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Legal Malpractice At A Crossroads? The Looming Threats[1]

I. Introduction

For lawyers, social media's ubiquity and the explosive expansion of electronically stored information ("ESI") provide both enormous opportunity and new risks to navigate. The growth of social media has generated new opportunities to market one's work, but carries with it emerging risks of unintentionally violating client confidences, creating unintended attorney-client relationships, and engaging in otherwise unanticipated and unintended unethical behavior, while at the same time risking heretofore unforeseen and unanticipated exposure to claims of ethical misconduct in the prosecution or defense of suits, interactions with judges and even defamation and invasion of privacy claims. This has created an entirely new set of malpractice concerns, with lawyers now expected to have more than merely a passing knowledge of how to utilize social media in their work, to understand the practical and ethical implications associated therewith, and to have and exercise basic levels of competency in handling ESI and advising their clients regarding same. Added to this, lawyers and LPL insurance claims representatives continue to be plagued with growing risks arising from representation of clients allegedly engaged in deceitful litigation activity, and never ending cost management issues dealing with low risk, but intransigent malpractice suits. This presentation will provide an analysis of these issues, and a blueprint for minimizing and managing them going forward.

II. The Growing Electronic Information Monster

The Dynamic Growth of Electronically-Stored Information ("ESI")

One of the most important issues an attorney must face in this day and age is one that has emerged with the growth and proliferation of ESI. Why is this the case? Well, the total amount of digital information created grew from 494 billion gigabytes in 2008, to 800 billion gigabytes (900 exabytes or 0.8 zettabytes) in 2009 or a 62 percent increase, to 1.2 billion gigabytes (1,350 exabytes or 1.2 zettabytes) in 2010.[2] To put this into perspective, the Library of Congress, which houses 17 million books, would only equal 136 terabytes of information. Five exabytes of information would be equivalent to information contained in 37,000 new libraries the size of the Library of Congress book collections. So in 2010 the amount of information created (1,350 exabytes) would equal 9,990,000 new libraries.[3] Indeed, to say the growth is "exponential" is somewhat of an understatement--it is now estimated that enterprise data is doubling every three years.[4]

The Recognized Power of ESI as Evidence.

ESI has been defined as, among other things, emails and attachments, voice mail, instant messaging and other electronic communications, and more recently has come to encompass posts on social media. While arguably supplemental to traditional forms of evidence, and witness testimony, its importance arguably transcends these traditional means of proving or disproving claims. In fact, in an interview with the official blog for the Washington DC Bar, Craig Ball a board certified trial lawyer and certified computer forensics examiner said it best: "Ultimately, what we seek to do is establish people's behavior, and their intent and mental state as they undertook certain behaviors, and the electronic trails we leave behind are more persuasive and probative than anything we've ever had before in law. There's nothing close to our ability to see inside people's heads by virtue of their use of these electronic tools today…Today, we have this ever-vigilant, highly accurate record being made of what we used to rely upon, very unreliable eyewitness testimony."[5] ESI provides attorneys with the who, what, where, when and why of the relevant events of a particular case more exactly than at any time during the history of litigation.

The Expanding Responsibilities of Attorneys in the Collection, Handling and Usage of ESI

Obtaining and Handling Electronically-Stored Information

Because of the recognized importance of ESI to the resolution of legal disputes, the steps to take in the implementation of a litigation hold have become extremely important, with real and potentially severe consequences for those who fail to follow them. As a basic standard of practice, when a litigation is reasonably foreseeable, the attorneys who have been retained on both sides should encourage their clients to: (1) identify relevant categories of potentially discoverable ESI to be segregated and preserved; (2) identify a relevant time frame for the hold and an initial search of documents; (3) identify the types and locations of ESI (including mobile devices, laptops, home computers); (4) identify applications where relevant information may exist (e.g., text messages, emails, voice mails, instant messages, word-processing documents, social media content); (5) identify all relevant ESI custodians; (6) identify search methodologies or protocols for retrieving/reviewing ESI; and (7) formulate keyword searches and agreements on search terms, archival and/or legacy ESI.[6]

