

# 2014 Gaming Law Conference

Presented by:  
The State Bar of Nevada  
Gaming Law Section

November 7th, 2014  
9:00 am – 5:00 pm

Red Rock  
Casino ~ Resort ~ Spa  
Las Vegas, NV



6 CLE Hours

600 E. Charleston Blvd. Las Vegas, NV 89104 702-382-2200

9456 Double R Blvd. Suite B Reno, NV 89521 775-329-4100



# Gaming Law Conference

*Presented by the State Bar of Nevada, Gaming Law Section*

Friday, November 7, 2014 | 9:00 a.m. - 5:00 p.m. | Red Rock Casino, Resort & Spa  
6 Hours CLE Credit (includes 2 Hours Ethics and 1 Hour Substance Abuse)

## Agenda

9:00 a.m. to 10:00 a.m.

### Women General Counsels

Phyllis Gilland, General Counsel, American Casino & Entertainment Properties (Moderator)  
Lynn Handler, Vice President and General Counsel, Palms Casino Resort  
Katie Lever, General Counsel, Senior VP of Legal and Compliance, Bally Technologies  
Kim Sinatra, Senior Vice President, General Counsel & Secretary, Wynn Las Vegas  
Katie Fellows, Vice President and General Counsel, Hard Rock Hotel & Casino  
Christina M. Mills, Senior Counsel, Aruze Gaming America, Inc.

10:00 a.m. to 10:10 a.m.

### Break

10:10 a.m. to 11:10 a.m.

### Problem Gambling and the Law: Implications for Clients, Companies & Others

Bo Bernhard, Ph.D., Executive Director, International Gaming Institute - UNLV  
Ngai Pindell, Associate Dean for Academic Affairs & Director of Gaming Law Program, William S. Boyd School of Law - UNLV

11:10 a.m. to 11:20 a.m.

### Break

11:20 a.m. to 12:20 p.m.

### AB 360 Interim Legislative Committee

Peter C. Bernhard, Of Counsel, Kaempfer Crowell (Moderator)  
Greg Brower, Senator, Nevada State Legislature (R-District 15)  
William C. Horne, Assembly Majority Leader, Nevada State Legislature (D-District 34)  
Mark A. Lipparelli, Founder & CEO, Gioco Ventures, LLC  
Tick Segerblom, Senate Judiciary Chairman, Nevada State Legislature (D-District 13)

12:20 p.m. to 1:45 p.m.

### Lunch

### A Conversation with Elaine Wynn

Director for Wynn Resorts and President of the Nevada State Board of Education



*Punam Mathur, Moderator*

Sponsored by:



1:45 p.m. to 2:45 p.m.

### Regulators Roundtable

Tony Alamo, M.D., Chairman, Nevada Gaming Commission  
A.G. Burnett, Chairman, Nevada Gaming Control Board

2:45 p.m. to 3:00 p.m.

### Break

3:00 p.m. to 5:00 p.m.

### Technethics: The Ethics of Social Media

Stuart Tiecher, Esq. "CLE Performer"

Snack Table Sponsored by:



Other Sponsors:



Register Online at <https://www.regonline.com/2014gaminglawconference>



# Women General Counsels

9:00 a.m. to 10:00 a.m.

Phyllis Gilland - Moderator

## Panel

Lynn Handler

Katie Lever

Kim Sinatra

Katie Fellows

Christina M. Mills

## Break

10:00 a.m. – 10:10 a.m.

## Women General Counsels

### **Phyllis A. Gilland**

Senior Vice President, General Counsel and Secretary  
American Casino & Entertainment Properties

Moderator



Ms. Gilland serves as American Casino & Entertainment Properties, LLC Senior Vice President, General Counsel and Secretary since October 2008. Ms. Gilland is also corporate Compliance Officer. She oversees corporate legal issues and is responsible for the Risk Management, including casualty insurance, Compliance investigations and oversight of Human Resources, Security and Surveillance departments. Ms. Gilland has developed and implemented the legal strategy for many companies in the areas of regulatory and business compliance, corporate governance, claim management, real estate matters, risk management, human resources, casualty insurance and welfare benefits, security and surveillance and mergers and acquisitions.

She also has experience operating businesses with responsibilities for overseeing sales, marketing, finance and human resources departments. Prior to joining ACEP, from 2000 to 2007 Ms. Gilland served as general counsel and chief financial officer for Taylor Construction Group Companies, headquartered in Des Moines, Iowa with affiliates around the country, including Las Vegas, Nevada. Prior to Taylor Construction, she served as general counsel for Principal International, Inc. from 1999 through 2000 and associate general counsel for Principal Financial Group from 1994 through 1999. In addition, Ms. Gilland has held positions with the Resolution Trust Corporation and KPMG.



### **Katie Fellows**

Vice President and General Counsel  
Hard Rock Hotel & Casino

Ms. has served as the Vice President and General Counsel for the Hard Rock Hotel & Casino Las Vegas since September 2011. Prior to her time with the Hard Rock Hotel & Casino, Ms. Fellows served as Senior Corporate Counsel for Caesars Entertainment where she managed legal affairs for Bally's, Paris, Planet Hollywood, Harrah's Lake Tahoe and Harvey's Lake Tahoe. Ms. Fellows began her career in private practice with the firm Jones Vargas, where her practice focused on local government affairs, which included providing legal advice relating to licensing and zoning matters and frequently representing clients before City Council and County hearings.

Ms. Fellows received her J.D. from the University of Nevada Las Vegas, William S. Boyd School of Law, where she was the Nevada Law Editor for the Nevada Law Journal, and her B.A. in Political Science from Yale University, where she was Captain of the Yale Women's Ice Hockey Team.

Ms. Fellows is also the current Chairman of the Board for the American Red Cross, Southern Nevada Chapter, a graduate of Leadership Las Vegas Class of 2008 and a member of the Yale Alumni Schools Committee.

**Lynn Handler**

Vice President and General Counsel  
Palms Casino Resort



Ms. Handler joined Palms Casino Resort in early 2014, and serves as its vice president and general counsel. As such, she leads Palms' legal, surveillance and risk management departments. She also serves as special counsel to Palms' board of directors.

Prior to joining Palms, Ms. Handler was chief legal counsel for William Hill Race & Sports Book, a newly-created U.S. subsidiary of a U.K. conglomerate. At William Hill, Ms. Handler was responsible for all domestic legal affairs of the company, as well as oversight for its corporate governance matters, while creating and structuring the law department of three separate entities merged to create the new U.S. subsidiary.

Before joining William Hill, Ms. Handler held positions with Pinnacle Entertainment, Inc. in Las Vegas as its Vice President and Corporate Counsel and Associate General Counsel; Resorts Atlantic City, Inc., as its Associate General Counsel and Director of Risk Management, respectively. She has also been in practiced casino law in private practice, most notably with Cooper Levinson in Atlantic City, NJ, a firm nationally known for its casino law department.

**Katie Lever**

General Counsel and Senior Vice President of Legal and Compliance  
Bally Technologies, Inc.



Katie Lever is General Counsel and Senior Vice President for Bally Technologies, a leading gaming technology innovator. In this role she is responsible for all legal and regulatory matters related to Bally Technologies' multi-faced operations, including management of its legal, intellectual property and compliance departments and providing strategic legal advice for the Company's international and iGaming business.

