

Think Before You “Speak”: What Lawyers Can And Cannot Say In The Digital Age

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Membership in the bar is a privilege burdened with conditions.

Justice Benjamin Cardozo

ATTORNEYS PERFORM nearly all of their work through speech either through written briefs or the spoken word. As Frederick Schauer poignantly declared:

As lawyers, speech is our stock in trade. Speech is all we have. Our tools are books and not saws or scalpels. Our product is argument, persuasion, negotiation, and documentation, so speaking (by which I include writing) is not only central to what the legal system is all about, and not only the product of law as we know it, but basically the only thing that lawyers and legal system have.¹

Although words are our stock in trade (our apologies to Abraham Lincoln, who famously declared that a lawyer’s time and advice are his stock in trade), we lawyers are not free to say whatever we want. Our comments—both orally and in writing—must be tempered and must comport with the Rules of Professional Conduct that govern our profession. Indeed, traditional theory has held that attorneys agree to many rules and regulations restricting attorney speech as a condition of being admitted to the bar.

Given the myriad rules and regulations that apply to attorney speech, lawyers often have questions about what they can and cannot say, especially when it comes to new forms of electronic communication such as Facebook, MySpace, Twitter and the like. This article discusses the rules governing attorney speech and provides some guidance about what lawyers can (and cannot) say on-line, about judges and to and about opposing counsel.

¹ Frederick Schauer, *The Speech of Law and The Law of Speech*, 49 ARK. L. REV. 687, 688 (1997).

I. On-Line

In today’s day and age, there can be no doubt that social media is part of the fabric of our lives. Consider these statistics:

38,000,000 people in the U.S. age 13–80 said their purchasing decisions are influenced by social media, a 14% increase in the past six months. (Source: Knowledge Networks)

1,000,000 people view customer service related tweets every week, with 80% of them being critical or negative in nature. (Source: TOA Technologies)

152.1 million people in the US will use Facebook this year. (Source: eMarketer)

15.3—the number of hours per week that the “average” Internet user spends online. (Source: eMarketer)

93% of American teens use the Internet regularly. (Source: Teen and Young Adult Internet Use. Pew Research Center)

45% of American adults say that the Internet plays an important role in their lives. (Source: Pew Internet)

59% of Internet users use at least one social networking service, compared to 34 percent who did in 2008. (Source: Pew Internet)

850,000,000 monthly active users for social networking giant Facebook, up from 500 million active monthly users last year. (Source: TechCrunch)

96% of Generation Y had joined a social network by 2010. (Source: www.socialnomics.com)

#1 activity on the Web is social media. (Source: www.socialnomics.com)

1 out of 8 couples married in the U.S. last year met via social media. (Source: www.socialnomics.com)

80% of companies use LinkedIn as a primary tool to find employees. (Source: www.socialnomics.com)

#2 largest search engine in the world is YouTube. (Source: www.socialnomics.com)

200,000,000+ Blogs on the Internet. (Source: www.socialnomics.com)

54% of bloggers post content or tweet daily. (Source: www.socialnomics.com)

Generation Y and Z consider e-mail passé. In 2009 Boston College stopped distributing e-mail addresses to incoming freshmen. (Source: www.socialnomics.com)

Years to Reach 50 millions Users: Radio (38 Years), Television (13 Years), Internet (4 Years), iPod (3 Years). Facebook added 100 million users in less than nine months; iPhone applications hit 1 billion in nine months. (Source: www.socialnomics.com)

If Facebook were a country, it would be the world’s 3rd largest. (Source: www.socialnomics.com)

It is no wonder that more and more attorneys are jumping on the social media bandwagon. Ask just about any lawyer today, and he or she will likely tell you that he has a Facebook page, or that she is on LinkedIn or Twitter, or that he writes a blog. It would be surprising indeed to find a law firm that does not have a website. With these new avenues of communication come new challenges. Chief among them: how does an attorney use social media and comport with his or her ethical obligations?

A. Law Firm Websites

According to legal marketing consultant Alyn-Weiss, “[l]aw firm websites are

the single most effective marketing tool employed by corporate, transactional and defense firms.” In their 2006 national survey of 119 firms, 82% had “received work directly or by referral during the past 24 months” from their website.² The American Bar Association reported in its 2008 Legal Technology Survey that 51% of solo practitioners in the U.S. and 77% of small firms (2 to 9 lawyers) have a website.³ According to that same survey, 100% of U.S. firms larger than 50 attorneys reported having a website, and 97% of those with between 10 to 50 lawyers have one.⁴

A law firm’s website should be used to convey important information about the firm: who are the attorneys that practice in the firm, what kinds of results have the firm’s attorneys achieved over time, what practice areas does the firm concentrate on, etc. When designing and maintaining a law firm website, those responsible should review and follow the rules that govern attorney advertising, particularly Rules 7.1 through 7.4 of the Model Rules for Professional Conduct.⁵

What do these rules mean in regard to a law firm’s website? Attorneys need to make sure that their websites do not contain material misrepresentations of fact or law. They cannot exaggerate their qualifications, lie about their experience or divulge information about their clients.

They must avoid statements that may create an unjustified expectation about the results that the lawyer can achieve (“Hire us. We guarantee we will win your case!”). Care must be taken to avoid comparing the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated (“We are the best personal injury lawyers in the state!”). Since some states do not recognize certification of specialties or expertise, attorney websites should exercise caution before using the terms “expert”, “specialist” or “certified”. Attorneys should make sure that they do not indicate that the “specialize” in a particular area(s) of law.

Most attorneys—and the law firms they work for—use websites to advertise their expertise. They often do this by listing representative clients and cases. However, as with all advertising, attorneys must be cognizant of their continuing duties to their clients. Even when the representation of a client is public knowledge, you should request the client’s approval for any mention of the client or their matters on your website.⁶

Lawyers must make sure that their websites contain legal disclaimers and a statement that the lawyer’s website constitutes advertising material.⁷ Such a disclaimer may look like the following:

² Bob Weiss, *Survey Says*, Law Practice Today, April 2006, available at <http://apps.americanbar.org/lpm/lpt/articles/mmb04061.shtml>.

