ARTICLE

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An Article We Wrote to Ourselves in the Future: Early 21st Century Views on Ethics and the Internet*

Abstract. Written from the viewpoint of the year 2050, this Article discusses the clash between legal ethics and the technological revolution of the early twenty-first century. As a result of ethics rules being applied to new technologies in ways never contemplated under traditional circumstances, lawyers had to be overly cautious when they used the Internet to correspond with or seek out clients, or otherwise promote their legal services. The lesson learned is that the legal community should reflect on the harm caused by over-zealous regulation and take a more reasoned approach to the use of technology for the benefit of lawyers, judges, and clients.

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* The title is derived from JOHN WESLEY HARDING, *Song I Wrote Myself in the Future*, *on* AWAKE (Appleseed Records 2001).

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I. INTRODUCTION

As a matter of historical interest, this Article examines the approach of the organized bar toward the ethical use of technology in the early twenty-first century. While many lawyers today in the year 2050 might find it hard to believe, when the technology we now call the Solar System Wide Web (SSWW) first became operational in the form of the World Wide Web (WWW), courts, lawyers, and bar ethics committees looked skeptically at practices that have long been commonplace and unquestionably proper.

In many cases, the organized bar applied rules in the context of technology that it would have never applied in the real world. Practices that were traditionally viewed as perfectly proper in real life were deemed unethical when conducted on the "Internet" (essentially a synonym for the WWW). While this dichotomy was understandable in some respects, numerous ethics decisions retarded the use of technology within the legal community, even though such technology provided a vital, efficient, and cheap means for lawyers to communicate among themselves, with their clients, and with prospective clients.

As most students of early twenty-first century history recall, the Internet and particularly what was then called Web 2.0—essentially now-defunct social networking web sites like Facebook, LinkedIn, and others—presented new challenges to the organized bar as well as old challenges in new forms. For example, bar associations pondered the propriety of lawyers using web sites to solicit clients or otherwise market legal services.[1] They also imposed an obligation on lawyers to include disclaimers on web sites that would warn non-clients not to send confidential information to lawyers without first making sure the lawyers could, and would, represent them.[2] They even suggested that lawyers had an obligation to prevent

1. *See infra* Parts III, IV.

2. *See* Eileen Libby, *Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients*, A.B.A. J., Jan. 2011, at 22, 23 (reporting on state bar opinions that recommended the posting of web site disclaimers "warning against disclosure of confidential or sensitive information and . . . no duty to maintain the confidentiality of any submitted information"); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, at 5–6 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10_457.authcheckdam.pdf (recommending the inclusion of warnings or statements "to avoid a misunderstanding by [a] website visitor that (1) a client-lawyer relationship ha[d] been created; (2) the visitor's information [would] be kept confidential; (3) legal

clients from using constitutionally protected speech to post online descriptions of their own lawyers.[3]

While all of these concerns now seem quite misdirected, if there is a single lesson to be learned from what follows, it is this: bar associations, courts, and lawyers have struggled, and no doubt will always struggle, with determining how legal ethics rules designed for the real world should be applied to the use of technology for virtual communication. Sometimes, without recognizing that they were doing so, they erred in creating "Internet only" rules that regulated lawyer conduct in ways that never applied offline in the real world. As a result, lawyers in the early twenty-first century needed to be particularly careful when using the Internet to communicate with or search for prospective clients, or to otherwise market legal services. The same point no doubt holds true even today for lawyers who use the SSWW to achieve similar ends.

II. BACKGROUND TO EARLY TWENTY-FIRST CENTURY REGULATION OF LAWYER COMMUNICATIONS ABOUT LEGAL SERVICES

A. *Lawyers Were Prohibited from Making False or Misleading Statements*

As remains the case today, lawyers in the early twenty-first century were prohibited from making false or misleading statements about their legal services.[4] This prohibition applied to all forms of communication in most states.[5] Thus, any statement a lawyer could not put in a traditional advertisement because it was false or misleading, he also could not put in an e-mail, blog post, or web page.[6]

Many statements were deemed to be misleading unless certain

advice ha[d] been given; or (4) the lawyer [would] be prevented from representing an adverse party").

3. *See infra* Part III(C).

4. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 7.1 (2010) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

5. *Id.* R. 7.1 cmt. 1 ("This Rule governs all communications about a lawyer's services . . . . Whatever means are used to make known a lawyer's services, statements about them must be truthful."); *see also, e.g.*, Va. State Bar Comm. on Legal Ethics, Legal Ethics Op. 1750 (2008), *available at* http://www.vacle.org/opinions/1750.htm ("The prohibition in Rule 7.1 . . . applies to all public communications and includes communications over the Internet.").

6. *Cf., e.g.*, S.C. Bar Ethics Advisory Comm., Advisory Op. 09-10, at 2 (2009), *available at* 2009 WL 6850298 (stating that all content in a lawyer's listing on a networking web site had to conform to the same communication and advertising requirements of Rules 7.1 and 7.2, and could "not be false, misleading, deceptive, or unfair").

disclosures or disclaimers were made.[7] For example, in many states, it was unethical to advertise a jury verdict without including certain disclaimers.[8] In Oklahoma, an attorney could list jury awards in an advertisement, including specific amounts, but only in conjunction with a disclaimer indicating that the statement was not meant to infer the probability of success for any prospective client.[9] Logically, because attorneys could not properly post such results on their web sites without the required disclaimer or disclosure,[10] it would have also been improper to include the same unqualified information in a LinkedIn or Facebook status update. Therefore, even the announcement of a jury verdict on Facebook or some other social networking site—without a disclaimer explaining that results in other cases would vary—could have, conceivably at least, been deemed to violate the ethics rules of many states.

B. *Lawyers Could Not Induce or Assist Others to Make Misleading Communications About Them*

Near the end of the twentieth century, the U.S. Supreme Court held that lawyer advertising was "commercial speech" that could be regulated but not prohibited except in narrow circumstances.[11] In response, the American Bar Association and state bars eliminated what had been long-

7. *See* Jason B. Lutz, *Attorney Advertising and Disciplinary Action: Some Do's and Don'ts of Advertising*, 25 J. LEGAL PROF. 183, 189–91 (2001) (discussing the importance of disclaimers and disclosures in lawyer advertisements to avoid having them be deemed misleading).

8. *See, e.g.*, N.C. State Bar Ethics Comm., Formal Op. 99-7 (1999), *available at* 1999 WL 33262184 (deciding that, because "[a] general representation about past results without additional information that puts the past results in context is misleading," a statement of "there is no guarantee of any recovery in your case" was not sufficient to alleviate the unjustified expectations that statements of past jury verdicts would create); *cf.* Tenn. Supreme Court Bd. of Prof'l Responsibility, Formal Op. 2004-F-149, at 2 (2004), *available at* 2004 WL 2213932 (concluding that a lawyer's advertisements could not refer to past successes or results, such as jury awards, unless they provided "the specific factual and legal circumstances underlying the claim[s]").

9. Okla. Bar Ass'n Legal Ethics Advisory Panel, Ethics Op. 320, at 2–3 (2004), *available at* 2004 WL 5135045.

10. *Cf., e.g.*, *In re* Amendments to the Rules Regulating the Fla. Bar—Rule 4–7.6, 24 So. 3d 172, 173 (Fla. 2009) (per curiam) (determining that "websites [must] be subject to all of the substantive advertising regulations applicable to other advertising media," including the rule governing references to past successes and results).

11. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 383–84 (1977) (holding that a blanket suppression of lawyer advertising was a violation of the First Amendment and detailing "some of the clearly permissible limitations on advertising," such as prohibiting false, deceptive, or misleading statements).

standing prohibitions against lawyer advertising, replacing them with rules that generally permitted lawyer advertising but prohibited conduct deemed not constitutionally protected, such as false or misleading speech.[12]

By definition, of course, these rules applied only to lawyers and did not purport to regulate statements by third parties. However, additional disciplinary rules governed not only the direct actions of lawyers but also any efforts by lawyers to circumvent the rules through the acts of third parties, whether by inducement, assistance, or other similar conduct.[13] To put it bluntly, just as a lawyer could not steal from a client, he also could not avoid discipline by having someone else steal for him.[14] The same principle applied to the advertising rules: a lawyer could be disciplined if he made a false or misleading statement as well as if he induced or assisted a non-lawyer (or, for that matter, another lawyer) to do so for him.[15]

But there were boundaries, at least in the real world, within which a lawyer could not be disciplined for the actions of a third party in the absence of any inducement or assistance in the third party's conduct.[16] As discussed below, however, this fairly discernable standard of ethical conduct became confused when courts and bar associations addressed lawyer advertising on the WWW under the disciplinary rules.

12. *See generally* Robert D. Peltz, *Legal Advertising—Opening Pandora's Box?*, 19 STETSON L. REV. 43, 63–81, 88–97, 103–36 (1989) (discussing changes in various bar ethics rules for regulating lawyer advertising and the subsequent cases and controversies following the *Bates* decision).

13. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2010) (stating that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

14. *See id.* R. 8.4(b) & cmt. 1 (subjecting for disciplinary action a lawyer who "commit[ted] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness," or "request[ed] or instruct[ed] an agent to do so on the lawyer's behalf").

15. *See, e.g.*, Cincinnati Bar Ass'n Ethics & Prof'l Responsibility Comm., Formal Op. 96-97-01, at 4 (1997) (on file with the St. Mary's Law Journal) (determining that a law firm was not responsible for a client advertising their firm as long as they did not request the advertising or compensate the client for it); *see also* Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 2–3 (2004), *available at* 2004 WL 1810682 (explaining that, as long as a client's advertising of the law firm was not "false, fraudulent, misleading, deceptive, self-laudatory, or [an] unfair statement," the lawyer had not violated the Ohio ethics rules concerning advertising).