Ms. Lever joined Bally from SHFL entertainment, where she was General Counsel and Executive Vice President and which was acquired by Bally in November 2013. Prior to joining SHFL entertainment in 2011, Ms. Lever was General Counsel and EVP of Global Cash Access, the gaming industry's largest cash access provider, and prior to that was a Partner with the Las Vegas law firm Schreck Brignone (now Brownstein Hyatt Farber Schreck), where she practiced transactional, commercial and corporate law for many of the largest gaming operators. Before joining Schreck Brignone, Ms. Lever practiced in Canada representing high-tech and bio-tech companies in private and public equity transactions.

She is the Vice President of the International Association of Gaming Advisors (IAGA) and a member of the State Bar of Nevada and The Law Society of British Columbia. She received her law degree from the University of Windsor.

**Christina M. Mills**

Senior Counsel  
Azure Gaming America, Inc.

Christina Mills joined Aristocrat Technologies, Inc. as a law clerk, while attending UNLV- William S. Boyd School of Law. Upon graduation and passing the Nevada Bar, she was promoted to Associate Counsel.

In 2011, she was hired as Associate General Counsel for MGM Resorts International with corporate transactional responsibilities, as well as supporting the Monte Carlo Resort Casino's operations team. After MGM Resorts, Christina was Associate General Counsel for Station Casinos, LLC. In 2013, she joined SLS Las Vegas as General Counsel and supported the development and opening of the resort casino in late 2014. Christina is currently Senior Counsel at Aruze Gaming America, Inc.



**Kim Sinatra**

Executive Vice President and General Counsel  
Wynn Resorts  
Las Vegas, Nevada

Ms. Sinatra currently serves as Executive Vice President and General Counsel for Wynn Resorts, Limited, a \$20 billion mark cap NASDAQ company which develops, owns and operates luxury destination casino resorts in Las Vegas, Nevada and Macau SAR. The Company was also recently designated as the awardee in Region 1 in Massachusetts. Ms. Sinatra joined the company in January 2004 as Senior Vice President and General Counsel of its development activities.

From 2000-2003 Ms. Sinatra served as Executive Vice President and Chief Legal Officer of Park Place Entertainment, Inc. (which was later acquired by Caesars Entertainment). She has also served as General Counsel for The Griffin Group, Inc., Merv Griffin's investment management company, and as a partner in the New York office of Gibson, Dunn & Crutcher LLP.

Ms. Sinatra received her JD from the University of Chicago and BA in Economics from Wellesley College.

Ms. Sinatra, her husband and three sons reside in Las Vegas, Nevada.

# What's on a General Counsel's Mind?

## Legal Matters and Trends

### 1. New Technology

#### Human Resources:

By 2025, it is estimated that ½ of the jobs currently performed in the US will be performed by machines. NEC Corp and La Trobe University Business School are currently testing a robot "Sophie" that is designed to pre-screen job candidates and record the conversation while also noting applicant's cognitive verbal responses and monitoring changes in facial expression, blood pressure, heart rate and more.

#### Mobil Gaming:

It's already here and not going away.

#### Computerized Slot Floors:

In addition to working with Minimum Internal Control Standards of each jurisdiction, also need to know and understand physical access and controls on property.

### 2. Cyber Security/ Data Security/Privacy

#### Data Security:

One of the top concerns for in-house counsel. Threat challenges come with a new language general counsel need to become familiar with (ex: Target, Sands, Home Depot, malware, spear phishing, email, spam, data breaches).

#### The "Cloud":

Issues identified with Cloud storage versus business needs and wishes.

#### Data Breach:

Can require notification to persons in every state and country from which a person resides where their personal information was disclosed.

Need for outside counsel and other vendors to support recovery efforts.

Prepare an “early warning system” and “plan of action” should a breach occur.

Work closely with IT and IT security committees (marketing and database groups).

Breaches could be happening in your company and you may have no clue it's happening. Need business focused general counsel to provide business advice for what is now considered just the cost of doing business.

### **3. Compliance Issues**

#### Management Compliance:

Assurance of Board of Directors that employees are complying with domestic and foreign laws and regulations involving areas such as fraud, bribery and acceptance of gifts and entertainment. Growing complexity of the regulatory state.

### **4. Social Media**

#### Company Policy's:

Utilization of company electronics/company policies;

#### NLRB:

Pronouncements limiting company's rights to respond/discipline;

#### Corporate Crisis Management Plan:

What would you do – do you have a plan in place?

### **5. How can Law Firms Help**

#### Information and CLE:

Make internal CLE programs available;

Issue focused newsletters;

Alerts;

Webinars;

Topical lunch and learns by subject matter





# Problem Gambling and the Law: Implications

10:10 a.m. to 11:10 a.m.

## Panel

Bo Bernhard

Nigel Pindell

## Break

11:10 a.m. – 11:20 a.m.

## **Problem Gambling and the Law: Implications for Clients, Companies & Others**

### **Dr. Bo Bernhard**

Executive Director  
International Gaming Institute - UNLV  
Las Vegas, Nevada



A 5<sup>th</sup> generation Nevadan, Dr. Bo Bernhard calls Las Vegas home, but he works frequently in jurisdictions as diverse as South Africa, Australia, Singapore, South Korea, Macao, Mexico, Vietnam, Taiwan, Argentina, Brazil, Russia, Portugal, Austria, Greece, England, and Canada. Dr. Bernhard began his research career at Harvard University, where as an undergraduate he completed a double major (sociology and psychology) *magna cum laude* thesis on the community impacts of the gaming and industry in Nevada. The foundations of this analysis have since been extended worldwide, and by the age of 30, Dr. Bernhard had lectured on his research on six continents.

After earning his Ph.D. in 2002, Dr. Bernhard was named the inaugural Research Director at the UNLV International Gaming Institute (IGI), and he was awarded a dual professorship in hotel management and sociology. In 2011, he was named Executive Director at the IGI, where he now oversees all research and academic functions.

Overall, he has directed over \$2 million in grant-funded research projects, on subjects ranging from problem gambling to the social impacts of casino industries to responsible gaming features to internet gambling. These efforts have earned him several awards of late: in 2007, his focus on globalization earned him the World Affairs Council's International Educator of the Year award; in 2008, he was given the UNLV Hotel College's Boyd Award for Research; in 2009, he was given the Hotel College's top teaching award and the university-wide Spanos Teaching Award; in 2010, he was named a Lincy Fellow at Brookings Mountain West; and in 2012 he was given the university-wide Barrick Scholar Award and the hotel college's Denken Award for research.



### **Ngai Pindell**

Associate Dean for Academic Affairs & Director of Gaming Law  
Program  
William S. Boyd School of Law – UNLV

Las Vegas, Nevada Professor Pindell earned his J.D. degree in 1996 from Harvard University, where he served as executive editor of the *Harvard Black Letter Journal*. After graduation, Professor Pindell practiced community development law in a nonprofit law firm in Baltimore, Maryland. He was later a Fellow, and also Visiting Assistant Professor, at the University of Baltimore School of Law where he taught the Community Development Clinic. Professor Pindell came to the Boyd School of Law in 2000. His research interests are in economic development and housing, and he teaches Property, Land Use Regulation, Local Government Law and Wills, Trusts & Estates. He is a board member of the Society of American Law Teachers (SALT) and co-president from 2011-2013.



# **AB 360 Interim Legislative Committee**

11:20 a.m. to 12:20 p.m.

Peter C. Bernhard - Moderator

## **Panel**

Greg Brower

William C. Horne

Mark A. Lipparelli

Tick Segerblom

## AB 360 Interim Legislative Committee

### **Mr. Bernhard**

Of Counsel  
Kaempfer Crowell  
Las Vegas, Nevada

Moderator



In 2001, Mr. Bernhard was appointed as chairman of the Nevada Gaming Commission, with regulatory and policy-making authority over all Nevada gaming licensees. He was re-appointed to serve four-year terms beginning in 2003, 2007 and 2011. He finished his service to the State on June 30, 2014 to facilitate smooth transition for the 2015 legislative session.