Relevant Rules and Regulations

Both the federal courts and the states have procedural rules in place for the handling of ESI. Fed. R. Civ. P. 34 (a)(1)(A) states that "a party may serve on any other party a request within the scope of Rule 26(b)…[seeking]…any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Fed. R. Civ. P. 37 (e) states that to the extent "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court…may order it presumed that the lost

information was unfavorable to the party; instruct the jury that it may or must presume the information was unfavorable to the party; or dismiss the action or enter a default judgment."

While there are often no specific state statutes which address ESI in the context of state court cases,[7] a number of Courts have taken great pains to publish guidelines regarding the collaborative rules regarding ESI maintenance and production, including the identification, in reasonable detail, of ESI that is or is not reasonably accessible without undue burden or cost; the methods of storing and retrieving ESI that is not reasonably accessible; the need for certified forensic specialists and/or experts to assist with the search for and production of ESI; relevant ESI custodians; search methodologies or protocols for retrieving or reviewing ESI (including key word searches, agreements on search terms, limitations regarding whether backup, archival, legacy or deleted ESI is to be searched); and the discoverability of deleted data, because "ESI is not to be deemed 'inaccessible' based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data."[8]

Minimum Required Competency For Attorneys

Recognizing the now critical aspect played in litigation by ESI, the California State Bar put forward an opinion, in 2015, stating that an attorney's obligations under the ethical duty of competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to eDiscovery, i.e., the discovery of ESI, and also noted that the duty of competence may require a higher level of technical knowledge and ability, depending on the eDiscovery issues involved in a given matter and the nature of the ESI involved. The Opinion continued that an attorney lacking a minimum competency regarding ESI has three options: (1) acquire sufficient skill regarding ESI issues before performance is required; (2) associate with or consult technical consultants/competent counsel; or (3) decline the representation.[9] The New York State Bar Association has promulgated similar comments and guidelines.[10]

Based on the above, attorneys handling e-discovery should be able to: (1) initially assess e-discovery needs and issues of the client; (2) analyze and understand a client's ESI systems and storage; (3) identify potential custodians of potentially relevant ESI; (3) engage in competent and meaningful meet and confer with opposing counsel on a discovery plan; (4) perform data searches; and (5) collect and produce responsive ESI, preserving integrity of same.[11] Indeed, competency may require even an experienced attorney to seek assistance from another lawyer with specific expertise in the area, or engage in consultations with an expert. It's not enough to rely on an IT department, thinking they know network searches better than an attorney. A production without consultation with an expert may result in a variety of mistakes being made, including violations of the duty of confidentiality.

Risks Presented to Professionals (in failing to preserve or pursue ESI)

ABA Civil Discovery Standards (Standard 10) states that : "When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so…This Standard is…an admonition to counsel that it is counsel's responsibility to advise the client as to whatever duty exists, to avoid spoliation issues." As such, this Standard posits a potential legal malpractice claim would exist if counsel fails to instruct his client about potential ESI spoliation

issues, and those issues result in prejudice to the client's claims or defenses. These risks are present in failing to effectively pursue ESI from adversaries and/or third-parties, as well.

In addition to the ABA Civil Discovery Standards, there have recently been minimum standards promulgated by different states which have to be taken notice of. For example, Massachusetts has recently set forth a regulation[12] which establishes minimum standards to be met in connection with the safeguarding of personal information contained in both paper and electronic records. The regulation states that every person that owns or licenses personal information about a resident of Massachusetts has a duty to, and shall develop, implement and maintain a comprehensive information security program with administrative, technical and physical safeguards for protection of personal information and information of similar character. The regulation states that such security systems should include secure user authentication protocols (like password/user IDs of lawyer/firm iPhones or Blackberries); secure access with unique IDs for users; encryption of all transmitted records and files containing personal information of others and all data containing personal information to be transmitted wirelessly (sent across firm channels or email, etc.) It also calls for the monitoring of these systems for unauthorized use; encryption of personal information stored on laptops or other portable devices; up-to-date security and firewall protection and proper training of all employees who use the system.