16. *E.g.*, Michael Z. Green, *Witness Preparation and Ex Parte Communications: A Fundamental Discussion?*, *in* ABA SECTION OF LABOR & EMP'T LAW, 2ND ANNUAL CLE CONFERENCE, at 1, 16 (2008), *available at* http://www.abanet.org/labor/lel-annualcle/08/materials/data/papers/095.pdf (stressing that, even though an attorney was prohibited from making ex parte communications through the acts of another, a client could still make ex parte communications on an independent basis).

III. EARLY TWENTY-FIRST CENTURY APPLICATION OF DISCIPLINARY RULES GOVERNING LAWYER ADVERTISING ON THE INTERNET AND SOCIAL NETWORKING SITES

One benefit of the Internet was the ability to easily move from one web page to another through a hypertext link.[17] A user could simply "click" on a link and be taken from one page to another page. When links were placed on a law firm's web site, a click could take the user to another internal page or beyond the law firm's Internet domain to a third party's web site. Conversely, links in search engines and other sites were sometimes employed to make a firm's web page a starting point for legal research and simultaneously drive traffic to the firm's web site.[18] Likewise, a third party could independently establish links on its own web site that would take its visitors to almost any page within a law firm's publicly accessible domain.[19]

Links within a law firm's web site did not raise any particular ethical concerns.[20] A link that only took a visitor to a different page on a law firm web site merely required the firm to ensure the linked-to page complied with the same rules that applied to all pages of its web site.[21] However, bar associations recognized that links to a law firm's web site, directing users from an external site associated with the law firm, could

17. *See* BLACK'S LAW DICTIONARY 759 (8th ed. 2004) (defining "hyperlink" as "[a]n element on a webpage . . . that, when clicked on, takes the user to another part of the same website or to a different website").

18. *Cf.* Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 ST. JOHN'S J. LEGAL COMMENT. 529, 543 (2002) (explaining the use of "priority placement" links that directed traffic to the law firm's web site).

19. *See id.* at 542 (noting that Florida ethics rules governing "computer-accessed communications [did] not apply simply because someone link[ed] material to a lawyer's site").

20. *Cf. id.* (suggesting that the question of a web page link's compliance with state ethics rules depended on whether the linked material was either under the lawyer's control or "primarily concerned with obtaining clients" (quoting Laws. Manual on Prof'l Conduct (ABA/BNA) 81:555 (Sept. 18, 1996)) (internal quotation marks omitted)).

21. *See, e.g.*, Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 2007-7, at 1–3 (2007), *available at* 2007 WL 7281749 (advising that a link on a lawyer's web site to his professional resume contained therein was permissible if the materials were accurate and truthful); *cf.* Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2000-6, at 6 (2000), *available at* 2000 WL 1872572 (determining that a law firm web site could "provide a link from an attorney's biography to published opinions of cases in which such attorney participated" because such information helped educate the public rather than presented "a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement").

present ethical problems.[22] Even a firm's link to a wholly independent third-party web site could engender ethical considerations for the firm.[23] Similarly, bar associations reasoned that lawyers could be disciplined under some circumstances involving independent third-party links to the firm's web site.[24] More specifically, an ethical line could be crossed if a client, who was particularly happy with a firm's representation, posted a firm-directed link in a blog entry extolling the virtues of the firm.[25] In fact, as further identified in this part of the Article, a myriad of issues arose when a firm linked to a third party's site or an independent third party linked to the firm's site.[26]

22. For example, a law firm could create a separate site, containing links to the firm's official web site that the firm controlled but did not appear on its face to be a law firm web site. *See* N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 1998-2, at 3–5 (1998), *available at* 1998 WL 1557151 (discussing the ethical issues of law firms hosting web sites with listserv-type discussion areas).

23. *See, e.g.*, J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 308 (2004) ("The lawyer or law firm providing the link from its web site does not control the completeness, accuracy, or timeliness of the content in the linked Internet sites.").

24. *See, e.g.*, Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 2–3 (2004), *available at* 2004 WL 1810682 (emphasizing that a lawyer had to be vigilant in monitoring web sites that linked to the lawyer's web site in order to stay in compliance with the ethics rules).

25. For example, a disciplinary rule in Ohio, prior to 2007, prohibited client testimonials from being listed on a lawyer's web site. *See* Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Formal Op. 2000-6, at 4 (2000), *available at* 2000 WL 1872572 (deciding that client testimonials on a law firm web site would violate the state's rules of professional conduct). In 2007, however, Ohio changed its rule to allow the online posting of client testimonials so long as they were verifiable and not false or misleading, which often required disclaimers or other language limiting the potential deception of the statements. *See* OHIO RULES OF PROF'L CONDUCT R. 7.1 cmt. (2007), *available at* http://www.sconet.state.oh.us/legalresources/rules/profconduct/profconductrules.pdf (noting that this Rule did not contain the former prohibition against client testimonials but did retain the prohibition against unverifiable claims).

26. *See generally* J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 308 (2004) (explaining the ethical considerations raised when links provided access to a firm's web site or a third party's web site). Commentators also opined about potential issues with unintentional or incidental linking in other contexts. For example, if an attorney sent an email message incorporating a signature block that included a web site link back to the attorney's firm, did inclusion of such a link transform the message into a commercial advertisement to which ethical rules and federal statutes applied? *See* William R. Denny, *Electronic Communications with Clients: Minding the Ethics Rules and the CAN-SPAM Act*, BENCH & B. MINN., Dec. 2005, at 17, 21 (concluding that, if the primary purpose of inclusion of the link in the e-mail was "commercial," then the CAN-SPAM Act and advertising ethics rules would apply).

A. *Ethical Issues that Arose When a Third Party Linked to a Law Firm Web Site*

As previously explained, nothing in the disciplinary rules regulated what a client or third party could put on its web site, or how a client could describe a lawyer, so long as the lawyer did not induce or assist in any improper statement—at least where the third party or client was not also a lawyer.[27] Thus, a line existed under the disciplinary rules between the unilateral actions of a client or third party and the concerted actions the lawyer was responsible for.[28] Yet, in the context of Internet linking, the boundary was not always clear.

1. Bare Links with No Commentary Were Proper, So Long As They Were Not Referrals

A simple descriptive link from a third-party site to a law firm's site—e.g., a link on a third party's page that, without payment from the lawyer or any other contact, merely stated "click here to go to BakerBotts.com"—apparently did not implicate ethical concerns if there was no comment made about the firm, its lawyers, or its services. For example, a client's unilateral decision to place a law firm's name or logo on its web page did not violate the ethics rules.[29] Authoritative commentaries recognized that

27. *See supra* Part II(B).

28. *See generally In re* Ratner, 399 P.2d 865, 870 (Kan. 1965) (reasoning that an attorney does not violate solicitation rules when the solicitations were done by an organization's members independently of the attorney's own actions).

29. *See* Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 2 (2004), *available at* 2004 WL 1810682 ("Communication to the public of a law firm's name and logo on a business client's Web site [was] acceptable because it [was] not a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement."); Cincinnati Bar Ass'n Ethics & Prof'l Responsibility Comm., Formal Op. 96-97-01, at 4 (1997) (on file with the St. Mary's Law Journal) ("A client of an attorney or law firm [could] list the attorney or law firm on the client's Internet Home Page and [could] provide a link to an attorney's or law firm's Home Page on the client's Internet Home Page if the attorney [did] not request the link and [did] not provide compensation or any thing of value to the client in return for the client listing the attorney or law firm as their attorney or law firm and providing the link on the client's Internet Home Page."); *see also* OHIO RULES OF PROF'L CONDUCT R. 7.2 (2007), *available at* http://www.sconet.state.oh.us/legalresources/rules/profconduct/profconductrules.pdf (mandating that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services" except for usual charges); *cf.* MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (2010) (stating that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services" except to pay for "the reasonable costs of [permissible] advertisements or communications," "the usual charges of a legal service plan or . . . qualified lawyer referral service," or the purchase of a law practice, or to "refer clients to another

a lawyer was not subject to discipline in such circumstances.[30]

Obviously, this result was proper. The rules were limited to acts of the lawyer as well as acts he induced or assisted in accomplishing. The rules did not subject the lawyer to vicarious responsibility for the unilateral acts of third parties. Not even the bar associations in the early part of this century strained their application of the disciplinary rules that far.

2. Lawyer Discipline for Third-Party Statements About a Lawyer on the Internet that the Lawyer Himself Could Not Make—Even When the Third Party Acted Wholly Independently of the Lawyer

Third parties could, of course, either act independently of or be induced by lawyers to post online statements about lawyers. While the Internet did not create the ability of third parties, including clients, to make statements that lawyers could not ethically make, it certainly increased the ease with which such statements could be made, and it also dramatically increased the scope of their audience.[31] As a result of early twenty-first century interpretation of the disciplinary rules, lawyers during that period faced an enormous burden to police against third-party postings of unethical statements about them.[32]

Bar associations properly recognized that a lawyer who induced a third

lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited"); *id.* R. 8.4(a) (declaring attempts to violate the rules of professional conduct, either personally or through another, to be professional misconduct).

30. *E.g.*, FLA. RULES OF PROF'L CONDUCT R. 4-7.6(d) & cmt. 4 (2002) (subjecting "[a]ll computer-accessed communications concerning a lawyer's or law firm's services . . . to the requirements of" the lawyer advertising rules, but clarifying that the Rule was "not triggered merely because someone other than the lawyer gratuitously link[ed] to, or comment[ed] on, a lawyer's Internet web site").