Prior to 2001, he served as a member and chairman of the Nevada Commission on Ethics. He has been a practicing attorney in Las Vegas, Nevada, since 1976, specializing in commercial litigation, reorganizations, and administrative law. Mr. Bernhard received his bachelor's degree in government from Harvard University in 1971 and his juris doctor degree from the National Law Center at George Washington University in 1975. He has served on various committees and organizations, including as a Nevada representative to the Ninth Circuit Judicial Conference, as Chair of the United States District Court Magistrate Selection Committee, and as a member of the Nevada Supreme Court Advisory Committee to Review the Nevada Rules of Civil Procedure.

During his tenure on the Nevada Gaming Commission, Mr. Bernhard has presided over the two largest combinations in Nevada gaming history (MGM-Mandalay Resorts and Harrah's-Park Place Entertainment), along with numerous licensing proceedings for newly-constructed facilities (Wynn, Red Rock Station, South Point) and for transfers of existing properties throughout the State of Nevada. As the policy-making body for gaming matters in Nevada, the Commission has recently evaluated regulatory concerns presented by internet gaming, by gaming expansion into new jurisdictions around the world, by evolving sources of capital (including increased investment in Nevada from private equity firms), and by the progression of server-based gaming, mobile gaming and other technological advances. During Mr. Bernhard's tenure, the Commission has also imposed the largest fines in Nevada gaming history for regulatory violations.

Mr. Bernhard is of-counsel to the Nevada law firm Kaempfer Crowell, primarily handling business litigation and real estate matters. He also represents Keep Memory Alive and the Cleveland Clinic Lou Ruvo Center for Brain Health, non-profit entities involved in research and clinical study of neurodegenerative disorders, such as Alzheimer's, Parkinson's, Huntington's, and ALS, handling the financing and business needs for the Frank Gehry-designed facility in downtown Las Vegas. He consults on regulatory issues and presents continuing education and training programs for the State Bar of Nevada, the University of Nevada Las Vegas, and the Executive Development Program at the University of Nevada Reno.



**Greg Brower**  
Senator  
Nevada State Legislature  
R- District 15

Mr. Brower represents Washoe County in the Nevada Senate where he serves on the Judiciary Committee. He is also a partner in the law firm of Snell & Wilmer where his practice is focused on civil and white collar criminal litigation, and administrative law, including Nevada gaming law matters. He previously served as U.S. Attorney for the District of Nevada, as a federal inspector general, as a federal agency general counsel, and at the U.S. Department of Justice headquarters in Washington, D.C. He has a J.D. from The George Washington University and a bachelor's degree in economics from the University of California, Berkeley.

**William C. Horne**  
Assembly Majority Leader  
Nevada Legislature  
D-District 34



Mr. Horne attended the UNLV Boyd School of Law, volunteering as a student attorney for the Child Welfare Clinic. William's sense of service to community and the examples set by his parents became more pronounced. He graduated in 2001 with a Doctorate of Jurisprudence. William worked as a law clerk while studying for his bar exam. After passing the bar, William decided to establish his own independent law firm rather than join the corporate establishment.

William is a devoted father to four children, Kayla, Chelsey, Henry, and Chloe. William is now a grandfather with the recent birth of his granddaughter Sarah. Despite his very busy schedule, William still has his priorities in order and makes time for family activities and helping with school work.

Through the 2007 and 2009 legislative sessions William has increased in seniority and provided steadfast leadership. William Horne currently serves as the Majority Whip.

He first chaired both the Commission for the Administration of Justice and the Corrections, Parole and Probation Committee. Horne now serves on the Commerce and Labor Committee and the Committee on Legislative Operations and Elections. He serves as chair for the Judiciary Committee which handles all criminal and gaming law. Nationally, Horne was named Chair of the Law and Criminal Justice Committee for the National Conference of State Legislators.

William continues his community and legislative work. In 2011 he was named the UNLV Greenspun College of Urban Affairs "Alumnus of the Year."



**Mark Lipparelli**  
Founder & CEO  
Gioco Ventures, LLC

Mr. Lipparelli is the founder of Gioco Ventures, LLC, a development stage technology/investment company and also serves as an advisor to clients in the gaming, entertainment and sports industries. Mr. Lipparelli recently completed a four-year term on the Nevada State Gaming Control Board including two years as Chairman. Prior thereto, Mr. Lipparelli served in several senior level management positions over a span of fifteen years with the gaming industry's leading technology companies including Bally Technologies, Shuffle Master, and Casino Data Systems.

Mr. Lipparelli currently serves as a member of the Board of Trustees of the University of Nevada Foundation and the Board of Directors of the National Center for Responsible Gaming.

During his regulatory tenure, Lipparelli served as a Board Trustee and Treasurer of the International Association of Gaming Regulators and was a member of the Gaming Policy Committee and the State Crime Commission in Nevada. In 2011, Mr. Lipparelli was named as *Regulator of the Year* for the Americas by the International Masters of Gaming Law and was named to an Advisory Panel on Sports Wagering to the International Olympic Committee. Mr. Lipparelli served five years as a member of the Board of Directors and two years as Vice Chairman of the Gaming Standards Association. Mr. Lipparelli graduated from the University of Nevada, Reno with an undergraduate degree in Finance, Master of Science degree in Economics, and is a graduate of the Executive Development Program sponsored by the Institute for the Study of Gambling and Commercial Gaming.

**Tick Segerblom**

Senate Judiciary Chairman  
Nevada State Legislature



Mr. Segerblom is the father of Nevada's Medical Marijuana law, SB 374, which was adopted by the 2013 legislature. He has served in the State Senate since 2012 and previously served in the State Assembly from 2006 to 2012. He currently serves as Chair of the Interim Subcommittee on Medical Marijuana and is the Chair of the Senate Judiciary Committee.

In his private practice Senator Segerblom specializes in the field of employee-employer relations and has been listed as one of Nevada's top employment lawyers in "The Best Lawyers in America" since 1993. He graduated from Pomona College in 1971 and received his law degree from the University of Denver in 1975. He is a member of the Nevada, Colorado and California bars.

# State Bar of Nevada Gaming Law Section

November 7, 2014  
Panel Presentation on AB 360

Moderated by Peter C. Bernhard  
William Horne  
Richard "Tick" Segerblom  
Gregory Brower  
Mark Lipparelli

## AB 360: Legislative Committee to Conduct Interim Study

- (i) Effects of Technology on Gaming;
- (ii) Distinction Between Restricted And  
Nonrestricted Gaming Licenses


## AB 360, Section 15(4)

4. The committee shall study, without limitation:

(a) The impact of modern and evolving technology upon gaming and the regulation of gaming;

(b) Interactive gaming in Nevada and other jurisdictions, and any proposed or enacted federal legislation in this area;

(c) The regulatory distinction between restricted and nonrestricted licensure, and the impact of technology upon this distinction;



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## AB 360, Section 15(4) (continued)

(d) The determination of whether the operation of slot machines is incidental to the primary business of a restricted gaming licensee, and minimum requirements that are or should be imposed upon such businesses;

(e) The effect of expanding capability of personal and portable electronic devices upon gaming and the regulation of gaming;





## AB 360, Section 15(4) (continued)

(f) The potential effects and consequences of authorizing the acceptance of race book and sports pool wagers made by an entity; and

(g) The effect of legislation approved by the 77th Session of the Nevada Legislature with regard to gaming and the regulation of gaming.



