ETHICAL PROBLEMS IN USING SOCIAL MEDIA

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Speaker, South Texas College of Law, Annual Family Law Conference 2008 – *Appealing Your Family Law Case*
Speaker/Author, The University of Texas School of Law: Effective Family Law Practice, The Definitive Short Course on Parent-Child Relationships 2007, *The World of Court Appointees: Amicus Attorneys, Attorney Ad Litems, Guardian Ad Litems and Social Studies*
Speaker/Author, Advanced Family Law Practice for Paralegals: Handling Financial Issues at a Higher Level 2007 – *Effective Presentation of Financial Matters – Financial Information Statements, Inventory & Appraisements, and Proposed Property Divisions*
Speaker/Author, Advanced Family Law Course 2006 – *Who Represents the Child? Not Me, I am the Amicus Attorney!*
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Speaker/Author, Houston Bar Association, Second Annual Family Law Institute, 1999 - *The Family Lawyer's Top Ten Ethical Issues*
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ETHICAL PROBLEMS IN USING SOCIAL MEDIA

I. INTRODUCTION

The use of advanced technology has transformed the practice of law, with social media revolutionizing the way clients and lawyers communicate. Because of these advances, lawyers need to be aware of the dangers that can arise, which will only become more complex as technology evolves. In addition to the risk of giving legal advice without adequate information or inadvertently establishing inappropriate attorney-client relationships on social websites, there are other ethical implications in online communications that attorneys should consider, particularly regarding attorney advertising and solicitation of clients. Another key area that has become more complicated with the proliferation of social media is the protection of attorney-client privilege.

Until recently, there were relatively few cases addressing social media. Guidance can now be found with more frequency in case law as these issues are being tested in court. This article will discuss social media issues that courts have addressed as well as review ethics opinions from bar associations across the country. Based on these rulings, the paper will offer some tips to help avoid the pitfalls that can arise.

The article is also intended to remind us all to practice professionalism when using social media. Professionalism should guide how we conduct ourselves in our emails, texts, tweets, posts, and other online interactions with opposing counsel, the court, and our clients. In Texas, the Disciplinary Rules of Professional Conduct govern the conduct of lawyers, and the paper will review the disciplinary rules that impact online communications.

Finally, the paper provides a serious reminder that in addition to ethical violations, misuse of social media can sometimes result in civil and criminal penalties. Major state and federal statutes imposing such penalties are highlighted.

As usual, many thanks are extended to those authors of previous papers related to this topic, including Kristal Thomson, Kenneth Raggio, John G. Browning, and Judge Emily Miskel. The assistance provided by these authors' excellent work is greatly appreciated.

II. SOCIAL MEDIA AND ATTORNEY ADVERTISING, MARKETING, AND SOLICITATION

Instead of traditional networking for client development, lawyers now are venturing into social media to expand the scope of their audience. Thousands of legal professionals use social media sites like LinkedIn, Facebook, Twitter, Instagram and more to extend their contacts. These sites can be like a free business brochure to publish work experience, education, specialties or interests. The ability to participate in specialized groups, such as "divorce lawyers," on these sites is another marketing tool. Users can post questions to the group, make announcements about their practice, and share information with the group. Therefore, social media profiles and posts can constitute legal advertisements.

Most states, including Texas, have special requirements for lawyer advertising and strictly limit solicitation. Novel issues arising from the use of online marketing must be considered.

A. Texas Rules Governing Solicitation and Advertising

In Texas, Part VII of the Texas Disciplinary Rules of Professional Conduct governs how lawyers may provide information about their services. An advertisement or solicitation remains subject to the Texas Disciplinary Rules regardless of the media used. Thus, Part VII applies to information disseminated over the internet. A review of these rules is essential to avoid unanticipated hazards. *See, e.g., Izen v. Comm'n on Lawyer Discipline*, 322 S.W.3d 308 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (affirming jury findings of numerous disciplinary rule violations regarding website advertisements resulting in probated suspension of law license).

The State Bar Advertising Review Committee has adopted Interpretive Comments to assist lawyers who advertise or solicit clients in public media. (available at https://www.texasbar.com). Interpretive Comment 17 addresses the "Internet and Similar Services Including Home Pages" and offers some clarification about the application of the Texas ethics rules to websites and other social media sites. The Comment confirms that Part VII only applies to commercial speech intended to secure professional employment. Thus, if an attorney's statements are not designed to market the lawyer's services, then Part VII's advertising restrictions do not apply.

Texas Disciplinary Rule of Professional Conduct 7.01 prohibits lawyers from advertising or practicing under a trade name or a name that is false and misleading. Therefore, an Internet domain name or URL may not be used as the name under which a lawyer or firm does business. Interpretive Comment 17(D). A domain name that is a reasonable variation of the law firm name as provided in Rule 7.01 may be used if it does not violate Rule 7.02. *Id.*

Texas Disciplinary Rule of Professional Conduct 7.02 addresses communications concerning a lawyer's services. The rule prohibits communications that contain material misrepresentations of fact or law or omit a fact necessary to

make a statement not materially misleading. In addition, the rule requires advertising lawyers to include specific information when referring to past successes or results. The rule provides:

> (a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:
>
> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
> (2) contains any reference in a public media advertisement to past successes or results obtained unless:
>
> (i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict;
> (ii) the amount involved was actually received by the client;
> (iii) the reference is accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client; and
> (iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well;
>
> (3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;
> (4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;
> (5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;
> (6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or
> (7) uses an actor or model to portray a client of the lawyer or law firm.

Comment 2 to Rule 7.02 provides that "Whatever means are used to make known a lawyer's services, statements about them must be truthful and nondeceptive." Be alert to exaggerations. In addition, remember that Rule 4.1 contains general restrictions on attorneys making false statements or providing false information.

Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct deals with in-person telephone, and other prohibited electronic contact between a lawyer and a prospective client where the lawyer seeks professional employment. Rule 7.03 forbids using "electronic contact" to solicit business directly from a potential client. The prohibited contact is defined as, "any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means." Tex. Disc. R. Prof. Conduct 7.03(f). Attorney websites are expressly excluded. *Id.* Comment 1 explains that forms of electronic communications are prohibited that pose a danger of overbearing a prospective client's will or that may lead to a hasty and ill-advised decision, just as with face-to-face solicitations. These include soliciting business in chat rooms, or sending "an unsolicited, interactive communication to a prospective client that, when accessed, puts the recipient in direct contact with another person." Tex. Disc. R. Prof. Conduct 7.03 cmt. 1.

Texas Disciplinary Rule of Professional Conduct 7.04 deals with advertisements in the public media by a lawyer seeking professional employment. A lawyer who advertises on the internet must display the statements and disclosures required for traditional print advertising. *See* Tex. Disc. Rule Prof. Conduct 7.04(r). Rule 7.04(f) requires lawyers to keep a copy or recording of each advertisement in the public media, the approval of the ad, and a record of when and where the ad was used for four years after its last dissemination. Even though social media pages and blogs are subject to constant, sometimes daily revision, Interpretive Comment 17 states that a printed copy of electronic communication, including profile pages, are subject to the retention requirements under Rule 7.04(f).

Rule 7.04(a)(3) permits lawyers to publicize their availability in legal directories and legal publications. Thus, lawyers have more latitude on sites like Texas Bar Connect, the social networking site restricted to members of the State Bar of Texas, than on other social media sites.

Texas Disciplinary Rule of Professional Conduct 7.05 expressly includes digital and electronic communications to prospective clients for the purpose of obtaining professional employment. The rule provides that the communication "shall, in the case of an electronic mail message, be plainly marked "ADVERTISEMENT" in the subject portion of

the electronic mail and at the beginning of the message's text." Tex. Disc. R. Prof. Conduct 7.05(b)(2). A copy of each solicitation communication and a record of the date, the name, and electronic address to which each such communication was sent must be kept by the lawyer or firm for four years. Tex. Disc. Rule Prof. Conduct 7.05(e).

Rule 7.07 sets out the requirements for public advertisements and written, recorded, electronic, or other digital solicitations to be filed with the Advertising Review Committee of the State Bar of Texas. Tex. Disc. R. Prof. Conduct 7.07. All the forms of communication addressed in the Interpretive Comment 17 are subject to the filing requirements under Rule 7.07, unless otherwise exempted under 7.07(e). Interpretative Comment 17 provides: "A digitally transmitted message that addresses the availability of a Texas lawyer's services is a communication subject to Rule 7.02, and when published to the Internet, constitutes an advertisement in the public media."

Summary of Rule 7.07:

- General rule: Attorneys must file each "advertisement in the public media" with the State Bar Advertising Review Committee. Rule 7.07(b).
- "Advertisement in the public media" generally includes a profile available to the public on the Internet.
- A specific sub-section applies to websites. Rule 7.07(c).
- The filing requirement is not the same as "pre-approval" available under Rule 7.07(d).
- Rule 7.07(e) has a list of information that is exempt from the filing requirement.
- The Advertising Review Committee has adopted Internal Interpretive Comments to be used by staff, and if the advertisements comply with the Interpretive Comments, staff is authorized to approve them.