³ Available at <https://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=2680085PDF>.

⁴ *Id.*

⁵ Available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

⁶ See Model Rule of Professional Conduct 1.6 (limiting disclosure of “information relating to the representation of a client”); ABA Committee On Ethics & Professional Responsibility, Formal Op. 10-457 (2010) (“Specific information that identifies current or former clients or the scope of their matters also may be disclosed, as long as the clients or former clients give informed consent...”).

⁷ Remember, even completely truthful statements about a lawyer’s experience may constitute a violation of Model Rule 7.3 if unaccompanied by an advertising notice as required by subsection (c) of that rule.

The information contained in this web site is intended to alert the reader to certain legal issues. The information is not intended as legal advice nor is it intended as a substitute for legal counsel. The information is not intended to create, and its receipt does not constitute, an attorney-client relationship. An attorney-client relationship does not exist until the client and the attorney explicitly so agree. We would be pleased to communicate with any interested persons by U.S. mail, telephone or e-mail. However, please remember that e-mail may not be fully secure and confidential and, therefore, you should avoid sending sensitive or confidential information by e-mail.

The information contained in this web site is intended, but not promised or guaranteed, to be correct, complete, and up to date as of the time it is posted. Smith & Jones has made every effort to comply with all known legal and ethical requirements in publishing this site. The firm does not desire to represent persons based upon their review of any portions of this web site that do not comply with the legal or ethical requirements of the jurisdiction in which those persons reside or do business.

This site contains links to other resources on the Internet. The purpose of these links is to help readers identify and locate resources which may be of interest to them. The inclusion of these links is not intended to imply or state that Smith & Jones endorses the linked entities or the content of those Internet sites. Smith & Jones has not tested any software or information which may be found on any of the linked sites and makes no representations regarding the quality or safety of any software found

on the Internet. To the extent that any applicable ethical rules or laws require us to designate a principal office and/or a single attorney responsible for this World Wide Web site, Smith & Jones designates its Chicago, Illinois office and William Smith as the attorney responsible.

This web site contains advertising material. The hiring of a lawyer is an important decision and should not be based solely upon advertisement. Before you decide, ask us to send you free written information about our qualifications.

No warranties or guarantees of any sort are expressed, implied, or intended to be made by anything stated in this web site. Your use of this web site is at your own risk. The materials and information presented in this web site are not represented to be in accordance with any standard or requirement for information of the type presented. Smith & Jones, its attorneys and employees explicitly disclaim any responsibility, liability or damages resulting to any person, corporation, partnership, association or other entity resulting from the use of the materials and information presented on this web site.

There are a few other points to keep in mind when dealing with attorney websites. Make sure you know the law of your jurisdiction regarding attorney websites. Texas requires lawyers to file a copy of their websites with the Advertising Review Committee “...no later than its first posting on the Internet.”⁸

⁸Tex. Disciplinary Rule of Professional Conduct 7.07(c).

To make sure that a website does not constitute the unauthorized practice of law in other jurisdictions, websites must make clear where the attorneys are licensed to practice law, where the firm's offices are located, where its attorneys practice and which jurisdictions the firm's lawyers will practice in. A website should never suggest that a lawyer is offering to provide legal services in a jurisdiction in which the lawyer is not admitted to practice law.

Be careful about including sample forms on the site. The provision of sample forms may give rise to an attorney-client relationship. If sample forms are included, make sure that they contain a disclosure/warning such as the one set forth above. In addition, exercise caution in allowing potential clients to contact the firm through the website. By allowing a potential client to contact the firm through the website, that individual may argue later that an attorney-client relationship was created. If individuals can contact the firm through the website, make sure the contact form indicates that no attorney-client relationship is created through that contact. State that an attorney-client relationship will only be formed after in person communication and the execution of a client engagement agreement. In addition, make sure that one person is appointed as the point person to respond to all inquiries received through the website.

B. Blogs

A blog is a personal journal published on the Internet consisting of discrete entries ("posts") typically displayed in reverse chronological order so the most recent post appears first. Many blogs provide commentary on a particular subject; others function as more personal on-line diaries; yet still others function more

as on-line brand advertising of a particular individual or company. A typical blog combines text, images, links to other blogs, web pages, and other media related to its topic. Blogs often allow readers to leave comments in an interactive format.

Lawyers have ethical requirements that restrain them from communicating private or privileged details to the public at large. Generally, if a client tells their lawyer something, the lawyer may not repeat it—unless the client gives informed consent to the disclosure. Consider the case of Kristine A. Peshek, an Illinois assistant public defender who lost her job after nineteen years of service over postings made on her personal blog "The Bard Before the Bar—Irreverent Adventures in Life, Law and Indigent Defense."⁹ Approximately one third of the blog was devoted to discussing Peshek's work at the public defender's office and her clients, and the remaining content concerned her health issues and her hobbies. Peshek's blog was open to the public and was not password protected. She knew that the content of her blog was available to anyone who had access to the Internet.

In making her work-related posts, Peshek referred to her clients by either their first names, a derivative of their first names or by their jail identification numbers. She revealed confidential details of her clients' cases. For example, one of her clients testified that she was drug free and received a sentence of just five days in jail. After sentencing, the client complained to Ms. Peshek that she was using methadone and could not go five days without it. Peshek posted these comments on her blog and also wrote that her

⁹ Ms. Peshek faces disciplinary action as well.

reaction was, “Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?”

In March 2008 Peshek represented a college student who had allegedly been in possession of a controlled substance. On March 14, 2008, Peshek posted the following entry on her blog:

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

Peshek’s posts violated client confidences. They revealed privileged information. The bar complaint filed against her also stated that her actions could also constitute “assisting a criminal or fraudulent act.”