## Recommendation

<http://www.leg.state.nv.us/Interim/77th2013/Committee/Studies/ImpactTechGaming/Other/SummaryofRecommendationICA.pdf>

At its meeting on May 27, 2014, the Committee adopted the following recommendation:

- Request the drafting of a bill to amend Chapter 463 (“Licensing and Control of Gaming”) of Nevada Revised Statutes to expand the authority of the Nevada Gaming Commission to promulgate regulations that encourage development and deployment of gaming devices incorporating innovative, alternative, and advanced technologies. (BDR -61)



# Issues to watch: 2015 Legislature

- ▶ Possible gaming bills
- ▶ Technology issues
- ▶ Budget and financial issues
- ▶ Interactive gaming
- ▶ Wagering on elections
- ▶ Medical marijuana and gaming licensees
  
- ▶ Others???
- ▶ Questions???





# **A Conversation with Elaine Wynn**

12:20 p.m. to 1:45 p.m.

With Lunch Served

Punam Mathur – Moderator

# Elaine Wynn

## A Conversation with Elaine Wynn

Moderator



**Punam Mathur**

Speaker, Trainer, Writer  
Punam Mathur, LLC

Mathur was formerly Vice President of Employee & Community Engagement at NV Energy (2009-11), a position that connected her to approximately 2,700 employees throughout the 45,592-mile service territory of NV Energy, while participating in community events throughout Nevada. Prior to that, she served for 13 years in the gaming industry, by the end, as senior vice president, corporate diversity and community affairs, for MGM MIRAGE.

During her tenure, MGM MIRAGE received numerous awards in her areas of responsibility, including being ranked among the "Top 50 Companies for Diversity" by Diversity Inc magazine and one of the "Top Corporations in the U.S." for multicultural businesses by DiversityBusiness.com. Prior to joining Mirage Resorts in 1996, she had been with the Las Vegas Chamber of Commerce for six years, holding a variety of management positions, the last of which was Senior Vice President of Government Affairs.

Mathur currently serves as immediate past chair of the Board of Trustees for Three Square, a non-profit organization dedicated to eradicating hunger in southern Nevada. Additionally, she serves as a member of the advisory board for The Smith Center for the Performing Arts.

An avid supporter of education, she is an appointee to the Governor's Blue Ribbon Task Force on Education Reform, is a member of the Superintendent's Blue Ribbon Task Force on Empowerment and an Executive Committee member of the Nevada Partnership for Inclusive Education.

The Gay and Lesbian Community Center of Southern Nevada named Mathur Woman of the Year for 2009.

## **Elaine Wynn**

Director for Wynn Resorts

President of the Nevada State Board of Education



Elaine Wynn has established herself as a savvy business leader, influential philanthropist and dedicated crusader for children's welfare. She has served as Director of Wynn Resorts since 2000 and has helped guide the company's expansion from the opening of Wynn Las Vegas in April 2005 and Wynn Macau in September 2006 to the unveiling of Encore in December 2008.

As Director of Wynn Resorts, Wynn has overseen a multitude of details that have contributed to the creation of the "Wynn lifestyle." Prior to her current position, Wynn served in a similar capacity as Director of Mirage Resorts from 1976 to 2000.

Just as her success in business is indicative of Wynn's intellect, her humanitarianism is indicative of her heart. A past member of the Executive Board of the Consortium for Policy Research in Education, she has served on the State of Nevada Council to Establish Academic Standards and chaired for eight years the UNLV Foundation, (the private fundraising arm of University of Nevada, Las Vegas). In 2011, Wynn was appointed by Nevada's governor to co-chair a Blue Ribbon Education Reform Task Force that resulted in the enactment of ambitious new reform legislation.

She is the founding chairman of Communities in Schools of Nevada and was appointed as Chairman of the national board of Communities in Schools, the oldest, most successful stay-in-school organization in America.

Wynn's dedication to the community has garnered numerous awards and accolades including the Governor's Philanthropist of the Year in 2005 and an Honorary Doctorate from the University of Nevada Las Vegas in 1986. She was awarded one of seven National Promise of America Founder's Awards for improving children's lives at a ceremony at the White House. She is especially proud of the dedication of the Elaine Wynn Elementary School in 1991.

On January 8, 2013, Wynn was appointed by Governor Sandoval to serve a two-year term on the Nevada State Board of Education. She subsequently became elected unanimously by the board to serve as President of that body.

In 2011 she established the Elaine Wynn Studio for Arts Education at the Smith Center for the Performing Arts in Las Vegas. The Elaine Wynn Studio includes classrooms, conference rooms and offices for education program staff, interns, and artists in residence. The building's two performance spaces, a "black box" theater and cabaret theater, are also used for children's theater and educational programming.

Born and raised in New York City, Wynn graduated from George Washington University in 1964 with a BA in Political Science. She resided in Washington D.C. before moving to Las Vegas in 1967.



# Regulators Roundtable

1:45 p.m. to 2:45 p.m.

Roundtable

Tony Alamo

A.G. Burnett

Break

2:45 p.m. – 3:00 p.m.

## Regulators Roundtable



**Tony Alamo, M.D.**  
Chairman  
Nevada Gaming Commission

Nevada State Legislature Born and raised in Nevada, Mr. Alamo currently serves as Chairman of the Nevada Gaming Commission. He was originally appointed to the Commission in May 2008, and was reappointed by Governor Sandoval in 2012. When announcing Dr. Alamo's appointment as Chair in July 2014, Governor Sandoval stated, "Tony's background and experience chairing several state commissions will ensure a smooth transition to the Gaming Commission and its effective regulation of the gaming industry."

From 2001 – 2007, Dr. Alamo served on the Nevada State Athletic Commission as a member and later as its chair, making him the first person in Nevada history to chair both the Athletic Commission and the Gaming Commission. He also served as a licensed ringside physician, and was the Chairman of the Athletic Commission's Medical Advisory Board in 2000.

He earned his undergraduate degree in chemistry from the University of Nevada, Las Vegas, and his medical degree from the University of Southern California, School of Medicine. After completing his residency at Los Angeles County-USC General and Huntington Hospitals, Dr. Alamo returned to Las Vegas and founded the Alamo Medical Clinic in 1994. More than twenty years later, he continues to own and operate the primary care clinic, located in the City of Henderson, which is now a multi-physician group.

Dr. Alamo is an Organizer and Director of the Bank of George, which is a community Bank chartered by the FDIC in 2007. He served as Chief of Staff at Sunrise Hospital and Children's Medical Center from 2002 – 2004, as well as Chief of Staff at San Martin St. Rose Hospital from 2006 – 2009.

With specialized training in Tactical Trauma/Medicine, Dr. Alamo has volunteered as a Tactical Physician for the Las Vegas Metropolitan Police Department (LVMPD)-SWAT Bureau for over 14 years. In April 2006, following a hostage barricade situation, he was the first civilian awarded the "Medal of Unit Valor" for "Valorous Conduct". Previously, the LVMPD had awarded the prestigious honor only to commissioned police officers.

An accomplished pilot, Dr. Alamo holds a Commercial Pilot Multi-Engine Instrument Rating. He lives in the City of Henderson with his family.

**A.G. Burnett**

Chairman  
Nevada Gaming Control Board

Mr. Burnett is the Chairman of the Nevada State Gaming Control Board. He was appointed to this role by Governor Brian Sandoval in October 2012. Prior to that, he was a Member of the GCB, appointed by Governor Sandoval in January 2011.



A.G. currently also serves as a Trustee and the Treasurer for the International Association of Gaming Regulators.