B. Attorney Websites

Websites have become an increasingly necessary means by which lawyers communicate with the public. In addition to providing information about the law and the value of legal services, websites also offer lawyers a twenty-four-hour marketing tool. Lawyers can disclose their qualifications and explain the scope of legal services provided, but they must be mindful of the expectations created by the website. In addition, lawyers must be careful not to include any misleading information on websites and should review all current and future law firm website content for violations. Ensure that the website has a statement identifying who wrote the content and who is responsible for it.

Texas Disciplinary Rule of Professional Conduct 7.07(c) requires a lawyer's website to be filed with the Advertising Review Committee of the State Bar of Texas, unless it is limited to certain exempt information enumerated in Rule 7.07(e). These exemptions include contact information, dates of admission to the bar, areas of practice, acceptance of credit cards, languages spoken and other specified information. Because of this limited information, an exempt ad is sometimes called a "tombstone" ad.

An attorney website's initial, or home, page must include:

1. The name of the lawyer or law firm responsible for the content;
2. A conspicuously displayed disclaimer regarding special competence or board certification; and
3. The geographic location of the lawyer or firm's principal office.

The State Bar of Texas Advertising Review Committee Interpretive Comment 17(A). A link to a separate page does not satisfy the requirement.

Interpretative Comment 17 states that social networking sites with "landing pages" generally available to the public, such as those on Facebook, Twitter, and LinkedIn, are advertisements. (A landing page is a website page that allows you to capture a visitor's information through a lead form, instead of merely directing the visitor to your homepage.) Where access is limited to existing clients and personal friends, however, filing with the Advertising Review Department is not required. The Comment clarifies that "blogs or status updates considered to be educational or informational in nature are not required to be filed with the Advertising Review Department." It is the responsibility of the attorney to demonstrate that any communication does not need to be filed with the Committee. State Bar of Texas Advertising Review Committee Interpretive Comment 17(G).

Lawyers who use website marketing must be alert to the risks associated with website visitors relying on information on the site or seeking legal advice. The American Bar Association issued a formal opinion with guidelines for lawyer websites. *See* Formal Opinion 10-457, August 5, 2010 (available at http://www.americanbar.org). The ABA rules allow a lawyer to include accurate information that is not misleading about the lawyer and the lawyer's law firm, including contact information and information about the lawyer's practice. To avoid misleading readers, this information should be updated on a regular basis. Lawyers should make sure that legal information is accurate and current. A lawyer who poses answers to a hypothetical question generally is not characterized as offering legal advice.

Lawyers should include statements that the information is general in nature and that it should not be a substitute for personal legal advice.

Websites should also include a user agreement that spells out the terms that the user must agree to when using the website. Attorneys who have websites should include a disclaimer to negate the intent to form an attorney-client relationship. Law firm websites should also include a disclaimer that legal information contained on the website is not the same as actual legal advice. A simple disclaimer or legal notice at the bottom of a home page probably does not create an enforceable agreement. Courts have held that terms may not be hidden or on another screen; they should be affirmatively "clicked" and agreed to by a website user (referred to as "click wrap" agreements). *See Specht v. Netscape Comm. Corp.*, 306 F.3d 17, 33-35 (2d Cir. 2002); *see also Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204 (Tex. App.—Eastland 2001, pet. denied) (upholding a forum selection clause in an online contract for registering Internet domain names that required users to scroll through terms before accepting or rejecting them).

The California Bar has addressed the required disclaimer. *See* St. B. of Cal. Standing Comm. On Prof. Resp. & Conduct Formal Op. No. 2005-168. A lawyer who provides to website visitors seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his website, may effectively disclaim owing a duty of confidentiality *only if* the disclaimer is in sufficiently plain terms to defeat the visitors' reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an "attorney-client relationship" or "confidential relationship" is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's website is subject to confidentiality. *Id.* If the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either party. *Id.*

Residents outside of Texas may view a Texas lawyer's website or other internet advertisement. Because many states have their own disciplinary rules related to online advertising, it is a good idea to include a disclaimer that the page or advertisement is intended solely for residents of Texas or persons seeking representation in Texas.

C. YouTube Videos

If a lawyer's YouTube video goes beyond strictly educational, informational or entertainment content, it constitutes advertising, subject to same rules that apply to television ads. In Texas, an attorney must file video postings seeking clients with the Advertising Review Committee. Merely including an attorney's contact information on a purely educational video, without soliciting contact, does not constitute advertising in Texas.

D. Profiles on Social Media

Although State Bar of Texas Advertising Review Committee Interpretive Comment 17 states that Facebook pages are advertisements and, therefore, subject to the filing requirements under Rule 7.07, the basic information that may be included on the firm profile would fall within the exceptions to the filing requirement. The Advertising Review Department of the State Bar of Texas takes the position that LinkedIn and Facebook profiles do not need to be filed for advertising review. The Director of the State Bar Advertising Review Department, Gene Major, has stated that attorneys may include their true and factual educational background in their social media profiles without triggering a filing requirement. *See* Debra Bruce, *Ethically Navigating the Social Media Landscape*, Tex. Bar J. March 2010 at 197. Comment 7 to Rule 7.02 of the Texas Disciplinary Rules of Professional Conduct states that the prohibition against false or misleading communications does not prohibit communications about "other truthful information that might invite the attention of those seeking legal assistance."

In Texas, Comment 6 to Rule 7.07 reminds us that "communications need not be filed at all if they were not prepared to secure paid professional employment." Using social media to build and enhance relationships and to engage in discussions about topics of interest can be distinguished from advertisement or solicitation. If the lawyer's profile said "Call me if you have been injured," and set out prior successes, a different conclusion would be reached, however. Solicitations offering to provide legal services are restricted under Rule 7.03 of the Texas Rules of Disciplinary Procedure. The rule expressly governs solicitation about a particular occurrence by "electronic contact."

Be aware that when an attorney lists areas of "expertise" or "specialties," the social media platform will label the lawyer to the public as an "expert." For example, a LinkedIn profile has a field for "specialties." You should leave the specialties field blank unless you are board certified by the Texas Board of Legal Specialization. Rule 7.04(b)(2) prohibits a statement in an advertisement that a lawyer has been designated by an organization as possessing special competence, unless the organization meets the requirements of the rule.

Be extremely careful in participating in websites where lawyers answer legal questions. Websites often describe the answering attorneys as "experts." The "Answers" section on the LinkedIn toolbar can also pose problems in this area. When you respond to questions there, the readers vote on the best responses posted. If you accrue several best

response votes, LinkedIn automatically designates you an "Expert" in that category. That designation would probably violate the specialization rules. Alternatively, you can demonstrate your knowledge and build relationships by answering questions in LinkedIn discussion groups that you join. Discussion groups do not have an "Expert" designation or "best answer" feature.

Although state bars usually categorize attorney websites as advertisements, they often treat legal blogs differently. In Texas, the Advertising Review Department does not consider blogs to be advertising if they consist of commentary or educational information. Comment 1 to Texas Rule 7.02 clarifies that the advertising rules "are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary."

LinkedIn permits your connections to write testimonials about you in the Recommendations section of your profile. You can prescreen these recommendations before they are posted for public view, so make sure they comply with the disciplinary rules. In Texas, Rule 7.02(4) prohibits comparisons to other lawyers' services, unless substantiated by verifiable objective data. Therefore, if your client enthusiastically reports that you are "the best trial lawyer in Houston," unfortunately, you need to ask that it be changed before the review is published.

E. Email Advertising

Advertising sent by email is permissible, but it must meet the specific requirements of Rule 7.05, which states that all solicitation emails must state "ADVERTISEMENT" in the subject line and at the beginning of the email's content. In addition, the email must not reveal the nature of the prospective client's legal problem in the subject line, must not resemble legal pleadings or other legal documents, must explain how the lawyer obtained the prospective client's email address, and must address whether the contact was prompted by a specific occurrence. A lawyer must keep all email solicitations he or she sends for four years.

There are some notable exceptions contained in Rule 7.05(e), such as email solicitations directed to past or present clients, the lawyer's immediate family, email information requested from a prospective client, and email communication not related to a particular event or existing legal problem. Attorneys must also be aware that there are numerous state and federal laws that prohibit email spamming and phishing.

F. Twitter and Chat Rooms

Under Rule 7.03, a lawyer is prohibited from initiating contact with a prospective client who has not sought the lawyer's legal advice through any live interactive manner online. This Rule applies to conversations in public chat rooms or bulletin board forums.

Rule 7.03(a) forbids using "regulated telephone or other electronic contact" to solicit business arising out of a particular occurrence or event from someone who has not sought the lawyer's advice. Rule 7.03(f) defines "regulated electronic contact" to include electronic communication initiated in a "live, interactive manner." Comment 1 to Rule 7.03 specifically references chat rooms, and communications on Facebook and Twitter can sometimes resemble a chat room conversation.

III. SOCIAL MEDIA'S IMPACT ON REPRESENTING A CLIENT

Attorneys always should be mindful of the obligations to clients, prohibited conduct, and precautions that are delineated in the Texas Disciplinary Rules of Professional Conduct. The most frequently encountered issues and the relationship to social media are outlined below.

A. The Duty to Keep Clients Informed

Rule 1.03 of the Texas Rules of Disciplinary Conduct provides that the lawyer must keep the client reasonably informed of the status of a matter and promptly reply to reasonable requests for information, and shall explain the matter to the extent necessary to permit the client to make informed decisions about the representation.