Incredibly, Peshek seemed to be more concerned with entertaining the visitors to her blog than maintaining the trust placed in her by her clients. Her blog posts clearly violated Rule 1.6 of the Illinois Rules of Professional Conduct. Rule 1.6 states:

Rule 1.6 Confidentiality Of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
 - (4) to secure legal advice about the lawyer’s compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
 - (6) to comply with other law or a court order.

Undeniably, a lawyer commits an ethical violation when he or she discusses or reveals confidential information per-

taining to a client without the client's consent or uses a client's story to market himself or herself without the client's consent. Blog posts that contain information of a private or confidential nature can and will likely result in a reprimand or other disciplinary action. This rule is violated even if the lawyer uses nicknames or aliases—provided the client(s) can still be identified.

Can a lawyer post information about a hearing that he attended in a case so long as no confidential information is listed in the blog entry? Not unless the lawyer has obtained informed consent from the client. Official comments 3 and 4 to Illinois Rule of Professional Conduct 1.6 indicate that lawyers are prohibited from discussing facts that are a matter of public record unless the client has given informed consent. A client's signature on a retainer agreement that includes a paragraph in which the client consents to the lawyer discussing the client's case in any type of medium may not be enough. The better course would be to prepare the blog post and obtain the client's signed consent to the post before broadcasting it to the world.

Lawyers can get in trouble even when they aren't posting about their cases. Consider the case of Frank R. Wilson, a lawyer in San Diego. Wilson, while serving on a jury in 2006, posted details of the case on his blog. As a result of his postings, the defendant's criminal conviction was set aside, Wilson paid \$14,000 in legal fees and lost his job.

As one set of legal commentators has noted, when discussing legal issues on a blog, lawyers must be aware of their broad public audience. They write:

To avoid misleading the public, the jurisdiction in which the legal infor-

mation applies should be noted on the [blog]. Lawyers should make sure that the information is correct and accurate. Blogs containing archived posts should be updated to reflect current cases and law, or at least include a disclaimer that the information may no longer be accurate. Be careful to avoid crossing the line between providing legal information—general information about the law—and giving legal advice by applying the law to individual circumstances.¹⁰

This advice leads to another issue lawyers need to consider. If the lawyer's blog is interactive—visitors can post questions and seek answers from the lawyer—the host must be concerned about the visitor later arguing that an attorney-client relationship was formed when the visitor asked a question and the lawyer provided an answer. Any lawyer that has a blog must make sure that it contains a disclaimer that anything posted on the site or in response to question cannot and should not be interpreted as legal advice and that no attorney-client relationship is formed with those visiting the blog. Any time a lawyer answers a question on her blog, she should make sure that the answer ends with the same disclaimer and encouragement that the visitor contact an attorney in his or her locale.

¹⁰ William R. Peterson and Clark E. Smith, "Law Firm Websites: An Ethical Minefield", *The Bench*, p. 16 (January/February 2013), available at <http://home.innsofcourt.org/for-members/current-members/the-bencher/recent-bencher-articles/januaryfebruary-2013/law-firm-websites-an-ethical-minefield.aspx>.

C. Social Networking Sites¹¹

The statistics provided above clearly indicate the importance of social networking today. Facebook, MySpace, Twitter and LinkedIn are sites where lawyers find themselves spending time connecting with others on-line. Although lawyers can use these sites to promote themselves and their practices—and to obtain information that can be used in prosecuting or defending cases—they must make sure that their use

of social media sites comports with Rules of Professional Conduct. Consider the following examples:

- An attorney deposes an eighteen year old non-party witness who was not represented by counsel. Her testimony was adverse to the attorney’s client. During the deposition the witness testified that she regularly uses Facebook to post personal information and photographs. In order for people to see her posts and photos, they must seek permission to become part of her network. The witness must grant the friend request in order for individuals to access her home page.

Believing that the content of the witness’s Facebook page might impeach her testimony at trial, the attorney decides to ask his administrative assistant to “friend” the witness on Facebook. The administrative assistant would state her real name, but would not reveal that she is affiliated with the attorney for the true purpose of obtaining information posted on the witness’ Facebook page for possible use to impeach or discredit the witness at trial. If the witness accepts the friend request, the administrative assistant agrees to furnish the attorney with any information posted on the witness’ Facebook page.

Would the attorney in this scenario violate any ethical rules? The answer is yes. The attorney is asking a third-party to communicate with the witness in a deceptive fashion. The administrative assistant failed to reveal a material fact, namely, that the assistant is asking to become friends with the witness solely for the purpose of

¹¹ Although the subject of this paper is “attorney speech”, the author would be remiss if he failed to mention a case where counsel “encouraged” his client to “clean up” the client’s Facebook profile. In *Lester v. Allied Concrete Co.*, Circuit Court of the City of Charlottesville, Case No. CL08-150 (2011), the plaintiff brought suit against Allied Concrete after his wife was killed in an accident allegedly caused by an Allied Concrete driver. The defendants sent plaintiff interrogatories and requests for production of documents asking for information about and copies of plaintiff’s Facebook postings. Included with the written discovery was a copy of a photo obtained from plaintiff’s Facebook page. This photo depicted the plaintiff holding a beer can, wearing a t-shirt emblazoned with “I Hot Moms”, surrounded by young adults. Upon receiving the discovery requests, counsel for the plaintiff accessed the plaintiff’s Facebook page and discovered a number of photographs that he believed would cause some issues at trial. Plaintiff’s counsel instructed his legal assistant to contact the plaintiff and instruct him to “clean up” his Facebook page. She did as instructed and plaintiff removed a number of photos from his Facebook page. The plaintiff subsequently deactivated his Facebook profile so that plaintiff’s counsel could avoid responding to the defendants’ discovery requests. The court found that plaintiff’s counsel violated several rules of professional conduct and that plaintiff himself was guilty to spoliation of evidence. Plaintiff’s counsel was ordered to pay \$542,000 in sanctions and the plaintiff was ordered to pay \$180,000 for obeying the lawyer’s instructions! Plaintiff’s counsel was also reported to the Virginia State Bar.

obtaining information that can be used to impeach her at trial. This type of deception violates ABA Model Rule 8.4.