Before being appointed to the Board, Mr. Burnett served as Deputy Chief of the Corporate Securities Division for the GCB. In that position, he handled legal matters that came before the Division and oversaw regulatory and investigative activities. He worked extensively with emerging gaming jurisdictions in their efforts to regulate gaming, and currently oversaw the compliance activities of publicly-traded Nevada licensees.

Prior to his time at the Board, A.G. served as Senior Deputy Attorney General in the Gaming Division of the Nevada Attorney General's Office, representing the Gaming Control Board, the Nevada Gaming Commission, and the Nevada Commission on Sports. During that time, he handled litigation matters on behalf of the Board, including disciplinary actions, tax hearings, and disputed licensing matters.

Before serving in the Attorney General's Office, A.G. was as an associate in the law firm of Robison, Belaustegui, Sharp & Low, engaging in civil litigation with an emphasis on employment and commercial litigation.

Mr. Burnett received his J.D. from Gonzaga University School of Law in 1996, and his B.A. in International Affairs and Political Science from the University of Nevada, Reno in 1992. A.G. served on the Executive Committee of the State Bar of Nevada's Gaming Law Section from 2000-2006, and also served on the Bar's Functional Equivalency Committee from 2001-2005. He is a member of the Nevada State Bar, and is licensed to practice before all Nevada and Federal courts.

He has spoken extensively on the issues of gaming regulation and regulatory compliance in numerous seminars and continuing legal education classes, including guest lectures at UNLV's Boyd School of Law.





# **Technethics: The Ethics of Social Media**

3:00 p.m. to 5:00 p.m.

Presenter

Stuart Tiecher

Conclusion of Conference

Thank you for attending.

## Technethics: The Ethics of Social Media



**Stuart Tiecher, Esq.**  
“CLE Performer”

Mr. Tiecher, Esq. is a professional legal educator who focuses on ethics law and writing instruction. A practicing attorney for over two decades, Stuart's career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession. Mr. Tiecher teaches seminars, provides in-house training to law firms and legal departments, and also gives keynote speeches at conventions and association meetings.

Stuart helps attorneys get better at what they do (and enjoy the process) through his entertaining and educational CLE Performances. His expertise is in “Technethics,” a term Stuart coined that refers to the ethical issues in social networking and other technology. Recently, Thomson Reuters published a book he wrote on the topic entitled, Navigating the Legal Ethics of Social Media and Technology. Stuart also speaks about “Practical Ethics”-- those lessons hidden in the ethics rules that enhance a lawyer's practice.

Mr. Tiecher is a Supreme Court appointee to the New Jersey District Ethics Committee where he investigates and prosecutes grievances filed against attorneys, an adjunct Professor of Law at Rutgers Law School in Camden, New Jersey where he teaches Professional Responsibility and an adjunct Professor at Rutgers University in New Brunswick where he teaches undergraduate writing courses.

## *Ethical Pitfalls in Social Networking Seminar Materials*

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

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

### ***1. Competence, Rule 1.1***

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

## **RULE 1.1 COMPETENCE<sup>1</sup>**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.  
Obtaining the requisite “knowledge and skill” through our interaction in social media

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

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

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<sup>1</sup> This paper purports to analyze the ABA Model Rules, but since copyright restrictions prohibit me from referencing the ABA Rules, most references in this paper to the “Rules” are actually references to the Delaware Rules of Professional Conduct. Minnesota is also a Model Rules state and while there are some differences between the Model Code and the Minnesota code, the portions of the ethics rules that are analyzed herein are substantively similar to the Minnesota Rules of Professional Conduct.

lining? Essentially, these attorneys are a research resource for the rest of us.

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

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

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

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

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

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

Thus, the increased availability of information may be an interesting, useful tool today, but the more prevalent it becomes, the greater the likelihood it will transform into an expectation. Will social

networking become considered part of the bare minimum investigation that a “competent” attorney performs. Could it lead the establishment of a “duty to tweet?” Will the commentary to the ethics rules in the future include a recommendation that attorneys “check the chatter” as a prerequisite to being properly thorough? It may seem far fetched, but it’s not so crazy. It’s happening in other areas of business—today it’s common practice for an employer to Google you or check out a prospective employee’s Facebook pages as part of the interview process. That didn’t exist a few short years ago.

Can we help another lawyer in an emergency situation via social networks?

Rule 1.1, Comment [3] states, **In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.**

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

The question, however, is whether you want to be responsible for advising that attorney without having the opportunity to provide adequate supervision or follow up. Think about it-- in the person-to-

person world, you'd give advice to a colleague and you could follow up with that person to see how things work out. However, once you give advice to a person in cyberspace, you may never see or hear from them again...until there's a problem! And I think we can all agree that if that attorney's head is on the ethical chopping block, he's going to do anything he can to get out of trouble, including throwing you under the cyber-bus.

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

## ***2. Confidentiality, Rules 1.6 and 1.9***

### **RULE 1.6 CONFIDENTIALITY OF INFORMATION**

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

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

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



- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

### **RULE 1.9 DUTIES TO FORMER CLIENTS**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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

Social networking is quickly becoming the primary mode of conversation for our clients. Chances are that our clients will be trying to use that medium to communicate with you as well. The problem, of course, is that posting information on a social networking site-- even on a client's Facebook "Wall" for example, is still out there all for the world to see. Remember that the lawyer's duty to retain

confidential information about a client is not altered just because we are dealing with a new medium.

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

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

### ***3. Unauthorized Practice of Law, Rule 5.5***

Pertinent Rules:

#### **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

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

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

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

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

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

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

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

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice

- and are not services for which the forum requires pro hac vice admission; or
- (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
- (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

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

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

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

Something to think about: this idea of being able to "transport knowledge across state lines," as

I like to put it, may give some ammunition to the proponents of liberalizing the rules regarding multi-jurisdictional practice. It also lends credibility to the argument that we need some sort of federally mandated ethics code that can govern cyberspace, like the FCC in the case of radio and TV.

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

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

#### 4. *Marketing and Solicitation, Rule 7*

Pertinent Rules:

##### **RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

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

##### **RULE 7.2 ADVERTISING**

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
- (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and
  - (3) pay for a law practice in accordance with Rule 1.17.
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

##### **RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
- 1) is a lawyer; or
  - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, or recorded or electronic communication or by in-person, telephone or real time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
  - (2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

#### **RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION**

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

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

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

##### 2000 amendment.

The manner in which attorneys are permitted to advertise is set forth pretty clearly in the rules.

The old Rule 7.2, before the revisions in 2002, referred to, "public media, such as a telephone directory,

legal directory, newspaper or other periodical, outdoor advertising, radio or television...communication." Today, as you can see from the rule quoted above, advertising includes, "recorded or electronic communication, including public media," Rule 7.2(a).

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

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

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

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

Rule 7.2(c) requires that the advertising communication includes your address and the name of

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

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

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

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



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

Social Networking blurs the definition of when "contact" with another person constitutes the "solicitation" of a prospective client. Like everything in the wonderful world of attorney ethics, each case is highly fact dependent. So what about the fact that you might initiate a conversation with a layperson in a chat room, or via the chat function on Facebook about an issue in your area of expertise-- is that a prohibited solicitation? What if, for example, you posted a comment directly on someone else's Facebook wall telling them that you represent them in an appeal of their property taxes? Is that the type of solicitation the rule envisioned?

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

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

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

mini-website. If that's the case, then the contents thereof would be subject to all of the rules on attorney advertising.