31. *Cf.* Kathryn A. Thompson, *Client Web Sites and the Lawyer Ethics Rules: What Your Client Says About You Can Hurt You*, 16 PROF. LAW., no. 4, 2005 at 1, 1, 4 (recounting that state ethics regulators focused on lawyer and client communications in print advertising "until the Internet created widespread opportunities for casual breaches of the lawyer advertising rules, by lawyers and clients alike").

32. *See, e.g.*, *id.* at 6 n.48 (discussing an ethics opinion that implied a lawyer referral arrangement with a third-party web site violated the "prohibition against false and misleading advertising merely because the [third-party] site could potentially publish misleading information over which the lawyer had no control"); *cf.* S.C. Bar Ethics Advisory Comm., Advisory Op. 99-09 (1999), *available at* http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/618/Ethics-Advisory-Opinion-99-09.aspx (advising that the attorneys for a class action suit had a duty to review an independent website, which their clients created without their knowledge to seek potential plaintiffs for the class, and to counsel their clients about properly using the site in compliance with the ethics rules governing lawyer advertising).

party to make a statement about the lawyer, which the lawyer could not himself ethically make, fell within the purview of the disciplinary rules.[33] However, when a lawyer did not act to induce online postings, the plain text of the disciplinary rules did not ostensibly reach the conduct.[34] Thus, when a third party posted statements about a lawyer that the lawyer could not make himself—e.g., "Prashant is the best and most reliable lawyer this side of Pluto,[35] so click here to visit his site"—the organized bar reached interpretations of the disciplinary rules that would have never applied in the real world.[36] The prevention of such postings stifled communication and hindered the ability of prospective clients to learn useful information about lawyers.

B. *Lawyer Responsibility for "Straw Man" Web Site Postings, Improper Solicitations, and Unethical Commentary the Lawyer Induced a Third Party to Post*

Three fact patterns were recognized as being clearly unethical under the plain text of the disciplinary rules. None of them seem particularly controversial in either application or interpretation of the rules.

First, a lawyer who created a "straw man" web site[37] to post content that he could not place on his own site could not avoid the strictures of the advertising rules by hiding the fact of control.[38] For example, a straw man

33. *See supra* Part II(B).

34. *Compare* MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2010) (stating that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another"), *with* LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION 73 (2d ed. 2009) ("[T]he place to start when interpreting a statute is with the words themselves.").

35. In the early part of the twenty-first century, Pluto was deemed to not be a planet. Robert Roy Britt, *Scientists Decide Pluto's No Longer a Planet*, MSNBC.COM (Aug. 24, 2006, 10:35 PM), http://www.msnbc.msn.com/id/14489259/ns/technology_and_science-space. Luckily, this mistake was later corrected, although a generation of school children was improperly taught otherwise.

36. *Cf., e.g.*, Alexander v. Cahill, 598 F.3d 79, 92 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 820 (U.S. 2010) (holding that an outright ban on client testimonials violated the constitutional protection of commercial speech).

37. Traditional definitions of "straw man" include "a fictitious person" and "[a] third party used in some transactions . . . to allow the principal parties to accomplish something that is otherwise impermissible." BLACK'S LAW DICTIONARY 1461 (8th ed. 2004). Thus, by analogy, a straw man web site was one set up as a cover for the owner to disseminate information without revealing his true identity.

38. *See* MODEL RULES OF PROF'L CONDUCT R. 7.1 (2010) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."); *see also id.* R. 8.4(c)

posting that the public could perceive as an arm's length statement of praise about a lawyer could instead be his self-serving and misleading statement. Hiding the fact that the lawyer himself was making the improper statement did not avoid the reach of the disciplinary rules because the lawyer's sponsorship of the statement had to be disclosed to avoid making the statement false or misleading.[39]

Second, lawyers could not pay third parties for the posting of links and accompanying commentary as a referral service.[40] Lawyers in the early twenty-first century, as now, were prohibited from paying persons to recommend the lawyers' services due to the inherently misleading nature of such arrangements.[41] Indeed, lawyers in the real world were often

(enumerating the types of lawyer misconduct to include "conduct involving dishonesty, fraud, deceit, or misrepresentation").

39. *See, e.g.*, N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2003-01, at 3 (2004), *available at* 2004 WL 837935 (concluding that a law firm could permissibly use a domain name that did "not embody the name of the firm or its lawyers" if the web site was not used to engage in the practice of law, complied with the rule against making false or misleading statements, and "clearly and conspicuously include[d] the actual name of the law firm"); *cf.* Utah Ethics Advisory Op. Comm., Advisory Op. 99-04, at 5 n.15 (1999), *available at* 1999 WL 608212 (referencing that some states required the disclosure of a lawyer's sponsorship of a law-related seminar, when communicating about the seminar, to comply with the rule against making false or misleading statements).

40. *See* MODEL RULES OF PROF'L CONDUCT R. 7.2(b)(4) (2010) (prohibiting a lawyer from giving anything of value to another person for a recommendation or client referral); Kathryn A. Thompson, *Client Web Sites and the Lawyer Ethics Rules: What Your Client Says About You Can Hurt You*, 16 PROF. LAW., no. 4, 2005 at 1, 5 (discussing the rule against providing "something of value" in the context of client websites posting communications and hyperlinks that referred users to the law firm); *see also* Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 99-3, at 2–3 (1999), *available at* 1999 WL 401674 (addressing the propriety of an attorney being listed in an online directory); Va. State Bar Comm. on Lawyer Adver. & Solicitation, Lawyer Advertising Op. A-0117, at 1, 3 (2006), *available at* 2006 WL 3306867 (recognizing that lawyers could permissibly be listed in an online legal services directory when the web site was in fact a lawyer directory and not a lawyer referral service).

41. *See* Bonilla v. Rotter, 829 N.Y.S.2d 52, 53 (App. Div. 2007) (holding that an investigator's claimed agreement with an attorney to identify persons injured in accidents, obtain their medical records, and recommend the attorney's services to them constituted an unenforceable contract); Abbott v. Marker, 722 N.W.2d 162, 165 (Wis. Ct. App. 2006) (refusing to enforce a fee-splitting agreement when the lawyer had agreed to pay the referring party a quarter of the recovered amounts); *see also* McCloskey v. Tobin, 252 U.S. 107, 108 (1920) (concluding that a law prohibiting an attorney from soliciting employment was a reasonable regulation directed against an evil "from which the English law has long sought to protect the community through proceedings for barratry and champerty"); Atchison, T. & S. F. Ry. Co. v. Andrews, 88 N.E.2d 364, 371 (Ill. App. Ct. 1949) (reasoning that evidence of an attorney's scheme to enlist plaintiffs' employees to pursue claims against the plaintiffs "show[ed] a brazen contempt for the law, legal ethics, and the rights of plaintiffs," supporting the charge of champerty); BLACK'S LAW DICTIONARY 246 (8th ed. 2004) (defining "champerty" as an agreement to divide the proceeds of a claim with an unrelated party who

disciplined for making improper payments for referrals or solicitations.[42]

Third, lawyers could not, of course, cause a third party to violate a disciplinary rule and avoid liability on the basis that the third party, not the lawyer, actually engaged in the conduct.[43] Specifically, under Model Rule 8.4(a), lawyers could not direct, induce, or assist others in improper conduct.[44] Clearly, a lawyer could not direct a third party to make a statement that the lawyer himself could not make. Similarly, a lawyer who wrote the content of a self-serving and misleading statement for a third party to place on its web site was responsible for the content because the lawyer assisted the third party to post the information.

The rules encompassed actual direction but excluded independent action within the scope of disciplinary prohibition. In between these extremes lay a myriad of circumstances that required careful analysis. The rules prohibited not only a lawyer's control of or ability to direct the acts of another but also degrees of assistance and inducement.[45] Specifically, the official comments to Model Rule 8.4 used the term "knowingly," suggesting that the lawyer had to willfully assist or induce the third party's conduct.[46] Due to the subjective nature of the inducement and assistance

supports or advances the claim).

42. *See In re* Krug, 852 N.Y.S.2d 855, 856 (App. Div. 2008) (holding that the accused lawyer violated the ethics rules because he admittedly paid referral fees to a nonlawyer); Columbus Bar Ass'n v. Chasser, 925 N.E.2d 595, 599 (Ohio 2010) (concluding that the lawyer had entered into an improper fee-sharing arrangement as compensation for the recommendation of the lawyer's services); Cincinnati Bar Ass'n v. Mullaney, 894 N.E.2d 1210, 1216 (Ohio 2008) (determining that the acceptance by a lawyer of a portion of a fee paid to a nonlawyer referral organization constituted an impermissible sharing of fees); Sneed v. Bd. of Prof'l Responsibility, 301 S.W.3d 603, 616 (Tenn. 2010) (upholding factual findings that the lawyer received referrals from nonlawyers and paid monies to the nonlawyers in return); *see also* Disciplinary Counsel v. Simonelli, 863 N.E.2d 1039, 1042 (Ohio 2007) ("The prohibition against sharing legal fees with nonlawyers benefits the public by (1) limiting the possibility that a nonlawyer will interfere with the exercise of a lawyer's professional judgment in representing a client and (2) ensuring that the total fee paid by the client is not unreasonably high. The prohibition also limits the possibility that a nonlawyer will be motivated to engage in the improper solicitation of business for a lawyer." (internal citation omitted)).

43. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2010) (declaring that lawyers were liable for actual or attempted violations of the rules of conduct even when accomplished through the acts of another).