In addition, the lawyer's actions (and those of his assistant) violate ABA Model Rule 4.1. That rule states, in relevant part, "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person..." By failing to reveal the true purpose of the friend request, the assistant made false statements of material fact in violation of the rules.

It should also be noted that the attorney cannot avoid responsibility by asking his assistant to engage in this prohibited conduct. ABA Model Rule 5.3 states in relevant part:

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

The lawyer is ultimately responsible for the unethical actions of his assistant if, as here, he can not engage in such behavior and he orders his assistant to engage in those actions or ratifies her conduct.¹²

- An attorney represents a former employee of a Fortune 500 company in a wrongful termination lawsuit. While the matter is in its early stages, the attorney receives the defendant's answer to the complaint and knows that the defendant is represented by counsel and who that counsel is. The plaintiff has provided his attorney with a list of all defendant's employees. The plaintiff's attorney sends out a friend request to two high-ranking company employees who the plaintiff has identified as "disgruntled." The friend request only gives the attorney's name. The attorney hopes that these employees have made disparaging remarks about the employer on Facebook and he intends to use any information he obtains from Facebook to advance the plaintiff's position in the litigation.

According to the San Diego County Bar Association Legal Ethics Committee, the attorney in this factual scenario violated several ethical rules, including ABA Model Rule 4.2, which states that "[i]n 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

¹² See Phila. Eth. Op. 2009-02, 2009 WL 934623 (2009).

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,”¹³ ABA Model Rule 4.1 (which prohibits counsel from making false statements of material fact to a third party) and ABA Model Rule 8.4(c) (which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation). The Ethics Committee stated:

We have concluded that [these] rules bar an attorney from making an *ex parte* friend request of a represented party. An attorney’s *ex parte* communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney’s duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request.¹⁴

In separate opinions, the Philadelphia Bar Association Ethics Committee, the

New York City Bar Association Committee on Professional Ethics, and the New York State Bar Association Committee on Professional Ethics all held that a lawyer—or someone working under the lawyer’s supervision—could not friend a witness using false pretenses. Each of the committees found that trying to gain access to someone’s social media page by friending the witness under false pretenses—or having a third party friend the witness at the lawyer’s request—would be unethical and a violation of Rule 4.1 and Rule 8.4.

In the last few years, there have been dozens of reports of attorneys running afoul of state ethics rules when it comes to the use of social media. Consider these examples:

- Federal prosecutor Sal Perricone made repeated visits to a website dedicated to all things New Orleans: www.nola.com. Using the screen name Mencken1951, Perricone posted hundreds of comments online about the owner of a landfill that Perricone was investigating. Perricone told his boss, U.S. Attorney Jim Letten, that he was the author of the posts after the owner of the landfill hired a forensic linguistics expert to examine nearly 600 comments made by Mencken1951. The expert had found striking similarities between the comments that were posted on-line and a brief Perricone had authored in the case, including the use of identical alliteration and antiquated words such as “dubiety” and “redoubt”. U.S. Attorney Letten removed Perricone from all matters on which he commented on the website and referred the matter to the

¹³ Comment 7 to ABA Model Rule 4.2 states: “In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.” In this scenario, the “high ranking” employees would likely fall into this category of protected employees.

¹⁴ SDCBA Legal Ethics Opinion 2011-2, 13 (May 24, 2011).

Justice Department's Office of Professional Responsibility.¹⁵

- A young lawyer appeared in front of Judge Susan Criss of the Texas District Court in Galveston and requested a trial continuance because of a death in the family. Judge Criss granted the delay and then checked the lawyer's Facebook page. Judge Criss stated "There was a funeral, but there wasn't a lot of grief expressed online. All week long, as the week is going by, I can see that this lawyer is posting about partying. One night drinking wine, another night drinking mojitos, another day motorbiking."¹⁶ The lawyer came back into court and asked for a second continuance. Judge Criss denied the request for another delay in the trial and turned over her on-line research to the senior partner in the lawyer's firm.
- In February 2012, an ethics complaint was filed against Illinois attorney Jesse Raymond Gilsdorf, alleging that he attempted to sway public opinion against the prosecution of his client, an alleged drug trafficker, by posting a discovery video online. According to the complaint, Gilsdorf hired a company to post the video of an undercover drug buy on YouTube and then linked to it on Facebook. The video was labeled "cops and Task

Force Planting Drugs." It implied that police had engaged in improper conduct and entrapped Gilsdorf's client, who was charged with unlawful delivery of a controlled substance. The video received more than 2,000 hits before a judge ordered its removal.¹⁷

- Also in February 2012, the South Carolina Supreme Court issued a public reprimand to a 2008 law school graduate who exaggerated his experience and made misleading statements about his legal skills on sites like LinkedIn. According to the South Carolina Supreme Court, the attorney violated lawyer ethics rules by falsely stating on law related websites that he had graduated from law school in 2005 and that he had handled matters in federal court. He also listed about 50 practice areas in which he had little or no experience. In addition, he set up Internet profiles on LinkedIn, lawyers.com and other online directories that contained "material misrepresentations of fact by overstating and exaggerating [his] reputation, skill, experience and past results."¹⁸
- In May 2012, Nelson Cope filed suit in the Cuyahoga County Court of Common Pleas against David Her-

¹⁵ See Allen Johnson, Jr., *The Alienation of Sal Perricone*, NEW ORLEANS MAGAZINE (May 2012) available at <http://www.myneworleans.com/New-Orleans-Magazine/May-2012/The-Alienation-of-Sal-Perricone/>.

¹⁶ John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, NY TIMES, September 12, 2009, available at http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=0.

¹⁷ Dan Long, *Complaint Filed Against Mt. Sterling Attorney in Pike County Case*, BROWN COUNTY DEMOCRAT MESSAGE, Feb. 22, 2012, available at <http://browncountydms.com/complaint-filed-against-mt-sterling-attorney-in-pike-county-case-p3512-1.htm>.