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

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

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

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

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

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

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

## 5. *Investigations*

The first lawyer to realize that we could find valuable information for our client matters on the Internet must have felt like they struck gold. I could see their facial expression in my mind's eye, reflecting a combination of revelation, shock, and opportunity. Their eyes most likely grew even wider when they found the treasure trove of information that exists on people's social media accounts. But for a certain time only the most technologically savvy lawyers availed themselves of this tool. Some didn't understand the new medium and others, even if they were familiar with the technology, weren't quite sure about the permissibility of trolling Facebook and the Internet in general in search of information to be used in the course of the practice. And there was good reason- for some time the matter was unresolved.

For that reason, I used to tell lawyers at my CLE seminars that social media searches were not a substitution for legitimate discovery techniques. But times have changed. Today, Internet and social media searches *are* legitimate discovery techniques.

It is almost commonplace these days to receive interrogatories where the opposing party asks for information regarding at least some aspect of your client's social media behavior. They might also include statements made on social media in the definition of "statements" in the Instruction section of the rogs. Your individual jurisdiction will likely have an entire progeny of cases that addresses whether, and to what extent, lawyers are permitted to ask about a party's social media use, account information, etc. I'd expect that this issue is among the most hotly debated pre-trial motions that lawyers are seeing

these days.

Most likely, that line of cases begins with an analysis of the seminal decision out of New York, Romano v. Steelcase Inc., 2010 NY Slip Op 20388 (N.Y. Sup. Ct. Sept. 21, 2010). In that case the court was presented with a plaintiff who claimed she sustained permanent injuries in an accident that prevented her from participating in certain activities (pg3). However, the other party found evidence on the public portion of her Facebook page that revealed an active lifestyle. 2010 NY Slip Op at 3. The fight was obviously over whether the postings on social media were discoverable, an issue that had not been decided in the jurisdiction at the time. The court held that the postings were discoverable.

The court granted access to the party's, "current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information..." 2010 NY Slip Op at 7. The Romano court separated their analysis into two parts: whether the content of the postings was discoverable according to local discovery standards and whether it was appropriate to seek discovery of publicly available social media posts. While the former question was a question of local evidence law that isn't relevant to our discussion, the latter is a wider-reaching privacy issue that impacts Technethics.

The court cited Katz v. United States, 398 US 347 (1967) and explained that in determining if there is a recognizable right to privacy, it must be determined that a person has a subjective expectation of privacy and that the expectation is one that society finds reasonable. 2010 NY Slip Op at 5. The court evaluated decisions from around the country and also reviewed the privacy policies of both

Facebook and MySpace and came to a clear conclusion when it stated, “Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy.” 2010 NY Slip Op at 6. The court made is clear that “Users...lack a legitimate expectation of privacy in materials intended for publication or public posting” (quoting, U.S. v. Lifshitz, 369 F3d 173 (2d Cir. 2004)).

The “legitimate expectation of privacy standard” applies to the ethics world as well. There have been numerous decisions throughout the country confirming that lawyers are not breaking any ethical rules by downloading information that is publicly available on the Internet. Those cases rely on the same rationale as the Romano court. Those concepts have been extended beyond general Internet searches to include social media posts that could be viewed by the public. Also note the New York State Bar Opinion #843 (9/10/2010) which stated that a lawyer may view and access the social media profiles of a party if the profile is available to the public.

Thus, a lawyer is not violating any ethical principles by conducting investigations on social media sites, if they are viewing posts which are readily available to the public. But isn’t that the easy question?

The Romano case and the ethics opinions cited above all dealt with information that was available to the public, whether a person purposefully put information out there for public consumption, or because a person’s chosen privacy settings (or lack thereof) permitted public consumption. In either case there is a lack of expectation of privacy. But what about searching for and

using information that is not posted for public consumption? What if a person intends for their postings to be seen only by their network of friends/contacts and their privacy settings are consistent with that intention? Can we search for that data? After all, there is some assumption of risk on the part of the poster isn't there?

As users of social media most people acknowledge that there is no such thing as complete privacy. The share button, the retweet, these are all functions that allow our handpicked network to deliver our pictures and comments to those people outside of our circle of friends. Users know that these facets of the platforms exist, yet they use the programs anyway. In fact, this vulnerability is exploited all the time. People who want to find out information for personal reasons or business purposes can get pretty crafty in doing social media searches and many of us both understand that and accept some element of risk in that regard. Everyone from a prospective suitor to a prospective employer checks up on people by perusing the social media platforms. But the person seeking your information may not be that cute guy or gal you met at the movies last week, it could be a lawyer searching for information to be used against you in a legal matter. Can a lawyer take advantage of that risk you're assuming? How far can they go?

Stated another way, can a lawyer "mine" for information? How far can a lawyer go, beyond trolling<sup>2</sup> the Internet for publicly available information? The only way we could mine for information is if we somehow obtain access to a person's Facebook page. We know that hacking into someone's

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<sup>2</sup> Is this the right word?

profile would be criminal and, therefore, a violation of Rule 8.4(b).<sup>3</sup> But what about using some other assertive tactic that's short of criminal behavior? To explore that, consider the following hypothetical:

You represent someone who is involved in a dispute. You think your adversary will be filing a complaint soon, so you're getting prepared for the apparent litigation. You know that you will need to call Susan as a witness in that litigation, but you don't know much about her. Before you commence litigation you ask your client, Andrew, to "friend" Susan on Facebook. You tell Andrew, "just try to be social and let's gather information we could use against her in litigation."

When I present that hypo to people face-to-face, I get a lot of furled brows and pursed lips.

"That doesn't smell right," they say. One person from the Midwest hit the nail on the head when he said, "That's just dirty pool." Both reactions reveal two things: the behavior doesn't feel right, and yet it's hard to articulate the exact problem.

The conduct isn't an outright lie. Neither the lawyer or it's agent is actually making an improper misrepresentation. If it were, the statement(s) might violate one of the rules on misrepresentation in the disciplinary code. I call those rules the "Fab Five of Attorney Lies." The 5 rules that address misrepresentation are Rules 8.1, Rule 3.3, Rule 4.1, Rule 7.1, and Rule 8.4. Each one of these explains when misrepresentations are inappropriate and they address those improper statements in different contexts.<sup>4</sup> This appears to be some sort of manipulative conduct, rather than an outright lie, which makes it a bit more difficult to assess. After all, much of what we do in the adversary system has some manipulative flavor to it, right?

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<sup>3</sup> See the appendix for the full rule.

<sup>4</sup> We talk more the specifics of those rules in detail elsewhere.



This fact pattern isn't one that I came up with on my own- it's a question that was raised to the Philadelphia Bar Association Professional Guidance Committee. In March of 2009 the Committee released Opinion 2009-02 that addressed the topic. An inquirer asked the Committee to determine if it was reasonable for a lawyer to use a third person to gain access to someone's social media page in order to gather information that might be used against that person. The third person wouldn't be instructed to speak any untruths, only to remain silent about their true motives. The Committee opined that the behavior would be improper.

The Committee stated that "the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive" 2009-02 at 3. You might recall that Rule 8.4(c) is a critical part of the rule on Misconduct (or as I've referred to it elsewhere in this text, "the Stupid Rule"). That section states that it is professional misconduct for a lawyer, "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation..." The opinion further explained that the conduct was problematic because, "it omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" 2009-02 at 3. Thus, it isn't an affirmative misrepresentation that triggers the ethical violation, rather it's the omission of a material fact that constitutes deception.

The Committee made that clear when they stated, "The omission would purposefully conceal

that fact from the witness for the purpose of inducing the witness to allow access when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony. 2009-02 at 3.<sup>5</sup>

So the Committee disapproved of the conduct because it was deceptive.