44. *Id.*

45. *Cf.* Merriam Webster's Online Dictionary, Assist, http://www.merriam-webster.com/dictionary/assist (last visited May 9, 2011) (defining "assist" as giving support or aid); BLACK'S LAW DICTIONARY 790 (8th ed. 2004) (defining "inducement" as "[t]he act or process of enticing or persuading another person to take a certain course of action").

46. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2010) (stating that "[l]awyers are

proscriptions, lawyers were required to be careful about even encouraging clients to post improper statements because encouragement could be viewed as assisting or inducing the third party to violate the ethics rules.[47] Additionally, the comments to Model Rule 8.4 stated that it "does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take."[48] Therefore, an attorney, if asked by a client about the legality of independent client referrals, was allowed to talk about client referrals as long as the attorney did not assist, induce, or encourage them.

If a law firm cooperated or worked with a client or third party to post content on an unaffiliated web site—even in what proved to be a failed effort to make the content *not* misleading—the firm might have been subject to a claim that it induced the posting.[49] Accordingly, two bar association ethics opinions suggested that a law firm had an affirmative obligation to ensure that client and third-party postings made in cooperation with the firm complied with the ethics rules.[50] For example, the Philadelphia Bar Association wrote that a lawyer "should review the web site to [e]nsure that there is nothing on it that would constitute any

subject to discipline when they . . . *knowingly* assist or induce another to [violate an ethics rule] . . . on the lawyer's behalf" (emphasis added)). *Compare* BLACK'S LAW DICTIONARY 888 (8th ed. 2004) (defining "knowing" as deliberate and conscious), *with id.* at 1630 (describing "willful" as voluntary and intentional).

47. *See* Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 2 (2004), *available at* 2004 WL 1810682 (proclaiming that "[l]awyers should not encourage others" to make statements that violate the ethics rules).

48. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2010).

49. *Cf.* Allen, Allen, Allen & Allen v. Williams, 254 F. Supp. 2d 614, 629 (E.D. Va. 2003) (granting an injunction against enforcement of Virginia's version of Rule 7.1 to a law firm that had been accused of violating the lawyer advertising rules). The Allen firm had aired a television advertisement touting the recognition of several of its partners in a directory of the best lawyers in the country. *Id.* at 618. After complaints by competitors, the firm attempted to alter the advertisement to comply with Virginia bar opinions on the permissible extent of lawyer advertising. *Id.* at 619. The bar issued revised advisory opinions that raised doubts as to when advertisements would violate the ethics rules. *Id.* at 620–22. The law firm sought an injunction prohibiting enforcement of the rule until the bar clarified its position. *Id.* at 615.

50. Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 3 (2004), *available at* 2004 WL 1810682 (suggesting that lawyers should examine client web pages and counsel those clients whose commentary violates the advertising rules); Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 2007-13, at 3 (2007), *available at* 2007 WL 5130541 (cautioning attorneys to ensure a third party's postings comply with the lawyer advertising rules when the attorneys pay to be listed on a "preferred" lawyer web site).

other violation of the advertising Rules."[51]

In sum, lawyers' hidden authorship of Internet posts, payment for improper online referrals, and inducement of improper statements on third-party web sites were unethical. The first two points seem non-controversial and the third, although covering ambiguous situations, was not an unreasonable view of the disciplinary rules. Because advertising restrictions upon lawyers were constitutional,[52] prohibiting these three fact patterns would likewise be so.

But ethical considerations involving use of the Internet did not stop there. What if a third party, including a current or former client, posted a statement that was false or misleading in terms of Model Rule 7.1? Or what if an existing client solicited additional clients to join a pending suit in which the firm represented the client and, in doing so, made statements that the lawyer could not have made? Under these circumstances, did the lawyer have any responsibility? These questions are addressed below.

C. *Lawyer Discipline for Constitutionally Protected Speech of Third Parties that the Lawyer Did Not Induce*

In the early twenty-first century, many social networking sites, such as LinkedIn, permitted members to "recommend" others and praise their work.[53] Ethics opinions at the time addressed whether a lawyer could "claim"[54] his name on a "lawyer rating" site that allowed clients and other persons to post comments about the lawyer.[55] Arguably, the question was

51. Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 2007-13, at 3 (2007), *available at* 2007 WL 5130541.

52. Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977) ("Advertising that is false, deceptive, or misleading of course is subject to restraint." (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 & n.24 (1976))).

53. *See* Nancy Roberts Linder, *Technology in Marketing: Cultivating Relationships Using LinkedIn*, MARKETING L. FIRM, Feb. 2011, at 5, 6, *available at* 26 No. 10 MKTLAWF 5 (Westlaw) (discussing the implications of using LinkedIn recommendations to cultivate relationships).

54. *See* S.C. Bar Ethics Advisory Comm., Advisory Op. 09-10, at 2 (2009), *available at* 2009 WL 6850298 (clarifying that "to 'claim' one's website listing [was] to 'place or disseminate' all communications made at or through that listing after the time the listing [was] claimed," thereby requiring the attorney to "take[] responsibility for its content and . . . conform the listing to all applicable rules").

55. *See id.* at 3 (agreeing that an attorney could allow peers and clients to post comments about the lawyer, but cautioning that such comments were governed by the state's rules of professional conduct); *cf.* Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 1–2 (2004), *available at* 2004 WL 1810682 (noting that the Ohio Code of Professional

distinguishable from a lawyer who claimed a domain name, consisting of his own name, because a lawyer's site did not generally permit clients and other persons to post comments about the lawyer. However, there was nothing unethical about a lawyer's participation in a lawyer advertising service; the impropriety arose from any comments posted to the lawyer's advertising page.[56] If a state required lawyers to prevent others from making false statements about them on their law firm web pages,[57] there was no principled reason why lawyers should not also be required to take the same action with respect to recommendations on other sites.

Perhaps proving this point, a lawyer could ethically claim his name on a listing service and be faced with whether a third party's comment created an ethical issue, just as a lawyer could ethically register a domain name and have a duty to ensure that similar postings were ethically sound.[58] Yet, a statement on the WWW in general, as opposed to a proprietary web listing service, would have been more widely distributed with an apparently greater potential to mislead the public. As a result, despite the factual distinction between web sites and listing services, it is difficult to understand why bar associations reached conclusions in the context of listing services that did not apply more broadly to the Internet.

1. Unethical Comments by Current Clients

With respect to clients, two early twenty-first century bar association

Responsibility did not directly govern the content that a client may place on that client's web site, nor did it restrict a lawyer from posting client names, with client consent, on its law firm web site).

56. *See* S.C. Bar Ethics Advisory Comm., Advisory Op. 09-10, at 2–3 (2009), *available at* 2009 WL 6850298 (stating that a lawyer's participation in a lawyer rating web site was not unethical, but that client comments could violate the lawyer advertising rules depending on their content).

57. *See, e.g.*, OHIO RULES OF PROF'L CONDUCT R. 7.1 & cmt. (2007), *available at* http://www.sconet.state.oh.us/legalresources/rules/profconduct/profconductrules.pdf (permitting the use of client testimonials as long as they were not false, misleading, or unverifiable); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, at 1–2 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10_457.authcheckdam.pdf (suggesting that a lawyer had to ensure any information on the lawyer's web site, concerning the lawyer and the lawyer's services, complied with the requirements of the Model Rules); *cf. supra* Part III(A)(2).

58. *Compare* S.C. Bar Ethics Advisory Comm., Advisory Op. 09-10, at 2–3 (2009), *available at* 2009 WL 6850298 (cautioning lawyers to monitor their claimed listings on lawyer rating web sites to ensure that client comments conform with the ethics rules), *with* N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2003-01, at 4 (2004), *available at* 2004 WL 837935 (concluding that a law firm could "use bonafide, non-misleading client testimonials in advertising provided the clients [did] not use the domain name as a sobriquet or substitute for the firm's name").

opinions that addressed the posting of client comments came to the same conclusion: the lawyer was admonished to "counsel the client about any omissions and advise the client about how the web page could be changed to comply with [the ethics] rules."[59] In a later opinion, the South Carolina Bar Association specifically reasoned, without any mention of the need for lawyer assistance or inducement, that such client statements could violate the disciplinary rules:

> Client comments may violate Rule 7.1 depending on their content. 7.1(d) prohibits testimonials, and 7.1(d) and (b) ordinarily also prohibit client endorsements. In the Committee's view, a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation or statement of approval of the lawyer. A lawyer should not solicit, nor allow publication of, testimonials. A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations. "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."[60]

In addition, if a client refused to makes changes to comply with the ethics rules, one bar association ethics committee recommended that the lawyer "give serious consideration to withdrawal from representation to avoid any impression that the lawyer has authorized or adopted the client's continued use of the web page."[61]

For two reasons, these bar opinions appeared to reach an improper interpretation of the ethics rules while stifling constitutionally protected speech. First, clients had a First Amendment right to make the statements.[62] Lawyers could not make such statements because they were

59. S.C. Bar Ethics Advisory Comm., Advisory Op. 99-09 (1999), *available at* http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/618/Ethics-Advisory-Opinion-99-09.aspx; Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 3 (2004), *available at* 2004 WL 1810682.

60. S.C. Bar Ethics Advisory Comm., Advisory Op. 09-10, at 3 (2009) (citation omitted) (quoting S.C. RULES OF PROF'L CONDUCT R. 7.1 cmt. 3), *available at* 2009 WL 6850298.

61. Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2004-7, at 3 (2004), *available at* 2004 WL 1810682.