¹⁸ Debra Cassens-Weiss, *Newly Licensed Solo Reprimanded for Exaggerating Experience in Online Profiles*, ABA JOURNAL, Feb. 1, 2012, available at http://www.abajournal.com/news/article/newly_licensed_solo_reprimanded_for_exaggerating_experience_in_online_profil/.

- rington, the Law Office of Kerns & Proe, Geo Survey, Inc. and State Auto Insurance. Cope has alleged that the law firm hired an investigator to gain access to the privacy-restricted Facebook page of his twelve year old daughter, the plaintiff in a dog bite case. According to the complaint, the investigator posed as one of the girl’s Facebook friends, enabling him to view her private information and access over 1,000 posted messages and 221 photos between the minor plaintiff and her friends. The complaint seeks compensatory and punitive damages for violations of the Stored Communications Act, civil conspiracy and intentional infliction of emotional distress.
- In July 2012, former Assistant Commonwealth Attorney Clifton Hicks was charged with one count of posting a written threat to kill or do bodily injury to another after posting messages directed at his former boss and supervisor on Facebook. According to an affidavit prepared to obtain a search warrant, one of the messages on Hicks’ personal Facebook page said that he was “tired of being intimidated”, mentioned the Commonwealth’s Attorney and his chief deputy by name, and then threatened to “...kick your asses.”¹⁹
 - In November 2012, Sarah Peterson Herr, a research attorney for a Kansas Court of Appeals judge, was fired after using foul language

about the state’s former attorney general in comments she posted to Twitter. While former Kansas Attorney General Phill Kline was appearing before the Kansas Supreme Court as part of an ethics investigation, Herr tweeted: “Why is Phil Klein (sic) smiling? There is nothing to smile about douche bag.”²⁰ Another of her tweets predicted that Kline would be disbarred by the court for seven years for his conduct.

- In March 2013, an Illinois Attorney Registration and Disciplinary Commission Review Board panel recommended that former Cook County prosecutor Laura J. Morask lose her law license for 30 days because she made allegedly misleading statements to a blogger about an investigation into her trial conduct. In 2001 Morask was investigated for statements she made during closing or rebuttal arguments in three different cases. In 2008, while running for judge, Morask was found not qualified for the position by the Chicago Council of Lawyers, who stated that she was cited for prosecutorial misconduct. When a Chicago attorney posted a link to the Council’s report on his blog, Morask e-mailed him, stating that she underwent “a full and complete hearing in the ARDC” and was “completely exonerated” (which in fact was not true). She asked the lawyer to post her comments on his blog and he did so. The Review

¹⁹ Louis Hansen, *Ex-Norfolk Prosecutor Charged Over Facebook Posts*, THE VIRGINIAN PILOT, July 27, 2012, available at <http://hamptonroads.com/2012/07/exnorfolk-prosecutor-charged-over-facebook-posts>.

²⁰ James Nye, *Nothing to smile about, d***he bag: Female attorney suspended for tweeting abuse at abortion row DA*, DAILY MAIL, November 21, 2012, available at <http://www.dailymail.co.uk/news/article-2236408/Female-attorney-suspended-tweeting-abuse-abortion-row-DA.html>.

Board panel concluded “as a matter of law” that Morask violated disciplinary rules “by reason of her purposeful conduct in disseminating false and misleading statements.”

D. Legal Advice Forums/Chat Rooms

Consider the following hypothetical scenario. Mark Smith is a personal injury lawyer in California. He is searching the Internet one day and discovers a chat room created for families and victims affected by the release of a cloud of toxic fumes released from a manufacturing plant in Bakersfield. The chat room’s website home page states that its purpose is “the provision of emotional support to victims of the recent mass disaster and their families by similarly affected persons.” Attorney Smith visits the website and, after monitoring the conversation, introduces himself as a lawyer and offers to answer questions. His goal is to prompt the individuals visiting the chat room to hire him for legal services. Did Attorney Smith violate the Rules of Professional Conduct by communicating with prospective fee-paying clients in a chat room for those affected by a mass disaster?

According to the California State Bar Standing Committee on Professional Responsibility and Conduct, the answer to this question is yes. The California Rules of Professional Conduct prohibit a lawyer from communicating with a potential client in “any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.”²¹ According to the Committee, attorneys must always be concerned with

the context in which they seek to communicate their availability for a legal engagement. Victims and family members who visit a chat room are seeking emotional support and do not expect to encounter a lawyer hoping to be retained. An attorney’s participation in this type of chat room would be a violation of the Rules of Professional Conduct. In addition, if an attorney “knows or reasonably should know” that visitors to a chat room are inhibited from making a reasonable judgment about retaining an attorney because of their “physical, emotional or mental state,” any “communication” the attorney makes about his availability for employment is a presumed violation of Rule 1-400.²²

II. About Judges

Attorney comments about judicial officers are a sticky wicket. Lawyers are officers of the court, and should show the utmost respect for it. This also means that, *because* they work for the court, lawyers should know, better than any other individual, what is really going on “behind the curtain.” This places them in a better position than anyone else to criticize the court and the judicial process. As the Florida Supreme Court noted, “Although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention.”²³ The

²² California Board of Governors of the State Bar, Standard (3).

²³ The Florida Bar v. Ray, 797 So.2d 556, 560 (Fla. 2001).

²¹ California Rule of Professional Conduct 1-400(D)(5).

question is, how does one balance these competing interests?

Most courts and states have adopted specific rules governing attorney comments about the judiciary. ABA Model Rule 8.2, which has been adopted by most states, states the following:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

What is the practical effect of this rule? It means that attorneys may criticize decisions of judges. But as licensed professionals, they are not free to make recklessly false claims about a judge’s integrity.