Comment 4 to Rule 1.03 provides that in some circumstances, a lawyer may be justified in delaying transmission of information to a client "when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication." For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. However, such circumstances appear infrequently.

It should come as no surprise that the single most common grievance against lawyers involves the failure to keep the client reasonably informed of the status of their case. Often, complaints arise about unreturned phone calls; unanswered emails, which often come at all hours of the day or night, pose the same risks.

B. Duty to Provide Competent Representation

Recently, the American Bar Association expanded Rule 1.1 of its Model Rules of Professional Conduct to make it clear that competent representation includes staying abreast of "the benefits and risks associated with relevant technology," including the impact on conducting investigations, engaging in legal research, advising clients, and conducting discovery. ABA Model Rule 1.1. Some jurisdictions have already concluded that lawyers should be held to a higher standard in making use of online resources. Therefore, because most divorce lawyers review the Facebook pages of both their client and the adverse spouse, arguably a lawyer who does not do so may fail to render competent representation.

The way an attorney acts to safeguard confidential client information is governed by the duty of competence, and determining whether a third party can access and use that confidential client information is a subject that must be considered in conjunction with that duty. A recent article advises that an attorney's duty to keep attorney-client communications private now includes knowing how to prevent hackers from gaining unauthorized access to a client's confidential information. *See* David Sarif and Natalie Tyler, *The Dangers of Free Wi-Fi,* Family Lawyer, Fall/Winter 2016. The article warns that hackers can steal information from your private or office secure network by using a rogue Wi-Fi access point installed without your knowledge. *Id.* at 6-7. An attack is not limited to sophisticated users; websites and online videos are readily available to show how to install these rogue Wi-Fi access points and hack someone's data. The article cautions attorneys to enable the "Ask to Join Network" function on all devices to prevent automatically joining Wi-Fi networks. In addition, attorneys should use tools like wireless intrusion prevention systems to safeguard against hacking.

The California Bar has addressed the duty of competence related to the use of technology in transmitting or storing confidential client information. In an advisory ethics opinion, the bar addressed a query about an associate attorney who regularly took his firm laptop computer to the local coffee shop and accessed a public wireless Internet connection to conduct legal research on a client matter and then emailed the client. He also took the laptop computer home to conduct the research and emailed the client from his personal wireless system. The Bar concluded that due to the lack of security features provided in most public wireless access locations, an attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on a client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, attorneys may need to avoid using public wireless connections entirely. In addition, if an attorney's personal wireless system has been configured with appropriate security features, he would not violate his duties of confidentiality and competence by working on a client's matter at home. St. B. of Cal. Standing Comm. On Prof. Resp. & Conduct Formal Op. No. 2010-179.

In summary, the Bar wrote that the duties of confidentiality and competence that attorneys owe to their clients require a basic understanding of the electronic protections afforded by the technology they use in their practice. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: (1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; (2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; (3) the degree of sensitivity of the information; (4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; (5) the urgency of the situation; and (6) the client's instructions and circumstances, such as access by others to the client's devices and communications. *Id.*

When an attorney employs encryption while using public wireless connections and enables his or her personal firewall, the risks of unauthorized access may be significantly reduced. Both of these tools are readily available and relatively inexpensive, and may already be built into your device's operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended.

C. Truthfulness in Statements to Others

Texas Disciplinary Rule of Professional Conduct 4.01 provides as follows:

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

The Comment to ABA Rule 4.1, on which the Texas rule is modeled, states that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." Model Rules of Prof'l Conduct R. 4.1 cmt. 1.

If a lawyer discovers that a client has committed, or intends to commit, a criminal or fraudulent act, the lawyer is required to urge the client to take appropriate action. *See* Tex. Disc. R. Prof. Conduct 1.02(d), (e), (f); 3.03(b). If the client has not complied, the lawyer then has a duty to disclose to others. *See* cmt. 4.

Be sure to keep your obligations under Rule 4.01 when using social media.

D. Communication with Someone Represented by Counsel

Another rule to remember when emailing or using other forms of social media is Texas Disciplinary Rule of Professional Conduct 4.02, which provides:

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
> (b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

E. Disobedience of Court Rulings

Texas Disciplinary Rule of Professional Conduct 3.04(d) states that a lawyer may not:

> (d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience.

A recent story reported in the news offers a cautionary tale about a client's disobedience of a court order. An Ohio man, Mark Byron, was found guilty of civil domestic violence against his wife. The court entered a temporary protective order prohibiting him from causing his wife "physical or mental abuse, harassment or annoyance." Five months after the entry of the protective order, Byron posted on his Facebook wall: "If you are an evil, vindictive woman who wants to ruin your husband's life and take your son's father away from him completely – all you need to do is say you're scared of your husband or domestic partner and they'll take him away!" Byron was threatened with 60 days in jail as a contempt sanction for this comment posted on his Facebook page in violation of the court's order. The court ruled that Byron could avoid jail and a $500 fine by posting daily apologies, written by the judge, for a month, and paying his wife's attorney's fees. *See Court's offer: Apologize on Facebook or go to jail*, Houston Chronicle, Feb. 25, 2012, A2.

F. Breaching Client Confidentiality

Texas Disciplinary Rule of Professional Conduct 1.05 prohibits lawyers from "knowingly" revealing a client's confidential information, with limited exceptions. Because social media can be used casually, it may lead a lawyer to unintentionally breach client confidentiality. For example, a lawyer might Tweet, "Just talked to a client who totally lied to me." Because the date and time of the Tweet is posted, it could reveal information to someone who knew who the lawyer was meeting with that day.

Confidentiality of client information and disqualification of the lawyer due to conflicts of interest may be implicated by website communications. When a website visitor submits information about his case or legal issue, the exchange may create a "prospective client" relationship. Whether the attorney invited submission of specific details about the case may govern whether such a relationship has been created. If a prospective client relationship is created, the lawyer may have a duty to treat the specific details provided by the potential client as confidential. The law firm may also face a conflict of interest that could prohibit representation of other parties.

Attorneys should employ precautions to protect confidential information when in public, such as ensuring that the person sitting in the adjacent seat on an airplane cannot see the computer screen or moving to a private location before discussing confidential information on a mobile phone. St. B. of Cal. Standing Comm. On Prof. Resp. & Conduct Formal Op. No. 2010-179.

Most bar associations have taken the position that the risks of a third party's unauthorized review of email (whether by interception or delivery to an unintended recipient) are similar to the risks that confidential client information

transmitted by standard mail service will be opened by any of the many hands it passes through on the way to its recipient or will be misdirected. *See, e.g.*, ABA Formal Op. No. 99-4138 (concluding that attorneys have a reasonable expectation of privacy in email communications, even if unencrypted, "despite some risk of interception and disclosure").

In 2011, the ABA updated its position. In ABA Formal Opinion 11-459 the Committee concluded that lawyers must warn clients about the risks of sending confidential communications when using email:

> Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

The rationale behind this holding is because email is inherently unsecure. Practitioners are now advocating the use of communication tools like client portals and law practice management software platforms, like MyCase, that incorporate some form of encrypted client communication into their platforms, as a solution to the problem of unencrypted, unsecure email.

Lawyers routinely include a confidentiality notice in emails. A typical confidentiality notice seen on emails reads as follows:

> Confidentiality Notice: The information contained in this email and any attachments is intended only for the recipient(s) listed above and may be privileged and confidential. Any dissemination, copying, or use of or reliance upon such information by or to anyone other than the recipient(s) listed above is prohibited. If you have received this message in error, please notify the sender immediately at the email address above and destroy any and all copies of this message.

If this notice is included on every email, however, no matter how routine (e.g., "How about lunch today?"), the notice loses its effectiveness. It could be argued that an important email is no more confidential than these trivial communications.

The question of attorney-client confidentiality may arise if a disgruntled client posts a negative comment about an attorney on social media such as Facebook or on an internet site such as AVVO. An attorney may only respond in a general manner, making a statement such as, "This firm strives to provide its clients with excellent legal service and regrets that any client is less than satisfied. Please contact the firm, and we will be happy to discuss your concerns with you."

G. Attorney-Client Privilege

The attorney-client privilege provides the client the right to prevent certain confidential communications from being revealed. Several exceptions to confidentiality have been developed in evidentiary law where the services of the lawyer were sought or used by a client in planning or committing a crime or fraud as well as where issues have arisen as to breach of a duty by the lawyer.

For the attorney-client privilege to apply, the communication must be confidential. Therefore, it is important to determine what is confidential. What is posted on the Internet has a lower "expectation of privacy" than a private telephone conversation. Once something is posted on Facebook or a blog, the information is available to the public. Therefore, viewing it does not constitute an invasion of privacy.

Courts have determined that an employee should have no expectation of privacy on a computer at work. All email coming in through a system operated by an employer can be subject to the employer's viewing. In California, a plaintiff who discussed his suit with her lawyer on work email was not permitted to claim privilege. *See Holmes v. Petrovich Dev. Co.*, 191 Cal. Rptr. 4th 1047 (Cal. App. 3d Dist. 2011). The court reasoned that the emails sent on a company computer were like consulting the lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion would be overheard by the employer. *Id.* The lesson that lawyers should take from *Holmes* is that failure to immediately recognize that a potential client is corresponding through an employer's email account could result in candid communications being displayed before a jury.