62. *See In re* Ratner, 399 P.2d 865, 868–69 (Kan. 1965) (holding that the First Amendment protected the rights of members of an organization to solicit other members to seek legal advice

subject to the lawyer advertising rules; however, clients were not subject to those same rules. Although pertinent, the bar opinions did not address this issue. Second, these interpretations conflicted with the limits of Model Rule 8.4.[63] As discussed above, lawyers could only be disciplined if they directed, induced, or assisted a client to make an improper statement.[64] Mere inaction towards the independently posted comments of a client, or even requests for a client to remove or correct such statements, could not be fairly characterized as directing, assisting, or inducing the client to violate the ethics rules. Moreover, a lawyer's apparent endorsement of a web page based on a period of acquiescence or failure to compel changes should not have violated any ethics rule; lawyers were not responsible for the unilateral acts of third parties, including clients.[65] Nonetheless, both bar opinions interpreted the ethics rules to require lawyers to ask clients to stop engaging in constitutionally protected speech. The obvious impact of this interpretation was to reduce the free flow of information about the quality of a lawyer's services.

Challenges to these regulations came quickly and revealed problems with their enforcement. In 2009, a news story reported that a lawyer filed suit challenging the Florida Bar's prohibition against use of a lawyer rating web site.[66] In the case, the lawyer had "allegedly submitted 'client rating request forms' to a web site that posted feedback from five of the attorney's former clients."[67] The Florida Bar advised the attorney that use of the site violated Florida's ethics rules because of communications referring "to past successes and results obtained."[68] The attorney had asked the web site to

because the solicitation was done independently of the attorneys' willful actions).

63. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2010) (stating that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

64. *See supra* notes 44–53 and accompanying text.

65. *See* James M. McCauley, *Blogging & Social Networking for Lawyers: Ethical Pitfalls*, ETHICS GURU: LEGAL ETHICS BLAWG (Jan. 20, 2010), http://ethicsguru.blogspot.com/2010/01/blogging-social-networking-for-lawyers.html (stressing that some legal ethics experts agreed that an attorney did not need to be accountable for unsolicited third-party endorsements or recommendations); *see also supra* Part III(A).

66. Brian A. Zemil, *Ethics Advisory Opinion Requires Attorneys to Police Web-Based Profiles*, ABA SECTION OF LITIG. (Dec. 21, 2009), http://www.abanet.org/litigation/litigationnews/top_stories/ethics-social-networking-south-carolina.html.

67. *Id.*

68. *Id.*

remove the client reviews but the web site refused to do so.[69]

Accordingly, if a newspaper or bar journal had included the same sort of unethical statements in an article about the lawyer, the lawyer would logically have to seek retraction or publication of a disclaimer as to the client's statements.[70] The Florida case further raised the question of whether a truthful, independent third-party statement could be misleading.[71] Rather than recognizing that clients had First Amendment rights and lawyers were not responsible for statements they did not direct, assist, or induce, such interpretations made lawyers the arbiters of the boundaries of First Amendment rights of their clients and third parties.

Thus, these opinions applied rules to the Internet in a way that they had never been applied in the real world, requiring attorneys to undermine the First Amendment rights of their own clients. For example, if Natasha was an exceptionally talented patent attorney and her clients were new small-time inventors who posted reviews on awesomepatents.com about her services, she could have been punished for claiming those reviews, and at the same time, she could have been required to ask the site to take down the reviews, ask her own clients to not engage in activity that they were legally entitled to engage in, and potentially withdraw from representing those clients. These opinions also placed attorneys in a position to fight their own clients to the detriment of their practice, their relationship with their clients, and the legitimate interests of prospective clients. As one commentator recognized, this interpretation of the ethics rules "place[d] an attorney in a 'damned if you do, damned if you don't' situation because he or she [had to] decide whether to leave a potentially inaccurate and unfavorable comment on a listing or to respond to the negative

69. *Id.*

70. *Cf., e.g.*, OHIO RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2007) (stating that "[t]he 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"), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf; *see also* Mark J. Fucile, *Law Firm Marketing—Part 2: Practice*, WASH. STATE BAR ASS'N, http://www.wsba.org/media/publications/barnews/apr08fucile.htm (last modified Apr. 2008) (suggesting that electronic and print advertising include a disclaimer for any client testimonials).

71. *Compare* MODEL RULES OF PROF'L CONDUCT R. 7.1 (2010) (stating "[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"), *with id.* R. 8.4 cmt. 1 (noting an attorney was not prohibited from merely "advising a client concerning action the client [was] legally entitled to take").

comment[,] . . . trigger[ing] a responsibility for all content and charg[ing] the attorney with control that he [did] not in fact have."[72]

2. Unethical Comments by Nonclients

No bar opinions analyzed whether a lawyer had the same obligations when a third party who posted such comments was never a client. Curiously, however, if a lawyer had an obligation to act *only* if the posting was made by a current or former client, that meant *only* clients gave up constitutional rights simply by being represented by a lawyer. Thus, although the early bar opinions did not address this fact pattern, it would have been more logical that, if a lawyer was responsible for acting in light of a client's improper posting, the lawyer likewise had to act in response to a non-client's unethical posting. Therefore, under the logic of the foregoing bar opinions, a lawyer should have been required to ask completely independent third parties to take down their unqualified postings about the lawyer.[73] If the third party refused to do so, however, the lawyer would presumably not have had to take any further action because there would have been no representation to withdraw from.[74]

72. Brian A. Zemil, *Ethics Advisory Opinion Requires Attorneys to Police Web-Based Profiles*, ABA SECTION OF LITIG. (Dec. 21, 2009), http://www.abanet.org/litigation/litigationnews/top_stories/ethics-social-networking-south-carolina.html (quoting Mark J. Fucile, member of the ABA Litigation Section's Ethics and Professionalism Committee and of the ABA Center for Professional Responsibility) (internal quotation marks omitted).

73. Model Rule 4.3, which prohibited a lawyer from engaging in certain conduct with respect to unrepresented third parties, would not appear to prevent communications requesting the third party take down postings about the lawyer. Specifically, that Rule provided:

> 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.

MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010). Thus, it should have been proper for the lawyer to communicate with a nonclient regarding such postings because the communication was not in connection with acting on behalf of a client, and the interests of the third party would not, absent unusual circumstances, be in possible conflict with the interests of the lawyer's client.

74. A somewhat related and interesting question was whether a law firm could post on its own web page a link to another firm's web page and make gratuitous statements about the other firm that would violate the rules if made by the other firm. In other words, did a lawyer have to abide by the advertising rules when he made statements about another law firm's web site? *See In re* Moran, 840 N.Y.S.2d 847, 849–50 (App. Div. 2007) (per curiam) (concluding that a lawyer who posted a link to

D. *Less Severe Restraint on Lawyers Linking to Third-Party Sites*

Just as lawyers today may link to third-party sites on the SSWW, so too did early twenty-first century lawyers often leverage links with third-party sites as a marketing tool to drive Internet traffic to law firm web sites by presenting resources of interest to clients, prospective clients, and the public generally.[75] While good for marketing, commentators noted several concerns and limitations on such practices. Yet, as detailed below, the organized bar took a far more restrained approach to limiting a lawyer's linking to third-party sites than they did with permitting third-party comments about lawyers. That is, a lawyer's speech was essentially less impaired.

First, although there was no uniform rule,[76] one ethics committee stated that "[l]inks to outside sites should, of course, clearly indicate to the web browser that they are not maintained by [the] Law Firm."[77] There were important reasons for such caution. Foremost, the lawyer did not "control the completeness, accuracy, or timeliness of the content in the linked Internet sites."[78] In addition, without a disclaimer or other indication of lack of responsibility for the content of the linked-to site, the risk of negligent referral arose if the site was one to which the firm was referring prospective or actual clients.[79]

Second, lawyers were admonished to not make links from their web sites appear to go to independent third-party sites when the linked-to sites were in fact controlled or owned by the lawyers.[80] "Information on external

a site detailing the disciplinary investigation of a rival firm "engaged in conduct that was prejudicial to the administration of justice and . . . adversely reflected on his fitness as a lawyer" because disciplinary proceedings were confidential).

75. *See* J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 308 (2004) (discussing the implications of an attorney linking his site to third-party sites); *see also* Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 ST. JOHN'S J. LEGAL COMMENT. 529, 538, 542 (2002) (asserting that the Internet created a venue for easy communication with a broad spectrum of people and insisting that a lawyer must make certain precautions to prevent dissemination of material from reaching unintended recipients).

76. *See* Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 ST. JOHN'S J. LEGAL COMMENT. 529, 542 (2002) ("It is unclear whether lawyers are responsible for labeling linked material . . . .").

77. N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 1998-2, at 3 (1998), *available at* 1998 WL 1557151.

78. J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 308 (2004).

79. *Id.*

80. *See id.* (asserting that, if a lawyer did not clearly indicate to users that the linked-to sites

sites to which links [were] provided from the lawyer's web site [was] not considered part of the lawyer's web site unless the external site [was] also controlled by the lawyer."[81] Thus, when a lawyer controlled or owned the third-party site, it was not only deceptive for the lawyer to portray the linked-to site as independent but also incumbent upon the lawyer to ensure the linked-to site's content complied with the advertising rules.

Third, a lawyer could not incorporate content from an independent third party's web site into his own web site, such as by quoting or "framing"[82] the content, if the content violated the lawyer advertising rules, such as by being false or misleading.[83] This principle, of course, precluded the use of framing to accomplish indirectly what the lawyer could not do directly—i.e., post false or misleading information.[84] In some respects, this approach may explain the notion that lawyers were required to act when they knew of unethical posts by third parties.[85] That is, if a lawyer who claimed a web site listing could be viewed as framing or adopting content posted by third parties, the requirement to police such content would seem less controversial. However, as noted above, the opinions did not rely on this reasoning and took a much broader view of

were not maintained by the lawyer, the lawyer ran the risk that a link to another site may serve as grounds for a contributory copyright infringement claim).