In *Fieger v. Michigan Supreme Court*, attorney Geoffrey Fieger obtained a \$15 million verdict in a medical malpractice action.²⁴ The defendants appealed, and on August 20, 1999, a three-judge panel of the Court of Appeals, Jane Markey, Richard Bandstra and Michael Talbot, unanimously ruled that the defendants were entitled to a judgment notwithstanding the verdict. Three days later on August 23, 1999, Fieger used time on his then-daily radio program to vent his frustration with the judges. He said:

Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too. [In referring to his client, Fieger said] He lost both his

hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.²⁵

Two days later, on the same radio show, Fieger called these same judges “three jackass Court of Appeals judges.” When another person involved in the broadcast used the word “innuendo,” Fieger stated, “I know the only thing that’s in their endo should be a large, you know, plunger about the size of, you know, my fist.” Finally, Fieger stated, “They say under their name, ‘Court of Appeals Judge,’ so anybody that votes for them, they’ve changed their name from, you know, Adolf Hitler and Goebbels, and I think— what was Hitler’s—Eva Braun, I think it was, is now Judge Markey, she’s on the Court of Appeals.”²⁶ Fieger received a public reprimand for his comments and the Sixth Circuit Court of Appeals refused to allow Fieger to assert a facial challenge to the Michigan Rules of Professional Conduct that prohibit lawyers from engaging in undignified or discourteous conduct toward a tribunal.

In *Idaho State Bar v. Topp*,²⁷ Bonner County filed a request in district court for “judicial confirmation” of a proposed \$4.1 million expenditure to be used to close three county landfills and build a garbage transfer station to haul garbage out of state. Judge Michaud heard oral argument on the judicial confirmation request. In an oral decision rendered immediately after the close of oral argument, Judge Michaud denied the county’s request for the

²⁵ *Fieger*, 553 F.3d at 958.

²⁶ *Id.*

²⁷ 925 P.2d 1113 (Ida. 1996).

²⁴ 553 F.3d 955 (6th Cir. 2009).

expenditure. The media interviewed John Topp, a part-time county attorney who was present during the proceeding. During the course of the interview, Topp suggested that Judge Michaud's decision was motivated by political concerns. The Idaho State Bar filed a complaint against Topp, claiming that his statements violated the Idaho rule prohibiting a lawyer from making a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. Topp filed a motion to dismiss the charges. The disciplinary committee denied the motion to dismiss and determined that Topp had violated the Idaho Rules of Professional Conduct. Topp then appealed to the Idaho Supreme Court.

In holding that Topp was subject to discipline for his remarks, the Idaho Supreme Court stated the following:

We conclude that a reasonable attorney...would not have made the statement in question. Because Topp's statement necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations, it impugned his integrity. Therefore, we hold that the ISB established a violation of I.R.P.C.

8.2(a) and that a public reprimand is the appropriate sanction for that violation.²⁸

Disparaging comments about the judiciary are not limited to radio, television and the print media. As outlined above, many attorneys make use of social media. Comments posted on blogs or on Facebook can cause serious problems for the unwary attorney. Take the case of Sean Conway, a Florida lawyer who posted comments about Judge Cheryl Aleman on Jaablog, a courthouse weblog. Conway made the following posting after a hearing before Judge Aleman:

Recently, in an attempt to make defendants waive their rights to a speedy trial, Judge Cheryl Aleman has decided to set trials about 1–2 weeks after arraignment, hoping that defendants will move for a continuance, thereby waiving their right to a natural speedy trial.

Today, Oct. 30th, I along with several other attorneys, had to endure her ugly, condescending attitude as one-by-one we all went up to the podium and noted that our respective clients had just been arraigned on Oct. 18th as she forced us to decide between saying ready for trial - or need a continuance.

²⁸ *Topp*, 925 P.2d at 1117. See also *In re Wilkins*, 782 N.E.2d 985 (2003) (holding that footnote in a brief that stated, "Indeed, the [Court of Appeals] Opinion is so factually and legally inaccurate that one if left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)" impugned the integrity of the judges and clearly violated Rule of Professional Conduct 8.2(a)); *The Florida Bar v. Ray*, 797 So.2d 556

(2001) (holding that letters written to the Chief Immigration Judge questioning the integrity and veracity of a certain immigration judge violated the rules of professional conduct and subjected the lawyer to a public reprimand); *In re Crenshaw*, 815 N.E.2d 1013 (Ind. 2004) (untrue allegations against judges, during and after proceedings, merited sanctions); *Matter of Palmisano*, 70 F.3d 483 (7th Cir. 1995) (attorney disciplined for making many baseless accusations after being relieved as counsel in the case).

Clearly she is doing this to get defendants to continue and, thereby, waive speedy. Every atty tried their best to bring reason to that ctroom, but, as anyone who has been in there knows, she is clearly unfit for her position and knows not what it means to be a neutral arbiter.

In my case, I filed a written plea of NG, waiving my def's presence from the 10/18 arraignment. The notice setting trial for the 30th wasn't mailed out until the 24th - and I got it on the 25th (I saved the envelope for any upcoming motion for discharge under the speedy trial rule). As my case was on recall for 2 hours, I watched this seemingly mentally ill judge condescend each previous attorney. I had my argument ready. Prior to being placed on recall, I first approached the podium and noted that her question to me: "trial or continuance" placed my client in a position of having to decide b/t his rt to a speedy trial & his right to explore discovery. Nonetheless, almost 2 hours later, my [case] was finally recalled:

ME: "Judge (not your honor b/c there's nothing honorable about that malcontent) ... there seems to be a mistake in this case."

EVIL, UNFAIR WITCH ("hereinafter "EUW"): "and what is that?"

ME: "well my client was just arraigned on Oct. 18th, and the notice setting this for trial today was mailed out on the 24th. I got it on the 25th, giving me basically 3 business days to prepare for trial. In these situations I like to refer to the 'Good Book' for direction and rule 3.160 (d), entitled Arraignment, clearly states that after a plea of not guilty is entered, the defense shall

be given a reasonable amt of time to prepare for trial."

EUW: [after retrieving her copy of what I just referred to as the 'Good Book'] responds: "How can you say you've only had 3 days? You were appointed back in mid-September? The Discovery exhibit was furnished around that same time?"

