, though, were Facebooks posts the judge wrote about the litigation, and accessing the website of the opposing party. *See In the Matter of B. Carlton Terry, Jr.*, North Carolina Judicial Stds, Comm'n, No. 08-234 (April 1, 2009).

3. Conclusion

It's easy to forget that *the Rules still apply* online. Facebook, LinkedIn, Twitter, and the like are designed for ease of use, but the seemingly informal relationships that develop through these media can and do lead to very real ethical issues. *Use common sense* with online networking, just as you would do with any friendly conversation in the halls of the courthouse.

❖

Questions? Call the Virginia State Bar's Ethics Hotline at 804-775-0564.

You will receive prompt, confidential advice about whether a particular contemplated action complies with the ethics Rules. Although the hotline experiences a high volume of calls, staff attorneys will return your call on the same day, usually within the hour after you leave a message.

Appendix: **Social Media Hypotheticals**

1. After logging on to your Facebook account, you notice that the opposing party in one of your pending civil cases has posted some blogs about the case. You know that this person is represented by counsel, but note that some of these postings appear to solicit responses from you. You think that since this person is soliciting your comments, you should engage in further discussions with this person on Facebook. If you feel that you may not, why? Hasn't this person waived the attorney-client relation by initiating this discussion with you? If you still have some discomfort about corresponding with this person, why not have an investigator correspond with them?

   References: Rules of Professional Conduct, Rule 4.2, Comment 3; Rule 8.4(a)

2. You represent the defendant in a high-visibility narcotics trafficking case. You have discussed the case with your client who plans to plead not guilty while you advance several defenses. Your client, however, had a substantial quantity of narcotics seized from his office, and this information is readily available to any member of the public through examination of the arrest warrants and other public records at the court. Discussion of this issue has been rampant on Twitter and Facebook since the arrest. You want to respond to the various blogs by discussing the arrest and seizure of the narcotics. Your client has not specifically told you to keep this information confidential, although it may be embarrassing to him. Since the public is discussing it on various social networks with impunity, and the information is readily available to the public, why can't you discuss on the web pages? What if the prosecution comments on the arrest, seizure, and the weight of the evidence against your client?

   References: Rule 1.6(a)

3. You regularly communicate with persons unknown to you on social networks. One shares her plans to seek a divorce, provides some details, and you respond with some off-the-cuff general advice. Has this person become your client? Can you represent this person's aggrieved spouse if they want to hire you to defend against the divorce?

   References: Rule 1.6(a), Rule 1.7(a)(2), Legal Ethics Opinions 1842 and 629, prospective Rule 1.18 (pending before the Supreme Court of Virginia)

4. You have built up quite a career in the field of criminal law, having served ten years as an Assistant United States Attorney and just as many years defending cases for private clients willing to pay you top dollar for your services. You have tried more that 300 jury trials and thousands of other criminal cases. You limit your practice to criminal law, and tout yourself as a "criminal specialist" on your LinkedIn page. May you do this? Why?

   References: Rule 7.4

5. Can you publish the results of your most high-profile case victories on your LinkedIn site? What if you are a civil practitioner and post your largest verdicts on your LinkedIn page?

   References: Rule 7.2(a)(3)

6. You are a public prosecutor who wants to post general information about the merits of a pending jury trial on LinkedIn and Facebook. May you do this? What if the case is merely a misdemeanor pending in the general district court, although well-known to the public?

   References: Rule 3.6(a), Rule 3.8(e)