H. Conflicts of Interest

In Texas, Comment 1 to Texas Disciplinary Rule of Professional Conduct 1.06 addresses conflicts of interest, as follows:

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

Disqualification of the lawyer due to conflicts of interest may be implicated by website communications and email inquiries. In California, a divorce law firm believed its online disclaimer concerning client inquiries and the non-existence of client-lawyer relationships created by email inquiries was sufficient. The law firm attempted to avoid taking on a duty of confidentiality by requiring each online inquirer to agree that (1) by submitting a question, the inquirer was not forming an attorney-client or a confidential relationship; and (2) whatever response the law firm provided would not constitute legal advice but, rather, "general information." A potential client emailed the firm, revealing her marital circumstances, including her adultery. A conflict check revealed that the firm already represented her husband. Although the firm was clearly conflicted out from representing the wife, the California State Bar Association ruled that the firm could no longer represent the husband either because of its inadequately worded online disclaimer. The opinion concluded a web site should contain a statement in sufficiently plain language that any information submitted at the web site will not be confidential. St. B. of Cal. Standing Comm. On Prof. Resp. & Conduct Formal Op. No. 2005-168.

The California rules are substantially the same as those in Texas. Therefore, a similar outcome would be likely in Texas.

I. Unsolicited Email and Tweets

A webpage listing attorney email addresses allows a putative client to send an email to a lawyer disclosing important confidential information that could lead to disqualification of the firm. A lawyer who receives an unsolicited telephone call can simply stop the prospective client from disclosing additional information as soon as the lawyer recognizes that a conflict exists. An email, however, is sent instantaneously and opened in full at once.

The Arizona Bar Association concluded that a lawyer who did not have a website, but only had an email address, did not implicitly invite prospective clients to submit information. Therefore, the lawyer did not owe a duty of confidentiality to prospective clients because there was no indication of a willingness to accept clients by email. On the other hand, the Arizona ethics opinion reasoned that if the attorney maintains a website without any express limitations on the formation of an attorney-client relationship or disclaimers explaining that information will not be held confidential, then the lawyer has implicitly agreed to consider forming an attorney-client relationship with the sender of an email. *See* St. B. of Ariz. Eth. Op. No. 02-04 (Sept. 2002) (available at http://www.azbar.org/ethics/ethicsopinions).

Beware of the temptation to offer legal services in response to a tweet. For example, it would be improper if someone tweeted on Twitter that she just got a DWI, and a lawyer responded to her, "If you are looking for a DWI lawyer, I can give you a break on fees. Email me." Unless the lawyer already had a prior relationship with the tweeter, that contact would violate ethical rules. On the other hand, consider a tweet stating, "Just got out of jail. Anyone know a good inexpensive DWI lawyer?" A response from a lawyer to that tweet would likely be permitted because the tweeter asked for a lawyer.

In addition, beware of online scams. One common scam involves a lawyer receipt of what appears to be a legitimate email from a prospective client, often based in another country. The terms of an attorney-client relationship and a fee agreement may be negotiated. The lawyer then receives what appears to be a valid domestic cashier's check, purporting to be a settlement check from a debtor drawn on a reputable bank. After the check is deposited in the lawyer's client trust account, the new "client" asks that the funds be wired to a foreign bank. The cashier's check is fraudulent, leaving the lawyer holding the bag, with his trust fund overdrawn. The California State Bar's Committee on Professional Responsibility and Conduct has issued an ethics alert describing how these scams work and how lawyers can protect themselves. (available at http://ethics.calbar.ca.gov, Jan. 2011).

IV. SOCIAL MEDIA AND LITIGATION

Most leading U.S. divorce lawyers surveyed report seeing an increase in the use of evidence from social networking sites in U.S. divorce cases, per survey results released in 2010 by the American Academy of Matrimonial Lawyers (AAML). An overwhelming 81% of the nation's top divorce attorneys say they have seen an increase in the number of cases using social networking evidence during the past five years. Facebook is the primary source for online divorce evidence; 66% of the members surveyed named Facebook as the source of compromising information used in litigation. *See* http://tinyurl.com/AAML-Study.

Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information (ESI). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may

require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality. St. B. of Cal. Standing Comm. On Prof. Resp. & Conduct Formal Op. No. 2015-193.

Obtaining and admitting social media evidence is beyond the scope of this paper. However, some ethical implications of social media on litigation are addressed.

A. Ethical Hazards in Obtaining Information From Social Networking Websites

Many lawyers find useful information about a party or witness in their postings on social media. To what extent may an attorney ethically use social media during case investigation and discovery? As a general rule, attorneys may access and review the public portions of a party's social-networking pages without facing ethical repercussions.

The New York State Bar Association Committee on Professional Ethics addressed whether a lawyer may view and access data that is publicly available on another party's social networking websites. The committee determined that a lawyer may obtain information that is publicly available on a social networking site so long as he does not use deception. "[T]he lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so." NYSBA Ethics Op. 843 (2010) (available at http://www.nysba.org.).

Due to privacy settings, sometimes valuable information would not be visible to the public in general, but would be visible to hundreds of "friends" of the target on Facebook or other media. Lawyers may be tempted to disguise their identity in order to friend the target, or to ask someone else to friend the target and share what they see. This kind of deception is a violation of ethics rules.

In March 2009, the Philadelphia Bar Association issued an opinion that such pretexting would involve dishonesty, fraud, deceit or misrepresentation on behalf of the lawyer, or the encouragement of such behavior, in violation of the Pennsylvania ethics rules. Phila. Bar Ass'n Prof'l Guidance Comm. Op. 2009-02.

B. Discovery

Several recent cases highlight the perils of electronic discovery gone wrong and illustrate the risks of failing to have in place document preservation procedures and litigation hold policies. While these cases address corporations, some of the principles also can apply to individuals.

A federal judge in Texas ordered Microsoft to pay damages of $25 million plus almost $2 million in attorney's fees for, among other matters, failing to produce a key email on a timely basis during discovery and failing to disclose the existence of a database. *See i4i LP v. Microsoft Corp.*, No. 07-CV-113, U.S. Dist. Ct. E. Dist. Tex. (Tyler Division).

Oracle America, Inc. sued Google alleging patent infringement related to Google's Android. *Oracle America, Inc. v. Google, Inc.*, No. 3:10-cv-03561-WHA, U.S. Dist. Ct. N. Dist. Ca. (San Francisco Div.). Google fought to protect as privileged an email from its engineer to a vice president at Oracle, including a draft of the email that Google had inadvertently produced. The federal court denied Google's attempts to claim attorney-client privilege of the potentially devastating email. *See* Henry Kelston, *Google's EDD Search Blunder in Oracle Case: the $1 Billion Mistake?*" (Feb. 17, 2012) (available at http://www.law.com).

C. Spoliation

Spoliation is the intentional destruction of evidence relevant to a case by the producing party. *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998). To constitute spoliation, it must be established that the nonproducing party had a duty to preserve the evidence. Parties have a duty to preserve evidence that is "relevant to litigation, or potential litigation." *Id.* This duty arises when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material or relevant to the claim. *Wal-Mart Stores v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003).

To determine whether spoliation of evidence was intentional, the court will look at the regular practice of the user. If the court determines that the producing party intentionally destroyed evidence, the court may impose sanctions or find the requesting party is entitled to a spoliation instruction in which the jury is instructed to presume that the destroyed evidence was unfavorable to the spoliating party. *Trevino*, 969 S.W.2d at 954, 960. The courts are given broad discretion regarding sanctions, and depending on the facts, can impose death penalty sanctions. In *Rimkus Consulting Group, Inc. v. Cammarata*, Judge Lee Rosenthal of the Southern District of Texas required a showing of bad faith before imposing severe sanctions for failure to preserve electronic information. 688 F. Supp. 2d 598, 612-13 (S. Dist. Tex. 2010).

The Texas Supreme Court set out to clarify the common law rules that govern spoliation of evidence in Texas and held that spoliation analysis involves a two-step judicial process:

(1) The trial court—rather than the jury—must determine, as a question of law, whether the party spoliated evidence.
(2) If spoliation occurred, the court must then assess an appropriate remedy.

Brookshire Brothers, Ltd. v. Aldridge, 438 S.W.3d 9, 20-21 (Tex. 2014). The court reasoned that spoliation is an evidentiary issue and not a separate cause of action, and because evidentiary issues are resolved by the trial court and not the jury, it is inappropriate to present spoliation issues to the jury for resolution. *Id.* at 20. The court also noted that while a trial court may hold an evidentiary hearing to assist the court in resolving spoliation issues, such a hearing may not take place in the presence of the jury. *Id.*

Upon a finding of spoliation, the trial court has broad discretion to impose a remedy. *Id.* In addition to the remedies available in the Texas Rules of Civil Procedure, the trial court also has discretion to craft other remedies, including the submission of a spoliation instruction to the jury. *Id*. at 22-23. The court noted that the imposition of a spoliation instruction as a remedy, "among the harshest sanctions a trial court may utilize to remedy an act of spoliation," should be taken cautiously. *Id.* at 23. An improper spoliation instruction presents a substantial likelihood of harm. *Id.* at 28-29 (reversing for improper spoliation instruction).