ME: "I have the envelope here saying it was postmarked on the 24th, meaning I got it on the 25th. And the rule says *after a plea of not guilty*. Only b/c I cannot say in good faith that I am ready to try this case today, I am reluctantly moving for a continuance as it is the only option you're leaving me. I would like to suggest that you delete his case from today's trial docket and reset it for a trial date a few weeks from now."

She, of course, didn't consider my suggestion and proceeded to question the def on waiving his speedy trial right.

My suggestion to anyone in this situation with her is to object based on Rule 3.160(d), remind her that the Rule clearly says "after entering a plea of not guilty" - NOT after counsel is appointed and NOT after discovery is received (shit, in my case, the Info wasn't even filed when I was appt'd.). Then, after covering yourself, be sure your case is ready the next time up, say ready each time it is up and then file for relief under 3.190 after natural speedy runs. Let her deny it, go to trial and win on appeal?

As a result of this posting, Conway was accused of five different bar violations, including impugning a judge's qualifications or integrity. Ultimately, the Florida

Supreme Court reprimanded Conway and required him to pay a \$1,200 fine.

When it comes to statements about the judiciary, it would behoove counsel to follow this advice: although a lawyer may, in a proper tone and through appropriate channels, attack the integrity or competence of a court or judge or the propriety of any particular judicial act, he may not, by unfounded charges, wild accusations, innuendo, misrepresentations half-truths and unwarranted assaults, create disrespect for the courts or their decisions. If he does so, he may be properly disciplined.

III. To and About Opposing Counsel

Perhaps no one has elucidated a lawyer's duty to other lawyers better than former Supreme Court Justice Sandra Day O'Connor: "[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice, increasing the effectiveness of our system of justice, and improving the public's perception of lawyers."²⁹ Despite these prophetic words almost a decade and a half ago, more and more complaints are being lodged today about the increasing incivility of the bar. Lawyers forget that when they say things—or write things—in the heat of the moment, those words may not only wound the recipient, they may subject the speaker to disciplinary action.

In *In the Matter of Anonymous Member of the South Carolina Bar*,³⁰ the respondent sent opposing counsel the following e-mail in an emotional and heated domestic dispute:

I have a client who is a drug dealer on ... Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near ... Street. Think about it. Am I right?

Opposing counsel's spouse, who was also an attorney, filed a disciplinary complaint against the sending attorney. The South Carolina Supreme Court found that the sending attorney had violated multiple rules of the South Carolina Code of Professional Conduct, including the provision that prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice.³¹

²⁹ Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L. Q. 5, 8 (1998).

³⁰ S.C. Op. No. 26964 (April 25, 2011).

³¹ The court also found that the offending e-mail violated the South Carolina lawyer's oath, which states, in part, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications..." Illinois' Attorney Oath contains a similar provision: "I acknowledge that I will be a zealous advocate while exhibiting civility, cooperation, and professional behavior at all times."

In *Cannon v. Cherry Hill Toyota, Inc.*,³² defendant’s counsel filed motions to disqualify and impose sanctions on plaintiff’s counsel. The defendant’s motions and briefs in support of the same were replete with unsubstantiated attacks against plaintiff’s counsel, including statements that “...plaintiff’s counsel are incapable of competently handling this litigation...”, “...[P]laintiff’s counsel [have] hidden facts and deceptively withheld information in this litigation...”, “[P]laintiff and her counsel [have]...obviated [sic] the Rules of Court, and deceived counsel to serve their own ends...” and “Plaintiff’s actions, as well as her counsel’s actions, are so contrary to the Rules of Ethics and, rising to the level of perjury, preclude [c]lass [c]ertification.” The district court found that defendant’s counsel should be sanctioned for his “...repeated use of inflammatory language in his personal attacks on Plaintiff and her attorneys, his unsupported accusation of perjury and unethical conduct and the misstatements of facts contained in his sworn certifications.”³³ In reaching this conclusion, the court noted:

[T]he circumstances of this case... present the unhappy picture of a lawyer who has crossed the boundary of legitimate advocacy into personal re- crimination against his adversary. [Citations omitted]. Lawyers are not free to, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone. [Citations omitted].³⁴

In *Matter of E. Thomas Pyle, III*,³⁵ the respondent received a public censure in a disciplinary matter. Following that proceeding, he mailed a letter to more than 281 friends, clients and family members criticizing the prior disciplinary hearing. Among other things, Mr. Pyle stated that the “deck was stacked against [him]” in the prior hearing, as a single attorney he did not “...have that much political capital with the Board members”, and “...the insurance company that insured the defendant in the underlying case may have yielded some influence in the complaint against [him].”³⁶ The Kansas Supreme Court found that Pyle’s letter violated several provisions of the Kansas Rules of Professional Conduct, including Rule 8.4 (which is modeled on ABA Model Rule 8.4). Rule 8.4 states, in relevant part, “[i]t is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice.”

The Kansas Supreme Court, in imposing a three-month suspension, stated the following about Pyle’s statements:

All lawyers, by virtue of their licenses, enjoy the status of officers of the court. That status brings with it the responsibility to refrain from conduct unbecoming such officers, to uphold the rule of law, and to enhance the public confidence in that rule and the legal system set up to safeguard it.

* * *

As Justice Potter Stewart put it in his concurrence in an earlier case:

³² 190 F.R.D. 147 (D. N.J. 1999).

³³ *Cannon*, 190 F.R.D. at 163.

³⁴ *Id.* at 162.

³⁵ 156 P.3d 1231 (Kan. 2007).

³⁶ *In re Pyle*, 156 P.3d at 1237.

[A] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.³⁷

So what does all this mean when it comes to lawyer-to-lawyer communication (or for that matter statements made to a third-party about an opponent)? Follow a modified “Golden Rule”: say unto others what you would have them say unto (or about) you.

IV. *Ex Parte* Communication with Independent Arbitrators or Judges

In our busy lives, it can be difficult to balance work and personal obligations. However, this is the career path that we walk and as officers of the court we must manage our personal and professional relationships with an eye toward upholding our responsibilities under the Code of Professional Conduct. This is especially true when friendships extend beyond the bench.