81. Utah State Bar Ethics Advisory Opinion Comm., Advisory Op. 97-10, at 1 n.5 (1997), *available at* 1997 WL 705482.

82. *See* BLACK'S LAW DICTIONARY 683 (8th ed. 2004) (defining "framing" as "a website's display of another entity's webpage inside a bordered area, often without displaying the page's URL or domain name").

83. *See* Donald R. Lundberg, *An Advertising Primer: Part 2,* RES GESTAE, Nov. 2005, at 32, 32, *available at* 49-NOV Res Gestae 32 (Westlaw) (discussing the implications of a disciplinary order issued against a lawyer who incorporated unethical content from another web site into his web site (citing *In re* Philpot, 820 N.E.2d 141 (Ind. 2005))). According to Mr. Lundberg, executive secretary to the disciplinary commission in Indiana, the lawyer in *Philpot* "incorporated content from another Web site that the Court found to be deceptive and prejudicial to the administration of justice because it advocated that parents in . . . mediations lie and use improper tactics like making false demands." *Id.* at 32. It is not apparent from the reported decision, however, that this assessment of the case was completely accurate. *See Philpot*, 820 N.E.2d at 141 (summarizing that the accused lawyer's informational website suggested that parents of special needs children "lie and create 'throw away' demands to achieve successful results in" mediation meetings with school officials).

84. *See* MODEL RULES OF PROF'L CONDUCT R. 7.1 (2010) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

85. *See supra* Part II(C); *cf.* Donald R. Lundberg, *An Advertising Primer: Part 2,* RES GESTAE, Nov. 2005, at 32, 32, *available at* 49-NOV Res Gestae 32 (Westlaw) ("As a general proposition, the fact that lawyer advertising or publicity appears on a Web site does not in any way exempt it from the rules governing lawyer advertising and publicity.").

the lawyer's obligation to act in response to third-party posts, even when they did not appear on the lawyer's web page through the actions of the lawyer to frame or otherwise incorporate the unethical statements.

Fourth, at that time, many states required lawyers to maintain copies or files of their web sites, under either a direct rule or rules treating web sites as advertisements with the same recordkeeping requirement.[86] However, the only opinion on applying this point to third-party web sites concluded that lawyers did not need to maintain copies of sites belonging to third parties when the lawyer's web site merely linked to them.[87]

Fifth, commentators recognized that lawyers did not have to monitor third-party sites that linked to the lawyer's site to ensure they did not contain improper content.[88] As explained then: "[The] burden on the lawyer to monitor the linked material would be an onerous one. If such material . . . can be updated and changed with relative ease, the obligation on the lawyer to keep abreast of changes to linked material could effectively eliminate the ability of a lawyer to link."[89] This no-duty rule was obviously in tension with the requirement that lawyers ask third parties to take down or otherwise correct their unethical comments posted on third-party sites.[90] Research revealed no authority harmonizing the two views. Apparently, a lawyer could establish a link to a third party's page as long as he did not know at the time of any improper content, and if he did not direct, assist, or induce the posting of any content on the third party's page, he did not need to actively monitor it. However, upon learning of improper content, the lawyer would presumably have been required to, at a minimum, remove the link and perhaps ask the posting party to remove or correct any improper content, or withdraw from

86. *See* Vanessa S. Browne-Barbour, *Lawyer and Law Firm Web Pages As Advertising: Proposed Guidelines*, 28 RUTGERS COMPUTER & TECH. L.J. 275, 302–16 (2002) (finding that Arizona, North Carolina, and Vermont specifically required attorneys to keep hard copies of their web sites at all times, and noting that many other states put web sites under the same set of guidelines that applied to any other form of advertisement).

87. N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 1998-2, at 3 (1998), *available at* 1998 WL 1557151 ("We do not believe that [a] Law Firm need retain copies of the contents of outside sites linked to its web page.").

88. *See* Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 ST. JOHN'S J. LEGAL COMMENT. 529, 542 (2002) (surmising that it would be too onerous for a lawyer to monitor constantly changing linked material).

89. *Id.*

90. *See supra* Part III(B)–(C).

representation if the third party was a client.[91]

Finally, a lawyer who knew that a third party's site contained information that violated the ethics rules was at great risk if he linked to that site from his web site.[92] Likewise, a lawyer could not ask a third party to post material on a linked-to site that would be improper for the lawyer to post himself.[93] Although research found no authority holding that lawyers had an obligation to monitor third-party sites for improper content and to subsequently demand the removal of such improper content, a lawyer who knowingly linked to such improper content could easily have been accused of circumventing the advertising rules.[94] Indeed, one authority suggested that, if the lawyer cooperated with the third party to establish the link, the lawyer had an affirmative obligation to monitor the linked site to ensure that its content did not violate the lawyer advertising rules.[95]

E. *Overly Cautious Approach to Communications About Lawyer Services on the Internet and Social Networking Sites*

Although research located no authority harmonizing the opinions supporting a lawyer's freedom to link and extending lawyer advertising rules to third-party sites, it seems clear that an actual duty to monitor third-party sites did not exist. Lawyers were not required to constantly review material on a linked-to site to see if a third party had made an

91. *See supra* Part III(B)–(C).

92. *Cf., e.g.*, *In re* Philpot, 820 N.E.2d 141, 141 (Ind. 2005) (holding an attorney accountable for information on his web site, which was incorporated from another web site, as deceptive and prejudicial).

93. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(a), (c) (2010) (defining misconduct as behavior that consisted of "dishonesty, fraud, deceit, or misrepresentation," or assisting or inducing someone else to violate the ethics rules).

94. *Cf.* J. Clayton Athey, *The Ethics of Attorney Web Sites: Updating the Model Rules to Better Deal with Emerging Technologies*, 13 GEO. J. LEGAL ETHICS 499, 512 (2000) ("[T]he question of a lawyer's responsibility for false or misleading communications made by others that are accessible through links on the lawyer's site [was] addressed by advising that such references be avoided."); Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 ST. JOHN'S J. LEGAL COMMENT. 529, 542 (2002) (suggesting that the ethics rules should apply when the linked material was under the control of the lawyer).

95. *See* Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 2007-13, at 3 (2007), *available at* 2007 WL 5130541 ("The Committee also cautions that since websites are advertising . . . the inquirer should review the website to [e]nsure that there is nothing on it that would constitute any other violation of the advertising Rules . . . as regards his participation thereon.").

improper statement that the lawyer himself could not make. However, under the ethics rules, lawyers had to consider that "knowledge" was defined to include not only actual knowledge but also knowledge that could be inferred from the circumstances.[96] Likewise, lawyers had the obligation to avoid not only the direct posting of improper content but also the inducing or assisting of others to do so.[97] Along with the lack of controlling authority in most jurisdictions, these parameters no doubt compelled lawyers in the early twenty-first century to often take the most risk-averse path and follow the most stringent view of such matters. Moreover, this approach most likely resulted in lawyers being overly cautious with providing information to clients, which would have enabled them to make better and more informed decisions, and frustrating one purpose of the WWW, which was to vastly enhance the dissemination of information.

Looking back, it is understandable why a lawyer could not post improper material and make it appear it was from a third party, or could not induce a third party to post improper material. These prohibitions were settled real world obligations. But the notions that a lawyer was obligated to correct truly independent third-party statements and to withdraw if a client refused to change an improper statement struck at the core of free speech. In the real world, lawyers clearly had no vicarious responsibility to police independent statements made about the lawyer.[98]

Thus, it is not surprising that in the second decade of this century the organized bar recognized that these opinions made little sense in light of their direct implication that lawyers had an obligation to police statements by clients and third parties in the real world. For example, later ethics authorities reasoned that, following prior decisions, lawyers would have to

96. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2010) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.").

97. *See id.* R. 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."); *id.* R. 8.4(a) (stating that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

98. *But cf.* S.C. Bar Ethics Advisory Comm., Advisory Op. 09-10, at 1 (2009), *available at* 2009 WL 6850298 ("Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer's behalf.").

ask a bar journal author, who wrote about a lawyer's big win, to include such statements as "past results are no indication of future success."[99] Fortunately, the prior opinions were overruled in their own states and not followed by others, but only after several years of confusion in the law and repression of communications about legal services.

IV. EARLY TWENTY-FIRST CENTURY APPLICATION OF DISCIPLINARY RULES GOVERNING SOLICITATION TO THE INTERNET AND SOCIAL NETWORKING SITES

As previously explained, although lawyer advertising was deemed constitutionally protected speech, states remained free to prohibit certain areas of lawyer speech, such as false or misleading communication. Another area involved solicitation of business from prospective clients that the lawyer knew were in need of legal services in a particular matter.[100] While courts held that written solicitations for employment were constitutionally protected,[101] states were still able to regulate them.[102] They were also constitutionally permitted to ban in-person communications to solicit business, largely due to the potential for lawyer over-reaching, the lack of written records of the communications, and their private nature.[103]

99. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2010) (noting that statements made by lawyers regarding prior successes "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," and suggesting that "inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead").

100. *See generally id.* R. 7.3 (restricting the methods a lawyer may employ when soliciting business from prospective clients).

101. *E.g.*, Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 472 (1988) (stressing that a state could categorically prohibit in-person solicitation for legal employment but could only constitutionally restrict written solicitations to the extent such regulations directly advanced a substantial government interest).