In addition to penalties against the party, a lawyer could be subject to discipline. Texas Disciplinary Rule of Professional Conduct 3.04(a) provides that an attorney shall not obstruct access to evidence; alter, destroy, or conceal a document or other material; or counsel or assist another to do so, if a competent attorney would believe the document or other material has evidentiary value.

The ethical duty to preserve information is a concern in the age of Facebook and Twitter. In the context of social networking sites, the user is invited to regularly update their profile to reflect changes in their day to day life, which can complicate matters. If a user simply deletes or removes information from media sites, it can still be retrieved from their computer's hard drive. The risk always exists that a client could delete or destroy outdated social media data as a regular course of activity without intending to have an impact on litigation. It is important to educate clients regarding the duty to preserve evidence. Attorneys should consider a written admonishment about spoliation to clients, including a requirement that the client consult with the attorney's office prior to destroying any social media evidence, altering social media, or making a social media page unavailable on the internet.

It is recommended that attorneys advise clients that they may not destroy any evidence, including evidence (prior posts and pictures) found on their social networking sites. For example, to the extent there is information on a party or witnesses' Facebook page which reveals facts or information relevant to custody, then the deletion of that information could be characterized a spoliation.

In 2011, a Virginia court sanctioned one lawyer $542,000.00 because his legal assistant advised their client to remove Facebook pictures that were detrimental to his case. *See* John Patzakis, *Facebook Spoliation Costs Lawyer $522,000; Ends His Legal Career*, (Nov. 15, 2011) (available at https://blog.x1discovery.com). When the defendant's lawyers learned this had happened, they filed a motion for sanctions based on spoliation of evidence. The motion was granted, and both the lawyer and client were fined. The lawyer's license was suspended for five years.

It is a good practice to include in temporary restraining orders and injunctions a prohibition against deleting any information from any social media site. The Texas Family Practice Manual provides for the following injunction: "Destroying, disposing of, or altering any e-mail or other electronic data relevant to the subject matters of this case, whether stored on a hard drive or on a diskette or other electronic storage device." This injunction should cover social media, but the better practice would be to include a separate injunction which specifically targets and social media accounts of the parties.

D. Trial Publicity

Texas Disciplinary Rule of Professional Conduct 3.07 provides:

> In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.

Many consider the rule vague and imprecise. Some commentators suggest that it has a chilling effect on free speech by silencing lawyers and denying the public accurate and truthful information.

The United States Supreme Court interpreted a similar rule in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Justice Kennedy wrote that the rule, as interpreted by the Nevada Supreme Court, was void for vagueness, failed to provide fair notice to those to whom it was directed, and was so imprecise that discriminatory enforcement was a real probability.

E. Juror Misconduct

Lawyers are not permitted to communicate, or cause another to communicate, with a juror during trial. Tex. Disc. Rule Prof. Conduct 3.06(c). Likewise, jurors are not supposed to discuss with anyone the cases they hear before deliberation or outside the jury deliberation room to avoid improper influences and to ensure that a jury's verdict will be just and fair. While there have certainly been instances of jurors improperly commenting on cases in the past, social media has made it quicker and easier for jurors to engage in misconduct. Courts have recognized that the widespread availability of the Internet and the extensive use of social networking sites, such as Twitter and Facebook, have increased the risk of prejudicial communications among jurors. *See, e.g., United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011).

Juror misconduct by unauthorized use of e-mails during deliberations has been addressed by some courts. In a recent federal criminal trial, a juror who had been dismissed disobeyed the court's orders and discussed via email with other jurors her opinion on the defendant's guilt. The federal court found the juror guilty of criminal contempt for juror misconduct and fined her $1,000. *U.S. v. Juror No. One*, Criminal Action No. 10–703, 2011 WL 6412039, (E.D.Pa. Dec. 21, 2011).

In an Arkansas state court, a defendant, Stoam Holdings, attempted to overturn a $12.6 million verdict because a juror used Twitter to send updates during the trial. One post stated "Oh, and nobody buy Stoam. It's bad mojo and they'll probably cease to exist now that their wallet is 12m lighter." *See* Renee Loth, *Mistrial by Google*, Boston Globe, Nov. 6, 2009, at A15 (available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles).

In Maryland, Baltimore Mayor Sheila Dixon sought a mistrial in her embezzlement trial because, while the trial was going on, five of the jurors became Facebook friends and chatted on the social networking site, despite the judge's instructions not to communicate with each other outside of the jury room. Brendan Kearny, *Despite Judge's Warning, Dixon Jurors Went on Facebook*, The Daily Record, Dec. 2, 2009 (available at http://mddailyrecord.com).

The Arkansas Supreme Court recently reversed a defendant's conviction and death sentence due to juror misconduct which occurred during a trial and the failure of the trial judge to declare a mistrial or replace the juror with an alternate. *Dimas–Martinez v. Arkansas*, No. CR 2007–94–2–A, 2011 Ark. 515, 2011 WL 6091330, at *11–15 (Ark. Dec. 8, 2011). During the trial, the juror tweeted about the proceedings. Even after the juror was questioned, admitted to the misconduct, and was again admonished not to discuss the case in Internet forums, he continued to tweet, specifically during jury deliberations. *Id.* at *14–15.

In Texas, rules have been adopted to address jurors and social networking. Rule 226a of the Texas Rules of Civil Procedure was amended, changing the mandatory instructions that trial judges give to potential jurors on a panel, and to the jury once selected. The amended rule includes the following instructions:

> Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or MySpace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court. * * *
>
> Do not investigate this case on your own. For example:
>
> a. Do not try to get information about the case, lawyers, witnesses, or issues from outside this courtroom.
> b. Do not go to places mentioned in the case to inspect the places.
> c. Do not inspect items mentioned in this case unless they are presented as evidence in court.
> d. Do not look up anything in a law book, dictionary, or public record to try to learn more about the case.
> e. Do not look anything up on the Internet to try to learn more about the case.
> f. And do not let anyone else do any of these things for you.

V. LAWYERS INTERACTING WITH THE JUDICIARY

The Texas Rules of Professional Conduct govern attorneys' interactions with the judiciary. These rules have implications for interactions on social media.

A. Disparaging the Judiciary

Beware of ethical rules prohibiting attorneys from making false or reckless statements about the judiciary or taking actions that prejudice the administration of justice. Refrain from disparaging judges, which is a frequent theme in online posts. A Florida attorney was sanctioned $1250 for posting comments calling a judge "unfit" "evil," and an "unfair witch." Stephanie Adams, *Sanctions for Lawyers who Blog, Tweet and Facebook*, May 2, 2011 (available at http://thedefensiveline.wordpress.com). Florida's rules prohibiting attorneys from making false or reckless statements about the judiciary are similar to Texas Disciplinary Rule of Professional Conduct 8.02, which provides that "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."

B. Honesty

Lying to a tribunal is prohibited in all jurisdictions. Texas Rule 3.03 prohibits attorneys from making a false statement of fact to a tribunal. The ABA Journal reported about an attorney who sought a continuance because of the death of her father. Judge Susan Criss of Galveston's 212th District Court, checked the attorney's Facebook page and learned that during that time the attorney had a busy social schedule to attend to—not a funeral. Molly McDonald, *Facebooking Judge Catches Lawyer in Lie*, July 21, 2009 (available at www.abajournal.com).

C. Maintaining Impartiality of the Tribunal; Ex parte Communications

Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct prohibits ex parte communications, providing that a lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;
(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;
(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;
(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

Canon 3A(4) of the Texas Code of Judicial Conduct prohibits many ex parte contacts with judicial officials. A lawyer in turn violates Rule 8.04(a)(6) by communicating with a judicial official in a manner that causes the official to violate Canon 3A(4), which provides.

> A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Some states strictly apply rules against ex parte communications. According to a public reprimand, a North Carolina judge engaged in unethical Facebook activity relating to a case being tried before him. During a child custody case, District Judge B. Carlton Terry Jr. "friended" one of the lawyers on the case, and each of them discussed aspects of the case on Facebook, constituting ex parte communications. The lawyer asked how he could prove the negative that his client did not have an affair. The lawyer noted that he had a wise judge, and the judge responded that he had two very good parents to choose between in the case. The judge also conducted ex parte online research about the wife by googling her and visiting her website. *See* Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, June 1, 2009 (available at http://www.abajournal.com).

The role of an amicus attorney is "to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." Tex. Fam. Code § 107.001(1). Therefore, some courts have decided that an amicus attorney "represents neither an appellant nor an appellee," and "the trial court, is, in effect, the amicus attorney's client for a limited purpose." *O'Connor v. O'Connor*, 245 S.W.3d 511, 515 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also In re Collins*, 242 S.W.3d 837, 842 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Section 107.005(b)(4) requires an amicus attorney to become familiar with the American Bar Association's standards of practice for attorneys who represent children in child custody cases. Tex. Fam. Code § 107.005(b)(4). In discussing the advocacy of the child's best interests, the ABA commentary recommends, although in the context of settlement negotiation, that ex parte communication with the judge should be avoided. Based on the ABA commentary, the Texarkana Court of Appeals found that the trial court erred in allowing ex parte communications with the amicus attorney, although it determined the error was not harmful. *In re S.A.G.*, 403 S.W.3d 907, 916-17 (Tex. App.—Texarkana 2013, pet. denied).