But it's not that simple because in rendering this opinion, the Committee touched on the third rail of a debate raging in the ethics world today. Some sort of deception seems to be at the root of every clandestine investigation. So can lawyers ever engage in that conduct? The issue has been hotly debated in several jurisdictions.

Throughout the country there have been a series of cases over the last decade which reinforce that deception by lawyers will not be tolerated in almost any context. For instance, in Colorado, Chief Deputy District Attorney Mark Pautler helped negotiate the surrender of a suspected violent, vicious criminal. In Re: Mark C. Pautler, Sup. Ct. Colorado, No. 01SA129, May 13, 2002.<sup>6</sup> When the perpetrator demanded to speak with a lawyer, Pautler posed as a public defender. While he wasn't honest with the perpetrator, he also didn't provide any legal advice and his tactics helped secure the man in a peaceful manner. In a scathing opinion, the Supreme Court of Colorado found that Pautler intentionally deceived the perpetrator and that he should be suspended. Pautler claimed that his actions

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<sup>5</sup> It should be noted that the opinion doesn't only state that the omission is deception. The Committee mentioned very briefly that they believed that the conduct also constituted the making of a false statement of material fact to the witness and would therefore be a misrepresentation that violates Rule 4.1. Unfortunately, the opinion says absolutely nothing else about the apparent 4.1 violation, so it's unclear how they arrive at that conclusion.

<sup>6</sup> All quotes retrieved from the case at <http://caselaw.findlaw.com/co-supreme-court/1378086.html>, last checked by the author on September 13, 2013.

were necessary to protect the public, but the court was not swayed.<sup>7</sup>

In their decision, the Supreme Court of Colorado spoke in lofty terms about the responsibility of the profession to remain above the fray. The case appeared to strike at the heart of the integrity of the profession. The Court stated, “In this proceeding we reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect. A prosecutor may not deceive an unrepresented person by impersonating a public defender.” Pautler at \_\_\_\_.

The Philadelphia Committee opinion about social media friending was an extension of that anti-deception approach that is common throughout the country. In that case, there was no overt lie, rather the lawyer omitted some material information and that omission constituted deception. It seems a logical extension, given the tendency of the ethics authorities to hold a high standard for lawyers when dealing with Misconduct and Rule 8.4(c). However, not every jurisdiction agrees.

The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics issued Formal Opinion 2010-2 regarding obtaining information from social networking websites. In a somewhat curious opinion, the Association came to a different decision than the Philadelphia Committee. The New York Association addressed, “the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via

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<sup>7</sup> The court Affirmed a three month suspension, which was stayed during a 12 month probationary period.

the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney’s direct or indirect use of an affirmatively “deceptive” behavior to “friend” potential witnesses.” It appears they used quotation marks because they weren’t convinced that the word deception applies to the situation.

The New York Association acknowledged that the City had a somewhat assertive approach to discovery. It stated that it would be inconsistent with that policy to, “flatly prohibit lawyers from engaging in any and all contact with users of social networking sites” 2010-2 at 1. They concluded that a lawyer or her agent, “may use her real name and profile to send a “friend request” to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request” 2010-2 at 1.

The New York City Association was clear that deception is not permitted, they just had a different view of what deception actually entailed. They agreed that creating a false persona to obtain information or other such tactics were a violation of the rules. But the Association considered the truthful friending of unrepresented parties to be a permissible informal discovery. 2010-2 at 2. The opinion stated that “while there are ethical boundaries to such “friending.” In our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements” 2010-2 at 1.

Thus, in the Philadelphia and New York City opinions, have two matters with exact opposite results. In both opinions you have a lawyer (or their agent) who friends a litigation target, but remains

silent about their identity. In Pennsylvania, the lawyer’s silence was considered a material omission and constituted deception, but in New York, the lawyer’s silence was an acceptance type of informal discovery mechanism.

I would be wary of that NYC decision for a few reasons. First, it doesn’t seem consistent with the litany of preceding opinions. If anything, the trend across the country is to ratchet up the pressure on lawyers. Courts and advisory boards seem to be more stringent about what constitutes deception, rather than less. The second reason is that the decision left what I call an “escape clause.” At the very end of the decision the New York Association made it clear that the friending would be permitted, subject to compliance with all other ethical requirements.” That phrase gives the Association a lot of wiggle room. Rarely is any disciplinary matter cut and dry- there are often some other facts that muddy the waters. Every disciplinary matter is fact sensitive and, therefore, easily distinguishable. It wouldn’t take much for a tribunal to find some facts that don’t comply with “all other ethical requirements.”

Third, it’s not clear that the New York City opinion would even be honored in it’s own state. You might recall that we discussed an opinion out of the New York State Association, Committee on Professional Ethics (Opinion #843). While that opinion dealt with the easier question of observing a person’s public profile, it referenced the Philadelphia opinion. The New York State Bar didn’t opine on the issue of friending-deception, and it even distinguished the facts it was presented from that of the Philadelphia matter, but it didn’t disagree with the Philadelphia rationale.

Finally, and most significantly, the NYC opinion isn't grounded in the same logic as the other opinions regarding deception. All of the previous decisions on deception focus on the point of view of the target. They all hold that the attorney's actions take advantage of a vulnerable layperson and the Philadelphia opinion is written from that point of view as well. The New York City opinion, however, is grounded in the lawyer's pseudo-right to a certain form of informal discovery. That approach isn't consistent with the logic of most disciplinary authorities in the country. My gut tells me that most states would abide by the Pennsylvania view.

So what's the takeaway? I believe that we need to look at the issue of deception from the point of view of the target. What is the expectation of the person from whom we are seeking the information? Better yet, what is the reasonable expectation of that person.

The opinions seem to be saying that it's not reasonable for the target to have a full expectation of privacy when using social media. Rather, there is emerging something akin to an expectation to be free from infiltration.

If a party puts information in places accessible to the public, then it's reasonable to expect that anyone can see it. Advisory boards don't have a problem with lawyers observing how someone holds themselves out to the public, even if it's clandestine observation by that lawyer. But if the target only reveals information in a controlled or limited situation, it's reasonable for them to have somewhat different expectations.

When they posted something on their personal social media page, in circumstances where other people must receive approval before viewing that page, the poster expected to show the information to their circle of friends. Of course, they understood and probably even expected that someone in their circle might reveal the information outside of that circle. But they didn't expect someone to sneak into the circle and see it for themselves.

When you evaluate the situation from the point of view of the target, it's easier to understand why the authorities are likely to believe that material omission constitutes deception, even if there is no affirmative untruth spoken. The key here is to realize that the ethics authorities view it all from the expectation of the target because they are the protected party. As we discussed earlier, the goal of the disciplinary system is to protect the public and protect the client.

There is another issue that was raised in both the New York State Bar opinion and Philadelphia opinion mentioned above that affects the investigation issue. During the course of our investigations, lawyers frequently reach out to other parties directly. We might interview a business executive, speak to a homeowner, or have a variety of other types of conversations. The people with whom we speak may or may not be represented by counsel. Our obligations to those people differ drastically, depending on that status. Let's talk about contact with unrepresented people first. The applicable rule is Rule 4.3:

### **Rule 4.3. Dealing with unrepresented person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Lawyers' actions are heavily scrutinized when we interact with people who are in vulnerable positions, and an individual who is not represented by counsel is one such person. The drafters of the disciplinary code realize that lawyers have the upper hand when interacting with such people because we have an intimate understanding of the system and the roles of all the players. The unrepresented person is in a position where they could be taken advantage of, so the rules are have been crafted to avoid that.