102. Generally, the ethics rules required written solicitations to state that they were "advertisements" and to include other information. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 7.3(c) (2010) (requiring that any "communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services . . . shall include the words 'Advertising Material'"). *But see* Vanessa S. Browne-Barbour, *Lawyer and Law Firm Web Pages As Advertising: Proposed Guidelines*, 28 RUTGERS COMPUTER & TECH. L.J. 275, 291 (2002) (emphasizing that "rules governing advertising and solicitation vary dramatically from state to state").

103. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449, 457 (1978) (holding that the Ohio State Bar "may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent"); MODEL RULES OF PROF'L

When bar associations began to apply these rules to electronic communications, they prohibited only "real-time" or "synchronous" electronic communications.[104] For example, the Model Rules were amended in 2002 to provide that "[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment."[105] Thus, the organized bar in the early twenty-first century created a dividing line between real-time electronic communications, which were prohibited if used to solicit clients known to have a specific legal need, and other electronic communications, which were regulated to varying degrees but not prohibited.[106] Many social networking sites offered various forms of synchronous and asynchronous communication, such as chat rooms in the former category and e-mail like services in the latter.[107] If a communication to solicit clients was real-time, it was a violation of the ethics rules and subjected the lawyer to disciplinary action.[108]

The bar associations generally viewed lawyer e-mails sent to solicit clients as *not* being real-time.[109] As a result, they were not prohibited real-time solicitations. Thus, lawyers could solicit employment using LinkedIn's "in-mail" feature or Facebook's similar proprietary e-mail system, although they still had to comply with the advertising rules governing targeted mailings.[110] The problem that lawyers faced was

CONDUCT R. 7.3(a) (2010) ("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 . . . is a lawyer; or . . . has a family, close personal, or prior professional relationship with the lawyer").

104. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2010) (requiring lawyers to abstain from soliciting potential clients by use of, among other forms, real-time electronic contact).

105. *Id.*

106. *See id.* R. 7.3 cmt. 3 (stating that a lawyer may direct electronic communications that are not in real-time to prospective clients).

107. John S. Wilson, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1220, 1222 (2007).

108. Kathryn A. Thompson, *The Worlds of Ethics and Technology Collide*, LEGAL ASSISTANT TODAY, Sept.–Oct. 2005, at 58, 62, *available at* http://www.legalassistanttoday.com/issue_archive/features/feature1_so05.htm.

109. *See id.* ("[C]ontacting prospective clients by e-mail is expressly permitted as a form of written solicitation under the new rule since it doesn't constitute direct contact.").

110. *See* Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 97-130, at 5 (1997), *available at* 1997 WL 816711 ("E-mail is most closely analogous to targeted, direct mail and for purposes of compliance with the Rules of Professional Conduct should be treated in the same manner.").

uncertainty over which side of the divide fell other forms of communication, such as chat rooms. At first, the trend was to treat them as if they were in-person solicitations because of their live, synchronous nature.[111] However, a more pragmatic approach was soon adopted by the Philadelphia Bar Association.

Rather than attempt to characterize chat room communication as synchronous or not, the Philadelphia Bar Association opinion looked at the social mores that lay behind the prohibition against in-person solicitations.[112] While recognizing that the Model Rules were written with the intent to deem chat room sessions as prohibited real-time communications, the Philadelphia Bar Association stated that the "social attitudes and developing rules of internet etiquette [were] changing" and that this trend made it "apparent to everyone that they need not respond instantaneously to electronic overtures."[113] Thus, "everyone realize[d] that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishe[d]."[114] As a result, the Philadelphia Bar Association concluded that chat room communications were not prohibited in-person or real-time communications.[115]

Although the Philadelphia Bar Association opinion focused more appropriately on the broader interests protected by the "no real-time solicitation" rule, rather than an arbitrary determination of whether a communication was synchronous or not, many uncertainties remained. For example, lawyers faced not only the lack of controlling law in most jurisdictions but also unpredictable variations that could occur while using the Internet.[116] Further compounding the confusion were notions that

111. *See* Cydney Tune & Marley Degner, *Blogging and Social Networking: Current Legal Issues*, *in* INFO. TECH. LAW INST. 2009, WEB 2.0 AND THE FUTURE OF MOBILE COMPUTING: PRIVACY, BLOGS, DATA BREACHES, ADVERTISING, AND PORTABLE INFORMATION SYSTEMS, ch. 4, at 113, 133 (2009), *available at* 962 PLI/Pat 113 (Westlaw) (stating that chat room communication was more like "real time electronic communication with all its potential for impermissible coercion").

112. *See* Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 2010-6, at 5 (2010), *available at* 2010 WL 2640840 (explaining that with in-person communications "the prospective client can walk away or hang up the phone, but it is socially awkward to do so in the face of a determined advocate").

113. *Id.*

114. *Id.*

115. *Id.* at 6.

116. *See, e.g.*, *id.* at 5 (imagining a scenario where a lawyer and prospective client happened to be logged onto a blog at the same time, and therefore essentially engaged in synchronous

"communications sent to the profiles of prospective clients on social networking sites . . . could be considered a hybrid between e-mail solicitation and contemporaneous communications one would find in an Internet chat room, as members of the social networking sites [had] the capability to respond to messages more or less instantly."[117] Thus, until clarity finally occurred in a particular state, lawyers were faced with doubt over the boundary between permitted and prohibited electronic communications to solicit business. If they guessed wrong, they could have been subjected to discipline.

V. THE STRUGGLES EARLY TWENTY-FIRST CENTURY ETHICS AUTHORITIES FACED BECAUSE OF SOCIAL NETWORKING SITES

Social networking sites on their face seemed private to some extent.[118] Facebook pages were at least somewhat private because they were viewable only by "friends" of their owners.[119] Similarly, some LinkedIn profiles were equally private.[120] Thus, a member's page on a social networking site was only viewable by those whom the member chose to share content, unless the member opted for public access.[121] In the early twenty-first century, the distinction between public and private settings on social networking sites created three issues, as further explained below.

A. *Deception Was Unethical*

One issue, dealt with rather quickly, involved the question of whether a

communications).

117. Maxwell E. Kautsch, *Attorney Advertising on the Web: Are We in Kansas Anymore?*, J. KAN. B. ASS'N, Oct. 2009, at 35, 38.

118. *See* Kara D. Williams, Comment, *Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights*, 76 U. CIN. L. REV. 707, 726 (2008) (stating that users expect at least some modicum of privacy on social networking sites, "and both MySpace and Facebook offer users optional privacy settings").

119. *Id.*; *see also Facebook Privacy Policy*, FACEBOOK, http://www.facebook.com/#!/policy.php (last visited May 9, 2011) (indicating that all users have the ability to decide who may view their profiles and other posted information and material).

120. *See* Bryan Van Wyk, Note, *We're Friends, Right? Client List Misappropriation and Online Social Networking in the Workplace*, 11 VAND. J. ENT. & TECH. L. 743, 758 (2009) (stating that LinkedIn users may designate who may access their profiles); *Privacy Policy*, LINKEDIN, http://www.linkedin.com/static?key=privacy_policy (last visited May 9, 2011) (indicating users may control access to their profiles).

121. If a person set the "privacy" setting to allow for public access, there was nothing illegal or unethical about looking at it. Romano v. Steelcase, Inc., 907 N.Y.S.2d 650, 657 (Sup. Ct. 2010).

lawyer could use deception to gain access to a person's private page. Ethics authorities uniformly held that an attorney's use of deception to discover helpful information for a client was unethical,[122] which was not a surprising conclusion. A Philadelphia Bar Association opinion addressed this issue in the context of Facebook.[123] In that inquiry, a lawyer had deposed a woman who stated in her deposition that she had a Facebook page, and the lawyer believed the page would contain information that he could use to impeach her testimony.[124] Not knowing, however, if she would "friend" him on Facebook, he proposed to have an assistant use a fake name to hopefully gain access to her page and provide information on that page to him, which he would then use at trial to impeach her.[125]

The Philadelphia Bar Association did not hesitate to conclude that the lawyer's proposed course of conduct would violate the ethics rules, labeling his plan as deceptive.[126] It reached this conclusion even assuming the deposed woman let every other person who asked to be her friend onto her page:

> Even if, by allowing virtually all would-be 'friends' onto her Facebook . . . page[], the witness [was] exposing herself to risks like that in this case [i.e., disclosing information to the world that could be used to impeach her], excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the [I]nternet and susceptibility to being deceived.[127]

However, while the use of deception on the Internet for such purposes was unethical, there remained some ambiguities where attorney deception was part of an effort to investigate likely criminal activity or otherwise

122. *See, e.g.*, Tory L. Lucas, *To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219, 244–55 (2010) (discussing cases in which attorneys were found to violate rules of professional conduct when they used deception to help their clients).

123. *See generally* Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 2009-02 (2009), *available at* 2009 WL 934623 (determining that an ethics rule violation would occur when a lawyer attempts to gain access to a person's private page through a third-party intermediary).

124. *Id.* at 1.

125. *Id.*

126. *Id.* at 2.

127. *Id.* at 3.

uncover illegal conduct.[128]

B. *Accessing Public Information Was Ethical*

The ethics rules generally prohibited ex parte communications with a person who was represented by counsel in the same matter the lawyer represented a client,[129] and they also imposed certain obligations on lawyers who dealt with unrepresented persons.[130] Was a visit to an opponent's web site during litigation a violation of such rules? Put another way, did anything prevent an adversary, during litigation, from accessing an opponent's web page, gleaning information from it, and then using that information against the site's owner?