D. Judges on Facebook

In some states, it is clear that a judge and an attorney who appears before the judge can be "friends" on Facebook. *See* N.Y. Op. 08-176 (2009); S.C. Op. 17-2009 (2009); KY. Op. JE-119 (2010); and Ohio Op. 2010-7 (2010). Florida is an exception. *See* Florida JEAC Op. 2009-20. The Florida Judicial Ethics Advisory Opinion determined that a judge who friends a lawyer appearing before him violates the judicial canon prohibit a judge from conveying, or permitting others to convey, the impression that someone is able to influence the judge.

South Carolina judges are free to participate in online social networking. In response to a question about whether a judge can "friend" law enforcement officers and employees of the court, the South Carolina Advisory Committee on Standards of Judicial Conduct issued the following conclusion in October 2009:

> A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge's position as magistrate.

Opinion 17-2009.

Although the technology is new, social networking sites simply provide other means of communication and social interaction. Judges must contend with the ethical risks, such as the appearance of impropriety, posed by other forms of social interaction. Therefore, the judicial conduct rules already in place should govern social media use. "Existing rules of judicial conduct are more than sufficient to provide guidance when it comes to judges' use of social media, once one recognizes that communications and interaction via social media are no different in their implications than more traditional forms of communication." John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. Miami L. Rev. 487, 490 (2014); *see also Youkers v. State*, 400 S.W.3d 200, 206 (Tex. App.—Dallas 2013, pet. ref'd) ("while the internet and social media websites create new venues for communications, our analysis should not change because an ex parte communication occurs online or offline.").

The Texas Judicial Canons do not, on their face, prohibit Texas judges from participating in online social networking. Nonetheless, social media activity can cause problems for judges, including providing a basis to recuse a judge. In *Youkers*, the Dallas Court of Appeals considered an allegation that a trial judge's designation as a "friend" of a victim's father on Facebook constituted a basis for recusal. *Youkers*, 400 S.W.3d at 205. In reaching its decision that recusal was not required, the court found that no rule, canon of ethics, or judicial ethics opinion in Texas prohibits Texas judges from using social media outlets like Facebook. *Id.* Merely designating someone as a "friend" on Facebook "does not show the degree or intensity of a judge's relationship with a person." *Id.* (*citing* ABA Op. 462). The judge testified at the hearing regarding the nature of the relationship with the victim's father. He stated they were running for office at the same time—that was "the extent of [their] relationship." *Id.* at 206. Additionally, the judge stated that he ceased reading the father's message once he realized it was an ex parte communication; he emphasized, "I have not considered any of the information in your e-mail as it would be improper for me to do so." The Court of Appeals found the judge acted in full compliance with the Texas Committee on Judicial Ethics' recommended procedure for treatment of ex parte communications. *Id.* at 206-07 (*citing* Comm. on Jud. Ethics, State Bar of Tex., Op. 154 (1993), which provides that a judge receiving an ex parte communication from a litigant may comply with canon 3B(8) by placing the communication in clerk's file, providing the communication to all parties, determining if the communication is proper, and, if it is not, advising the communicant that all ex parte communications must cease).

Another recent Texas opinion addresses a judge's posts on Facebook. *See In re Slaughter*, 480 S.W.3d 842, 846 (Tex. Spec. Ct. Rev. 2015). A Special Court of Review appointed by the Texas Supreme Court addressed complaints against a judge who was very active in posting comments about matters that were occurring in her court and in utilizing her Facebook page to educate the public about her court. The judge maintained a public Facebook page which displayed: (1) a photograph of the judge wearing her judicial robe; (2) featured a photograph of the Galveston County Courthouse; and (3) described the judge as a "public figure" and as "Judge of the 405th Judicial District Court." She posted about a high profile, criminal jury trial concerning a man charged with unlawful restraint of a child for allegedly keeping a nine-year-old boy in a 6 x 8-foot wooden enclosure inside the family home. The case became known in the media as "the Boy in the Box" case.

A couple of days before the trial was set to begin, the judge posted the following on her Facebook page:

> We have a big criminal trial starting Monday! Jury selection Monday and opening statements Tues. morning.

The following day, in response to the above-described post, a person posted the following comment on the judge's Facebook page:

> One of my favorite Clint Eastwood movies is "Hang 'Em High," jus sayin your honor.

When trial began, the judge posted the following comments on her Facebook page:

> Opening statements this morning at 9:30 am in the trial called by the press "the boy in a box" case.
> After we finished Day 1 of the case called the "Boy in the Box" case, trustees from the jail came in and assembled the actual 6' x 8' "box" inside the courtroom!
> This is the case currently in the 405th!

The judge also included a link to a Reuters article entitled "Texas father on trial for putting son in box as punishment." *Id.* at 847.

On the third day of trial, defense counsel in the criminal case filed a motion to recuse the judge and a motion for mistrial based on the judge's Facebook activities. A visiting judge assigned to hear the motion to recuse granted the motion and removed the judge from the case. The case was transferred to another court and that judge granted the defendant's motion for mistrial, causing the case to be retried. In the subsequent trial, the defendant was acquitted of the charges. *Id.* 480 S.W.3d 847.

The Special Court of Review ultimately concluded the judge did not violate Canons 3(B)(10) and 4(A) of the Code of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution. There was no evidence presented that the judge's extrajudicial statements would suggest to a reasonable person the judge's probable decision on any particular case or that would cause reasonable doubt on the judge's capacity to act impartially as a judge. The posts "amounted to an error in judgment by posting facts from a pending case in her court." The reviewing court found the judge's actions "troublesome," however, because the comments went "beyond mere factual statements of events occurring in the courtroom and add the judge's subjective interpretation of these events at or near the time of their occurrence." *Id.* at 852. The opinion noted "extrajudicial comments made by a judge about a pending proceeding will likely invite scrutiny" and can "create the very real possibility of a recusal (or even a mistrial)." *Id.*

VI. CRIMINAL AND CIVIL LIABILITY

State and Federal laws impose civil and criminal liability for wiretapping, improper access of stored communications, and invasion of privacy. Thus, lawyers should advise clients of potential criminal violations or civil liability that could result from improper use of social networking sites and emails.

A. Federal Statutes

Unless a federal statute grants exclusive jurisdiction to the federal courts, claims arising under federal law may be brought and adjudicated in state courts. Claims under the Federal Wiretap Act and the Stored Communications Act have been adjudicated in Texas state courts. *See, e.g., Boehringer v. Konkel*, 404 S.W.3d 18, 32 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

1. Federal Wiretap Act

The Federal Wiretap Act is found at 18 U.S.C. § 2510-22. In 1986, the Electronic Communications Privacy Act (ECPA) was added as an amendment to the federal wiretap law. The act makes it illegal to intercept stored or transmitted electronic communication without authorization and imposes criminal penalties and civil damages. In 1994 the Wiretap Act was amended again the expressly provide protection for wireless and cellular communications. *See* Communications Assistance for law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994); *see also Bartnicki v. Vopper*, 532 U.S. 514, 524 (2001) (confirming the protections to wireless and cellular communications under the Federal Wiretap Act).

Use or disclosure of intercepted communications is prohibited under the Federal Wiretap Act. Courts have found that the act may be violated by simply revealing or suggesting the general nature of an intercepted communication. *See Godspeed v. Harman*, 39 F. Supp.2d 787, 790 (N.D. Tex. 1999). Liability is not limited to the person who intercepted

the communication. If a third person is given an illegally intercepted communication, the third person violates the Wiretap Act if he intentionally discloses the contents of an intercepted communication that he knew or should have known was obtained through interception. 18 U.S.C. § 2511(1)(c).

The Federal Wiretap Act applies to interceptions that are contemporaneous with the communication. Therefore, the Act does not apply to stored electronic communications. *See Steve Jackson Games, Inc. v. U.S. Secret Serv*., 36 F.3d 457, 461-62 (5th Cir. 1994).

There is no exception in the act for the interception of communications by spouses in the marital home. Therefore, many courts have applied the law to spouses. Not all intercepted communications between spouses will be actionable, however. The interception must be intentional, the intercepting spouse must have knowledge that information was obtained through interception in violation of the act, and the other party must not have consented. *See Thompson v. Dulaney,* 970 F.2d 744, 788 (10th Cir.) 1992.

There is also no immunity under the Federal Wiretap Act for attorneys. An attorney may be held criminally or civilly liable for using or disclosing communications that were illegally obtained in violation of the act. Civil damages for violating the Federal Wire Tap Act are assessed as the greater of $100 a day for each day of violation or $10,000. 18 U.S.C. § 2520(c)2(B).

The Federal Wiretap Act contains a specific exception for an interception by a *party to the communication.* 18 U.S.C. § 2511(2)(d). Second, an interception is permissible if *one party to the communication has given prior consent* to the interception. *Id.* Generally, a parent may vicariously consent to the recording on behalf of his or her child if the parent has a good faith reasonable basis to believe that consent was necessary for the protection of the welfare of the child. *Pollock v. Pollock*, 154 F.2d 601 (6th Cir. 1998); *Allen v. Mancini*, 170 S.W.3d 167, 173 (Tex. App.—Eastland 2005, pet. denied) (stating father was entitled to consent to a tape recording both for himself and for his child as her joint managing conservator).