Rule 4.3 is designed to curtail manipulation by the lawyer. To do so, it prohibits lawyers from making it seem as if we're a neutral party. Essentially, this is simply prohibiting a misrepresentation—we would be telling an untruth if we stated that we were disinterested. However, the drafters understood that simply refraining from a misrepresentation might not be enough. There could be a situation where the lawyer's interest isn't a specific topic of discussion, and in that case, there could be confusion on the part of the unrepresented party. There's an obvious incentive for lawyers to perpetuate that state of confusion, for the benefit of their client. The rules don't want to allow the lawyer to get away with that, so the text goes further than just prohibiting a misrepresentation.



Rule 4.3 places somewhat of an affirmative duty on lawyers who are speaking with unrepresented parties. If the lawyer, “knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.” Thus, the rules place an obligation on a lawyer to speak up if they have some unfair advantage over a person in a vulnerable position. This is a sentiment that we see elsewhere in the rules. It's important to see how this manifests itself elsewhere in the code, because this concept must inform our behavior.

Lawyers have an enhanced duty when they solicit work from a prospective client, as seen in Rule 7.3. This may be the most counter-intuitive rule on the books. After all, if we know that someone is in need of our legal services, our first instinct is to run toward them. However, Rule 7.3 tells us to do the opposite.

Rule 7.3 is broken down by modes of communication, in decreasingly order of severity. Subsection (a) addresses person-to-person communication—the most intense type of communication. That's the type of communication where lawyers pose the biggest threat to vulnerable people. In those intense situations we have the greatest ability to convince another party to act in the lawyer's best interest, instead of the potential client's best interest. As a result, contact is permitted in very limited circumstances:

**Rule 7.3. Direct contact with prospective clients** (*in part*)

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

Subsection (b) of the rule addresses a less onerous mode of communication, writing. It imposes restrictions as well, in the form of required disclaimers, etc. The point is the drafters restricted our behavior because we are dealing with a person in a vulnerable position. The theory is that we are supposed to protect our clients, not prey upon them.

Likewise we see an enhanced duty when dealing with clients with another category of vulnerable people, those with diminished capacity. Consider Rule 1.14:

**Rule 1.14. Client with diminished capacity** (*in part*)

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

This rule begins with the concept of “respect.” In subsection (a) the lawyer is required to do they best to maintain a normal lawyer client relationship. Among other things, this shows the need to

respect the client’s desire to make decisions for themselves, regardless of the fact that they might have diminished capacity. The increased responsibility is revealed in section (b).

If a lawyer believes that this type of vulnerable person is at risk of certain types of harm, we could take protective action. Granted, the rule is phrased in a discretionary manner (the rule states that the lawyer “may” take action), but I think that’s just to give the lawyer the ability to be flexible, depending on the circumstances of a particular case. The expectation is clear- when dealing with a person of diminished capacity, we may need to take steps to protect them.

How is this all invoked in social media investigations? We started this section by talking about Rule 4.3 and dealing with unrepresented people. If a lawyer tries to friend a third party and that third party is not represented by counsel, Rule 4.3 is invoked. Our enhanced duties when dealing with vulnerable people are then invoked. The New York State Bar Association Opinion acknowledged this in its Opinion #843 (see footnote [1]). The Philadelphia Committee opinion had a little different take.

Remember, the Philadelphia Committee dealt with deceptive tactics. In the fact pattern that was presented to them, the lawyer was not revealing that she was a lawyer, rather there was purposeful silence about the fact so as to avoid tipping off the other party. In that case, the Committee stated that Rule 4.3 would not be implicated, because the unrepresented party was unaware that they were dealing with a lawyer. I don’t feel very comfortable with that analysis.

What we’ve seen in the situations where lawyers deal with vulnerable people is that it’s the lawyer’s responsibility to do the protecting. The very nature of being vulnerable may cause that other

person to be unaware of dangers. And one of those dangers might be emanating from the lawyer herself. Plus, I could envision a situation where a lawyer is silent about their role in a matter, which causes another person to misunderstand that lawyer's role in the matter, per 4.3(b). Thus, I can foresee a disciplinary tribunal, when faced with similar facts, holding a lawyer to the standards of Rule 4.3, even if the other party is unaware that the person with whom they are dealing is a lawyer.

## ***6. Supervision***

It's clear that the ethics rules demand that we understand this topic, from a competence and diligence standpoint. But, despite what our mommies and daddies told us as children, it's not all about us. The ethics rules regarding supervision demand that we understand these platforms as well. Consider the two key rules: Rule 5.1, which addresses the supervision of lawyers, and Rule 5.3 which addresses the supervision of nonlawyer assistants. The ABA version of both rules mirror each other (of course, these are actually the Delaware version, but we've already been through that disclaimer).

### **Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;  
or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**Rule 5.3. Responsibilities regarding non-lawyer assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Subsection 5.1(a) basically requires that lawyers in a managerial role create appropriate policies that ensure that lawyers are conforming to the rules. The primary difference between this section and its counterpart in 5.3(a) is that nonlawyer assistants don't need to conform to the ethics rules because they're not lawyers. As a result, you can see at the end of subsection 5.3(a) that the slightly different language. Instead of requiring that lawyers conform to the "Rules of Professional Conduct," Rule 5.3(a) insists that the nonlawyer's conduct be, "compatible with the professional obligations of the lawyer." One could argue that such language may actually create a more difficult situation since "professional standards" is more vague and amorphous than "Rules of Professional Conduct."

Regardless, there are similar obligations in both instances.

Subsection (b) of both rules imposes duties on lawyers who have direct supervisory responsibilities over other lawyers and nonlawyer personnel. It imposes a direct responsibility for supervision upon lawyers with such authority. However, the subsection that puts a lump in many-a-lawyer's throat is subsection (c). In both rules, subsection (c) addresses when we may have vicarious liability for the actions of another lawyer or assistant.

We all know that our associates and nonlawyer assistants are using social media. Some of them are only using it on their own time and yet others are using it in firm-sanctioned blogs or even marketing efforts. Yet some of us remain ignorant, lazy or otherwise unmotivated to stay abreast of the topic. Well, if we know that they are using the platforms and we know that there are ethical concerns with their use (as you'll see shortly), then how can we claim to be exercising proper supervision if we don't understand the very platforms that these lawyers are using? The answer is, of course, we can't. Thus, just like competence and diligence, the rules on supervision demand that all lawyers understand SM.

Let's hammer this point home with some illustrations. What are you going to say if someone approached you in the courthouse and says,

Colleague: "Hey Jim, I'm so sorry to hear about that problem you're having with that new paralegal you hired last month."

You: "What problem with that new paralegal?"

Colleague: "Wow, you didn't see that twitpic he posted with that Judge while they were out at a club last weekend? It's been retweeted a thousand times!"

You: Ummmm...what's a twitpic?"

Or maybe you'll be the victim of this go-around:

Client: "Hey Lauren, how are you dealing with your partner's blog post."

You: "What blog post, what do you mean."

Client: "You didn't read that racist rant that your associate threw down on his blog, 'This Week in New Jersey Criminal Law?' You don't subscribe to his RSS feed?"

You: "Ummmm...what's an RSS feed?"

Right now I know what some of you are thinking. You're thinking, "Ummmm...what's an RSS feed?"<sup>8</sup> The bottom line is that you need to understand the platforms that your associates and nonlaw staff are using if you want to be providing adequate supervision.

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<sup>8</sup> I'm not going to tell you. Go look it up

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