During the first year of this century, an Oregon Bar Association opinion addressed this issue.[131] It recognized that the digital nature of the contact was irrelevant; if the contact was prohibited in the real world, then it was prohibited in the digital one as well.[132] Accordingly, the opinion reasoned that, because a web site was generally in the public domain like "a newspaper, magazine, or other document available for public

128. *See* Va. State Bar Comm. on Legal Ethics, Legal Ethics Op. 1845 (2009), *available at* http://www.vacle.org/opinions/1845.htm (concluding that, like government lawyers, members of the Virginia State Bar, who were charged with uncovering the unauthorized practice of law, could use false names to ferret out wrongdoing under a "government lawyer" exception to the general principle that deception was improper); Tory L. Lucas, *To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219, 283–86 (2010) (noting that many states created an investigation exception to the anti-deception rules so that attorneys could use deception when investigating a breach of criminal, civil, or constitutional law).

129. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."); Michael Z. Green, *Witness Preparation and Ex Parte Communications: A Fundamental Discussion?*, *in* ABA SECTION OF LABOR & EMP'T LAW, 2ND ANNUAL CLE CONFERENCE, at 1, 16 (2008), *available at* http://www.abanet.org/labor/lel-annualcle/08/materials/data/papers/095.pdf (explaining how an attorney was prohibited from making ex parte communications through the acts of another).

130. *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010) (governing an attorney's obligations to persons who were not represented by counsel).

131. *See generally* Or. State Bar Legal Ethics Comm., Formal Op. 2001-164 (2001), *available at* 2001 WL 167177 (determining that a lawyer does not violate the ethics rules if he merely "reads information posted for general public consumption" on a passive web site), *superseded by* Or. State Bar Legal Ethics Comm., Formal Op. 2005-164 (2005), *available at* 2005 WL 5679590 (replacing the prior opinion to not alter its substantive content but to update citations and references to ethics rules that became effective in 2005).

132. *Id.* at 1.

consumption," a lawyer who read information posted on an opponent's web site was "not communicating with the represented owner of the [web site]."[133] Yet, the opinion further considered the then-burgeoning interactive nature of the Internet. Some web sites consisted of more than mere passive postings because they allowed for interaction between visitors and site owners.[134] The Oregon Bar Association distinguished between different degrees of interactivity:

> Some Web sites allow the visitor to interact with the site. The interaction may consist of providing feedback about the site or ordering products. This kind of one-way communication from the visitor to the Web site also does not constitute communicating "with a person" . . . . Rather, it is the equivalent of ordering products from a catalog by mailing the requisite information or by giving it over the telephone to a person who provides no information in return other than what is available in the catalog. . . .
>
> A more interactive Web site allows the visitor to send messages and receive specific responses from the Web site or to participate in a "chat room." A visitor to a Web site who sends a message with the expectation of receiving a personal response is communicating with the responder. The visitor may not be able to ascertain the identity of the responder, at least not before the response is received. In that situation, a lawyer visiting the Web site of a represented person might inadvertently communicate with the represented person. If the subject of the communication with the represented person is on or directly related to the subject of the representation, the lawyer violates [the rule against ex parte contacts].
>
> For example, assume Lawyer *B*'s client is a retailer in whose store a personal injury occurred. Lawyer *A* could visit the store and purchase products without the consent of Lawyer *B*, and could ask questions about the injury of clerks and other witnesses not deemed represented . . . . Lawyer *A* could not, however, question the store owner or manager or any clerk whose conduct was at issue in the matter. That same analysis applies if Lawyer *B*'s client operates an "e-store." Lawyer *A* could visit the "e-store" site and review all posted information, purchase products, and respond to surveys or other requests for feedback from visitors. Lawyer *A* could not send a demand letter or an inquiry through the Web site requesting information about the matter in litigation unless Lawyer *A* knew that the

133. *Id.* at 2.
134. *Id.*

> inquiry would be answered by someone other than Lawyer *B*'s client (or, if the client is a corporation, someone deemed represented).[135]

Thus, passive viewing of publicly available information on an opponent's web site did not implicate the rule against ex parte contacts. Information on a web page in the public domain was not confidential and could be used against a represented person in the same matter the lawyer represented a client. But any contact that consisted of an improper interactive inquiry did implicate the rule against ex parte contacts. There was, however, one important error in the Oregon Bar Association opinion. Under this opinion, a lawyer could not contact a person through the Internet unless the lawyer knew the person was *not* represented.[136] In comparison to Model Rule 4.2, the more precise and correct language would have stated the contact was proper unless the lawyer knew the person was represented.[137]

C. *The Odd View that Material Became Undiscoverable If It Was Posted on a "Private" Facebook Page*

Several decisions in the early twenty-first century analyzed whether information that a member of a social networking site had posted on his or her "private" page was shielded from discovery.[138] Surprisingly, the courts gave serious consideration to the fact that the information was posted privately.[139] An argument was made that such information should

135. *Id.* at 2–3 (footnote omitted) (citation omitted).

136. *Id.* at 3.

137. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010) (stating that "a lawyer shall not communicate . . . with a person the lawyer *knows to be represented*" (emphasis added)).

138. *See generally* EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434–37 (S.D. Ind. 2010) (determining that all relevant materials on a social networking site could be discovered even when the content was "locked" or "private"); Ledbetter v. Wal-Mart Stores, Inc., No. 06-CV-01958-WYD-MJW, 2009 WL 1067018, at *1–2 (D. Colo. 2009) (denying plaintiffs' motion for protective order because subpoenas issued to social networking sites were "reasonably calculated to lead to the discovery of admissible evidence"); Romano v. Steelcase, Inc., 907 N.Y.S.2d 650, 652–57 (Sup. Ct. 2010) (granting an order for defendant to access the plaintiff's social networking site pages and accounts because they could contain relevant evidence and the plaintiff had "no legitimate reasonable expectation of privacy" regardless of privacy settings).

139. *See Simply Storage*, 270 F.R.D. at 434, 437 (noting that a protective order had been entered to address "privacy concerns . . . germane to the question of whether requested discovery [was] burdensome or oppressive and . . . sought for a proper purpose," and suggesting that counsel confer on the appropriate scope of the order to prevent discovery of irrelevant and potentially embarrassing private information); *Ledbetter*, 2009 WL 1067018, at *2 (finding that a stipulated

not be discoverable because it was posted on the social networking site rather than the user's personal computer, even though the page owner obviously had control over it.[140] A law review article published in 2009 summarized the criticisms and concerns on this issue:

> Despite the increasing number of attorneys perusing these web sites for evidence, the use of social networking web sites as evidence also has its critics. As one author remarked, "The problem with these networking sites is that it is really a domain of fiction, and is therefore an unreliable source of information." Furthermore, critics argue that these web sites are not as helpful as they seem at first blush because users have the option of making their profiles private. However, although the web sites provide users this privacy option, many fail to recognize this option exists, and some even choose to display their profiles to the world. Despite these concerns, this form of evidence gathering is becoming more commonplace, and more courts are beginning to recognize the reliability of information derived from them.[141]

The better view would have addressed the Internet, and social networking sites in particular, with the same principles of discoverability that applied in the real world. A person's diary was discoverable if it contained relevant information, even if it was marked private and kept locked away from public access, subject to the general rules regarding all forms of discovery.[142] Accordingly, relevant information posted on a

protective order was sufficient to protect the privacy interests in "confidential information" on social networking sites); *Romano*, 907 N.Y.S.2d at 655–57 (reasoning that the defendant's need for information, which could not be discovered by any other means, outweighed the plaintiff's privacy concerns in entries on social networking sites, which did not provide a reasonable expectation of privacy under Fourth Amendment analysis).

140. *See* Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. REV. 1057, 1064 (2009) (discounting that "social networking web sites present[ed] discovery problems . . . because information [was] not physically stored on the user's computer and the user [did] not own the web site" on the basis of case law supporting that "ownership and actual possession [were] not necessary for discovery purposes"); *cf.* Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc., No. 2:06-CV-00788-JCM-GWF, 2007 WL 119149, at *8 (D. Nev. 2007) ("The Court notes that a refusal by Plaintiff to produce relevant and discoverable email communications based on a wrongful and bad faith denial that the Myspace.com accounts belong to her could be grounds for imposing sanctions.").

141. Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. REV. 1057, 1060–61 (2009) (footnotes omitted).

142. *See* Topol v. Trs. of Univ. of Pa., 160 F.R.D. 476, 477–78 (E.D. Pa. 1995) (ordering the plaintiff to produce a diary that was clearly relevant, nonprivileged, and would "not cause undue annoyance, embarrassment, or oppression").

private Facebook page should have been equally discoverable. Today, a plaintiff who claimed to have been injured while mining ore on Deimos, but who posted online photos of himself dancing the night away at one of the notorious bars on Phobos, could not argue that the images were undiscoverable because he had placed them in a folder labeled "confidential and private." Posting information online and marking it "private" surely does not and did not make it more private than any other posted information. Fortunately, courts soon recognized that privacy settings—while implicating whether the information could be obtained outside the discovery process—did not make information undiscoverable.[143]

VI. CONCLUSION

As this Article illustrates, in the early twenty-first century, the organized bar was too skeptical and cynical about the use of technology, applying principles to the Internet that had no analogous application in the real world. This dichotomy resulted in clients receiving too little information about lawyer services and juries not hearing the truth in court proceedings, among other things. Today, of course, lawyers face "new" issues such as telepathic advertising, deportation by teleportation, and the use of holographic evidence. In applying the ethics rules of 2050, the organized bar should consider the damage that earlier skeptics caused, and take a more welcoming view of technology and what it can do for lawyers, judges, and clients.

143. *See, e.g.*, *Simply Storage*, 270 F.R.D. at 434 (contending that, while there were privacy concerns with information posted on social networking sites, a "person's expectation and intent that her communications be maintained as private [was] not a legitimate basis for shielding those communications from discovery").