There is a strict exclusionary rule for all illegally intercepted wire or oral communications. 18 U.S.C. § 2525. The exclusion applies to the contents of the illegally obtained communication and any evidence derived from it.

2. Stored Communications Act

The Stored Communications Act (SCA) protects the privacy of Internet users by prohibiting Internet service providers from generally disclosing the contents of electronic communications while in storage by that service. 18 U.S.C.§ 2701-12. The penalty under the federal law is imprisonment for one to ten years and a fine. 18 U.S.C. § 2701(b). In addition, the act provides for a civil cause of action and damages. 18 U.S.C. § 2707.

The Stored Communications Act requires that, when the government seeks such records from a service provider, it must obtain a court order after submitting an application identifying "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

Courts have been inconsistent regarding the applicability of the SCA to social networks and the discoverability of information contained on social media. Some courts have ignored the SCA and permitted broad production of a party's entire social network site on the theory that the information is public because it is disclosed to third parties. Other courts have attempted to apply the SCA, but ordered portions of the social network site to be produced. *See* Miguel Helft and Claire Cain Miller. *News Analysis: 1986 Privacy Law is Outrun by the Web,* The New York Times, Jan. 9, 2011.

3. The Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act (CFAA), Title 18 U.S.C. § 1030, criminalizes unauthorized access to computers to obtain financial information or commit fraud, among other actions. Hacking and malicious viruses are also criminalized.

The statute contains a wide variety of penalties for violations, including fines and maximum imprisonment ranging from one to ten years, depending on the circumstances. 18 U.S.C. § 1030 (c)(2)(A-C). *See, e.g., U.S. v. Phillips*, 477 F.3d 215 (5th. Cir. 2007) (affirming a conviction for intentionally accessing a protected computer without authorization and recklessly causing damage, including the assessment of over $170,000 in restitution).

B. State Laws

There are state law counterparts to the Federal Wiretap Act and the Stored Communications Act. In addition, there are statutes imposing criminal penalties and civil liability for other specific internet related actions. In particular, the Texas Penal Code makes unauthorized access to a computer a crime and includes several Internet crimes, including online impersonation.

1. The Texas Wiretap Acts

The Texas criminal wiretap statute is found in Texas Penal Code Section 16.02 and is substantially similar to the Federal Wiretap Act. The statute criminalizes the interception of a wire, oral, or electronic communication, and an offense is a second-degree felony. *See* Tex. Penal Code § 16.02(f). In essence, a person violates the wiretap statute by intentionally recording, or intentionally disclosing the contents of, a "wire, oral, or electronic communication." Tex. Penal Code Ann. § 16.02(b)(1), (b)(2). For purposes of the wiretap statute, an "oral communication" is one "uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation." Tex. Penal Code Ann. § 16.02(a).

The Texas statute prohibiting the unlawful interception of electronic communications applies to interspousal telephone wiretaps. *See Duffy v. State*, 33 S.W.2d 17, 23 (Tex. App.—El Paso 2000, no pet.) (Texas wiretap statute prohibits a spouse from intercepting the other spouse's telephone calls). Texas follows the vicarious consent doctrine, allowing a parent to vicariously consent to a recording on behalf of his or her child. *See Alameda v. State*, 235 S.W.3d 218, 233 (Tex. Crim. App. 2007); *see also Allen v. Mancini*, 170 S.W.3d 167, 172 (Tex. App.—Eastland 2005, pet. denied) (in a modification action, father who was JMC could consent on behalf of his daughter to a recording between the daughter and her mother).

The civil wiretap act is found in Chapter 123 of the Texas Civil Practice and Remedies Code and mirrors the civil penalties in the federal statute in several respects. Tex. Civ. Prac. & Rem. Code § 123.002. The Act provides that an aggrieved party may sue a person who intercepts communications and provides for damages of $10,000 *for each occurrence.*

2. Texas Penal Code Section 16.04; Unlawful Access to Stored Communication

The Texas counterpart to the Stored Communication Act is found in Texas Penal Code Section 16.04, which provides: "A person commits an offense if the person obtains, alters, or prevents authorized access to a wire or electronic communication while the communication is in electronic storage."

The Texas act provides that "[a] court shall issue an order authorizing disclosure of contents, records, or other information of a wire or electronic communication held in electronic storage if the court determines that there is reasonable belief that the information sought is relevant to a legitimate law enforcement inquiry." Tex. Code Crim. Proc. art. 18.21, sec. 5(a).

The State must comply with both Texas law and the Stored Communications Act to obtain stored records. The information required for a court order under the Stored Communications Act is less stringent than the standard for probable cause to obtain a search warrant. The State's warrantless acquisition of four days' worth of historical cell-site-location information (CSLI) recorded by the cell-phone service provider did not violate the Fourth Amendment's protections from unreasonable search and seizure because a third-party (AT&T) gathered and maintained the information as business records of the service provided to the customer and there was no reasonable expectation of privacy in the data. *Ford v. State*, 477 S.W.3d 321, 330 (Tex. Crim. App. 2015).

3. Texas Penal Code Section 32.51; Fraudulent Use or Possession of Identifying Information

Section 32.51 of the Texas Penal Code makes it a crime to obtain, possess, transfer or use another person's identifying information without consent with the intent to harm or defraud. The relevant statutory language states: "A person commits an offense if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of: (1) identifying information of another person without the other person's consent." Tex. Penal Code § 32.51(b)(1). The Texas Court of Criminal Appeals has determined that the statutory language is ambiguous because the word "item" is statutorily undefined and it is reasonably susceptible to more than one understanding in this context. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015)

Although the law was designed to criminalize identity theft, it has also penalized the creation of, and posting to, a social media site in another person's identity. *See Ex Parte Harrington*, ___S.W.3d___, No. 14-16-00059-CR, 2016 WL 3902228, at *4 (Tex. App.—Houston [14th Dist.] July 14, 2016, no. pet. h.) (concluding that section 32.51 was not constitutionally overbroad and rejecting argument that it was a "thought crime"); *see also Roller v. State*, No. 13-09-00175-CR, 2010 WL 2783764 (Tex. App.—Corpus Christi July 15, 2010, pet. ref'd) (mem. op.) (affirming conviction for setting up false MySpace page and posting explicit photos of complainant).

4. Breach of Computer Security

Texas Penal Code Section 33.02 covers breach of computer security and states that it is a crime to knowingly access a computer or computer network without the effective consent of the owner. A violation of this section ranges from a Class A misdemeanor to a felony of the first degree, depending on the dollar amount involved in the case. Tex. Penal Code § 33.02(b).

No violation of Texas Penal Code section 33.02 was found where the defendant's unmarked and unlocked flash drive was left in a common-use computer facility. *Kane v. State*, 458 S.W.3d 180, 187-88 (Tex. App.—San Antonio 2015, pet. ref'd). Therefore, the evidence obtained from the flash drive was legally obtained and the denial of the defendant's motions to suppress was affirmed. *Id.*

Unauthorized viewing of emails is not expressly included in the Texas statute. Criminal prosecutions may nonetheless result, however. For example, a Michigan man was tried for reading his wife's emails under a felony statute. The 1980 Michigan statute at issue also does not mention that reading another person's emails is a crime. The statute merely states as follows:

> A person shall not intentionally access or cause access to be made to a computer program, computer, computer system, or computer network to devise or execute a scheme or artifice with the intent to defraud or to obtain money, property, or a service by a false or fraudulent pretense, representation, or promise.

Because the Michigan law is similar to the Texas law, an aggressive prosecutor could seek to apply the law to viewing a spouse's email.

5. Online Impersonation

Texas Penal Code Section 33.07 makes it a crime to:

(a) use the name or persona of another person to create a web page on a commercial social networking site or to post one or more messages on a commercial social networking site without obtaining the other person's consent and with the intent to harm, defraud, intimidate, or threaten any person.
(b) send an electronic mail, instant message, text message, or similar communication that references a name, domain address, phone number, or other item of identifying information belonging to any person without obtaining the other person's consent, with the intent to cause a recipient of the communication to reasonably believe that the other person authorized or transmitted the communication, and with the intent to harm or defraud any person.

To establish an offense under section 33.07, an intent to harm must be established. The harm need not be physical. *See Hudspeth v. State*, 31 S.W.3 409, 411 (Tex. App.—Amarillo 2000, pet. ref'd). Emotional distress can be sufficient. *White v. State*, No. 14-05-00454-CR, 2006 WL 2771855 (Tex. App.—Houston [14th Dist.] Sept. 28, 2006, pet. ref'd) (mem. op.); *see also Ex parte Dupuy*, ___S.W.3d___, No. 14-15-00677-CR, 2016 WL 3268442, at *8 (Tex. App.—Houston [14th Dist.] June 14, 2016, no pet. h.) (reviewing bail and considering seriousness of third degree felony charges against defendant who allegedly posted advertisements in escort section of adult website with true names, photos, and phone numbers of complainants).