In *Matter of Elizabeth Jane Barringer*,³⁸ the Illinois Attorney Registration and Disciplinary Commission sanctioned an attorney and required her to complete a professionalism seminar for engaging in *ex*

parte communications with an impartial arbitrator. In *Barringer*, a friendship developed between a workers’ compensation attorney and an arbitrator for the Workers’ Compensation Commission. The ARDC decision stated:

The Respondent became acquainted with Teague [the Arbitrator] in 2007, and the two became ‘good friends.’ The respondent socialized with Teague regularly, about every two months. Usually, a group of people, including the Respondent and Teague, would meet for dinner or for happy hour. On occasion, the Respondent and Teague went to a concert with a ‘big group of people.’ Teague attended the Respondent’s wedding in October 2010. Additionally, the Respondent and Teague exchanged numerous personal e-mails.³⁹

Most attorneys and law firms would consider this to be the successful development of a professional relationship and be thrilled. But, the Respondent and Teague forgot the additional duties and responsibilities placed upon them by their respective positions in the legal system.

Those interactions between *Barringer* and Teague were innocuous and within the strictures of the Code of Professional Conduct. But, the parties’ conduct crossed the line in a series of e-mail exchanges in 2009 and 2010, and this exchange ultimately led to an ARDC investigation. Allegations in five separate cases were brought before the panel, and the panel found that *Barringer* engaged in improper conduct in two of the cases. In one of the

³⁷ *Id.* at 1247.

³⁸ 2011 P.R. 0079 (Ill. ARDC 2011) available at http://www.iardc.org/rd_database/disc_decisions_detail.asp.

³⁹ *In re Barringer*, 2011 P.R. 00079 at 3.

cases, Barringer represented an employer and a *pro se* plaintiff sought workers compensation benefits from that employer. In that case, the following exchange of e-mails occurred prior to the case reaching Teague’s docket and prior to a case being filed:

[Barringer]: don’t forget about my pro se from hell who will be dead last in the pro se line. She told me yesterday that she intends to ‘fight with everyone’ at the docket. I’m seriously about to say screw her and instruct the insurance company to close her file.

[Barringer]: crazy pro se is a no go for Tuesday. She went off the hook this morning and is unwilling to be cooperative to a pre-trial. So her file has been closed until she obtains an attorney.

Teague: all you can hope now is that she doesn’t get an atty and the statute runs. Stupid people kill me.

[Barringer]: no one is going to touch her case after what we offered he because there is no way they would be able to collect a fee. Plus she’s insane

Teague: I agree, but these are hard lessons to learn.

[Barringer]: true. I think she’s bipolar because she just called back and now wants \$1,500 more to resolve her claim so hopefully I’ll just have to get the contract approved. I should be a candidate for sainthood after dealing with her.

Teague: are you going to get the jack? It’d be nice to have it done.

[Barringer]: they’re giving me the money to get rid of her. Plus, she’s going to sign a global release and resignation. Totally worth the money.
Teague: so what is that, 10k?

[Barringer]: \$14,900. Too much if you ask me but what it takes to get her to go away.

Teague: WOW-way to freakin’ much! I’d make her try that sucker.

[Barringer]: but we also get [her] resignation out of it which makes it worth it to them. Don’t worry she’ll make comments about how cheaply we got off and bitch about something.⁴⁰

In this instance, the ARDC found that Barringer “...engaged in conduct prejudicial to the administration of justice.”⁴¹

The panel also found Barringer in violation of the Code of Professional Conduct when she exchanged e-mails with Teague on a case that was pending on Teague’s docket. In that case, the plaintiff’s attorney sent a letter to Teague in an attempt to get a continuance of a hearing. Plaintiff’s counsel made the mistake of improperly addressing the letter to an arbitrator ‘Dibble’ with a copy going to Barringer.

When Teague obtained a copy of the letter she sent an e-mail only to Barringer stating the letter “...is not sufficient and is not granted. No good cause has been set forth in addition to the fact I am NOT Arbitrator Dibble.”⁴² Barringer replied “I don’t know why a continuance letter was sent since we have agreed to try this claim Tuesday.”⁴³ Teague then responded “[H]is letter is poorly written then. It says it’s set for hearing, but also that he wants a continuance. What a dumb ass.”⁴⁴ Barrin-

⁴⁰ *Id.* at 7–8.

⁴¹ *Id.* at 22.

⁴² *Id.* at 25.

⁴³ *Id.*

⁴⁴ *Id.*

ger replied “Oh, it was embarrassingly terrible.”⁴⁵

Rule 3.5 of the Illinois Code of Professional Conduct states that “[a] lawyer shall not (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order.” The ARDC panel found that the Barringer violated Rule 3.5(b) and stated “clearly the above e-mails between [Barringer] and Teague were *ex parte* and were exchanged while a workers’ compensation proceeding was pending before Teague. Also, there was no authorization by law or court order for such communications.”⁴⁶ The ARDC panel further found that Barringer violated Rule 8.4(d), which states that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” The panel stated:

It is clear to us that when an arbitrator and an attorney for one party, in a case pending before that arbitrator, make disarranging comments about the counsel for the other party in that case,

it raises a serious question regarding the fairness of the proceeding. As the Supreme Court has stated, ‘the administration of justice requires a tribunal that is impartial in appearance, as well as in fact.’⁴⁷

In the age of Twitter, and as many of the messages above show, we have an exponentially increased ability to communicate and send messages with little forethought. But, with the obligations each of us agrees to take on when we become a member of the bar, we do not have the same leeway to mindlessly send a Tweet or e-mail without pausing for a moment and ensuring that the content we are placing out into the world is not protected, is not disparaging and does not violate our applicable Code of Professional Responsibility. As technology continues to progress it will continue to make it easier to communicate. As members of the bar, we must ensure that this ability to communicate with increased efficiency and speed is not used to the detriment of our duties and our clients.

⁴⁵ *Id.*

⁴⁶ *Id.* at 26.

⁴⁷ *Id.*