The statute has survived recent constitutional challenges. *State v. Stubbs*, No. 14-15-00510-CR (Tex. App.—Houston [14th Dist.] Aug. 9, 2016, no pet. h.) (reversing finding that section 37.07 was unconstitutional); *Ex parte Bradshaw*, No. 05-16-00570-CR (Tex. App.—Dallas Aug. 23, 2016, no pet. h.) (rejecting constitutionality challenge).

6. Civil Action for Harmful Access by Computer

Section 143.001 of the Texas Civil Practice and Remedies Code creates a cause of action to "a person who is injured or whose property has been injured as a result of a violation under Chapter 33" of the Texas Penal Code. A prevailing party is entitled to actual damages and reasonable attorney's fees.

A recent opinion from Dallas, *Pickens v. Cordia*, 433 S.W.3d 179 (Tex. App.—Dallas 2014, no pet.) discusses this cause of action. The defendant, the son of T. Boone Pickens Jr., is a recovering drug addict who, as an "interventionist," helps addicts "to get and stay clean." He also writes a blog that he says has as its "primary theme" his own "history of, and then recovery from, substance addiction." His family members sued him for harmful access by computer, invasion of privacy, defamation, and other causes of action based on remarks he published about them on his blog. *Id.* at 182.

In seeking dismissal of the suit, the defendant was required to show that the plaintiffs' allegations related to a matter of public concern as defined by the TCPA, the Texas Citizens' Participation Act. *See* Tex. Civ. Prac. & Rem. Code §§ 27.001(3), (7); 27.005(b). The TCPA provides an expedited means for dismissing actions involving the exercise of certain constitutional rights, including free speech. *See* Tex. Civ. Prac. & Rem. Code § 27.001–.011

Although the evidence showed some previous coverage regarding T. Boone Pickens outside the business world, the appellate court found the defendant had not made the necessary statutory showing to establish the kind of

prominence associated with general-purpose public figures. *Pickens,* 433 S.W.3d at 186. The Court of Appeals reversed the dismissal of the harmful access by computer cause of action. *Id.* at 187.

VII. DEFAMATION

Defamation is a broad term covering slander and libel. Slander is a false statement made to injure the reputation of a person. Libel is a similar statement that is published, usually in writing. The Internet, because of the freedoms it provides, is a potential source of defamatory issues. The *Pickens* case discussed above also addressed defamation. 433 S.W.3d at 187. The family alleged the blog contained false and defamatory statements about them, and the appellate court noted, "free speech is not absolute and does not insulate defamation." *Id.* at 187. Therefore, the Court of Appeals affirmed the trial court's denial of the motion to dismiss on this claim.

Lawyers face huge difficulties when trying to address unfavorable online comments. In addition to client confidentiality issues addressed above, lawyers should be cautious in responding to a disgruntled client to avoid exacerbating the problem. As recently reported in *Texas Lawyer*, a Dallas firm has sued an anonymous "Ben Doe" who allegedly wrote a negative Google Review about the firm. *See* Angela Morris, *Dallas Firm Sues Doe Defendant Over Online Review*, Texas Lawyer, Jan. 16, 2012, p. 5. As alleged in the petition, the review stated, "Bad experience with this firm. Don't trust the fake reviews here." In the petition, filed December 22, 2011, in Travis County's 98th District Court, the firm alleges the review is defamatory because it "implies professional incompetence" and "alleges dishonesty and fraudulent conduct." The firm felt there was no other option than to sue "Ben," so that it could subpoena Google to learn the reviewer's identity.

Debra Bruce, president of Lawyer-Coach in Houston, a legal consulting firm, believes it is a "big mistake" for firms to sue the authors of negative reviews. "I think they'll draw more attention to it. They'll hurt themselves more than help themselves," says Bruce. Jay Pinkert, a principal at Tenacious Marketing and Communications in Austin, which offers legal marketing services, says it "boggles the mind" that firms would sue online reviewers. By filing suit, the firm "created a story where there was none: Now it will show up in search, now it will attract attention." Bruce and Pinkert give the same advice about the best way for firms to react to negative reviews: Post responses to express concern about the reviewers' experiences with the firm, and invite the reviewers to discuss their issues offline to resolve them. *See* Morris, *supra.*

By posting on YouTube a video in which he solicited plaintiffs for a class action, the California 1st District Court of Appeal ruled that a lawyer had opened himself up to a defamation suit and could not use the state's anti-Slapp law, designed to protect free speech and public participation, to ward it off. *See* Kate Mosier, *Lawyer Sued Over You Tube Video Can't Fight Back With Anti-Slapp Law,* Feb. 1, 2012 (available at http://www.law.com).

The Texas anti-Slapp law, the TCPA, is set forth in Chapter 27 of the Texas Civil Practice and Remedies Code. The Legislature explained its purpose in enacting the TCPA was "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code § 27.002. The Act contains a "commercial speech exception" and does not apply to a suit against "a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer." Tex. Civ. Prac. & Rem. Code § 27.010(b).

Lawyer advertising is commercial speech. *See Neely v. Comm'n for Lawyer Discipline,* 196 S.W.3d 174, 181 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). In a recent case, the Court of Appeals found the lawyers' television advertisement was created primarily to attract clients; therefore, it was commercial speech and exempt from the protection of TCPA pursuant to Section 27.010(b). *Miller Weisbrod, L.L.P. v. Llamas-Soforo, M.D.*, No. 08-12-00278-CV (Tex. App.—El Paso Nov. 25, 2014, no pet.) (mem. op.).

VIII. EMPLOYEE USE OF SOCIAL MEDIA

Because the use of social media allows someone to immediately communicate with exponential numbers of people, employers have increased concerns regarding employee communications. Due to perceived anonymity, an employee may engage in conduct online that the employee might refrain from in person, without understanding that online communications may be traced to a particular user. The employee may not be fully aware of the ethical implications of social media given the relative newness of these online activities.

A partner or supervising lawyer is in a position of authority over the work of other lawyers and may be disciplined for permitting another lawyer to violate the disciplinary rules. In addition to governing a lawyer's own conduct, Texas Disciplinary Rule of Professional Conduct 8.04 provides that a lawyer may not "violate these rules, knowingly assist or induce another to do so, or do so through the acts of another." While Rule 5.01 of the Texas

Disciplinary Rules of Professional Conduct follows the general principle that a lawyer is not vicariously subjected to discipline for the misconduct of another person, under Rule 8.04, a lawyer is subject to discipline if the lawyer knowingly assists, induces, orders or encourages another to violate these rules. Comment 4 to Rule 5.01 also suggests that a supervising lawyer who knows that a supervised lawyer misrepresented a matter to an opposing party in negotiation, may be required by Rule 5.01(b) to correct the resulting misunderstanding.

Lawyers also have ethical responsibilities regarding non-lawyer assistants, including secretaries, paralegals, and law student interns. These assistants act for the lawyer in rendition of the lawyer's professional services. A lawyer should give these assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. Rule 5.03 provides that a lawyer will be subject to discipline for the violation of these rules by an assistant if the lawyer "orders, encourages, or permits the conduct involved," and "knowingly fails to take reasonable remedial action to avoid or mitigate the consequences" of the misconduct. Tex. Disc. R. Prof. Conduct 5.03(b).

The Philadelphia Bar Association's Professional Guidance Committee has issued an ethics opinion that a lawyer may not ask a non-lawyer assistant to "friend" an unrepresented witness on Facebook without revealing that she is affiliated with the lawyer or the true purpose of the friend request. Opinion 2009-02 (March 2009). The Pennsylvania ethical rules discussed in the opinion are substantially the same as those in Texas. In the opinion, the Committee found that the deception in concealing the purpose of the access would violate Rule 4.1's prohibition against making false statements of fact.

There are many risks to employers from employee misuse of social media. Some of these dangers are that employees may engage in:

- copyright infringement: posting content without permission from the owner;
- trademark infringement: showing third party logos or trademarks without permission;
- invasion of right of privacy: showing a person's image or likeness without permission;
- defamation, libel and slander: making false claims about a person;
- false advertising or unfair competition: making false claims about a service; and
- disclosure of proprietary or confidential information.

IX. TIPS FOR LAWYERS USING ONLINE SOCIAL NETWORKING

Lawyers should follow some of the same advice they give to clients: treat social media as any other form of communication, subject to the same ethical rules. The following tips can help avoid problems for attorneys who use online social networking:

- Be very clear who you are online. When an attorney networks, he should identify his profession as a lawyer but never engage in offering any legal advice.
- Look very carefully before joining a site. Evaluate whether the site is appropriate for lawyers.
- Make sure all entries, posted anywhere online, are updated and correct.
- Be wary of posting anything specific about clients and the firm.
- Be careful not to solicit clients.
- With the tendency to quickly send electronic communications, it is easy to write before thinking and to lose track of what is written.
- Think long-term. View anything written through the eyes of a client or prospective client. Once something is posted, it might live forever in the world of Google, even if you think the offending passage has been deleted.

X. CONCLUSION

Social media is a huge part of our personal and professional lives. These sites provide exceptional marketing opportunities and are used frequently as litigation tools. Lawyers are now beginning to identify the ethical issues encountered with social networking, and the rules governing our professional conduct will continue to evolve and adapt at a rapid pace. All lawyers should stay abreast of these changes and the effects on their clients and their practices.