Given the developing rules and guidelines on this, a significant possibility exists that this could be fertile ground for litigation in the future if an attorney or firm mishandles such confidential information. Further potential grounds for professional risk on the part of attorneys include: (1) a lawyer's failure to put a litigation hold in place on ESI, rendering certain inculpatory or exculpatory evidence inadmissible at trial; (2) a lawyer's failure to obtain text messages; (3) a lawyer's failure to obtain inculpatory or exculpatory posts and/or pictures on a Facebook page, Twitter feed and/or Instagram; (4) a lawyer's failure to preserve the confidentiality of certain documents of his client or adversary; or (5) a lawyer's failure to implement or have his client implement security procedures and possible methods of ESI recovery, among others.

II. The Social Media Monster

The Massive Growth in Usage of Social Media

Social Media has in particular become an important part of an attorney's responsibilities when it comes to ESI collection, and the growth numbers are staggering. Between the years 2010 and 2015, the total number of social media users worldwide more than doubled, from 970 million people to 1.96 billion people; 2.1 billion people have social media accounts and there are 3 billion internet users globally. 89% of adults aged 18-29, 82% of adults age 30-49 and 65% of adults aged 50-65 have social media accounts. Even 49% of adults over the age of 65% are social media users. Facebook is used by 71% of adults, and with 1.55 billion monthly active users is by far the most-used social media site. Twitter now boasts the second highest total of monthly active users, with 315 million.[13]

The Means Available for Investigating and Pursuing Discovery of Social Media

ESI has been defined as, among other things, emails and attachments, voice mail, instant messaging and other electronic communications, and, as noted above, more recently has come to encompass posts on social media. Preservation of social media content is challenging for parties on both sides of the plaintiff-defendant divide. The most pressing question: What, if any, of a client's or adversary's social media content is relevant to the matter at hand? Whether all social media content is freely discoverable appears to be a still-unsettled issue. The most substantial preservation challenge associated with social media stems from the almost exclusive control that service providers (e.g., Facebook, Twitter etc.) have over how social media accounts and content are managed.

If social media is reasonably expected to have the potential to be an important part of a case, the individual or organization should take steps within their control to ensure appropriate preservation. The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.[14] A Facebook page, for instance, is a form of ESI and, as such, falls within the rules concerning the preservation and spoliation of ESI.[15] A litigant must preserve a Facebook page or any other form of ESI—in other words, ensure it is not deleted—if it is "relevant" to a case. Relevance is usually a broad standard. [16]

The good news is that sanctions for failing to preserve social media materials as part of an ESI production are not necessarily going to be automatic. A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense."[17] Where the evidence is determined to have been intentionally or willfully destroyed, however, the relevancy of the destroyed documents is often presumed.[18]

Further, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense.[19] Sanctions may also be imposed when ESI is demanded, withheld or destroyed in bad faith or with gross negligence.[20] Significantly, in this regard, it is noteworthy that tools like the internet page archive site called the "Wayback Machine," as well as metadata and the nature of the internet itself often mean nothing is erased or completely wiped and, as such, attorneys can take some comfort in potentially being able to find ESI even when it might otherwise be presumed lost.

How it Impacts Legal Practice for Attorneys and Adjusters

Required Social Media Competence

According to the Commercial and Federal Litigation Section of the New York State Bar Association ("NYSBA") and its revised, nationally-recognized social media ethics guidelines, a lawyer has a duty to understand the benefits and risks and ethical implications associated with

social media, including its use as a mode of communications, an advertising tool and a means to research and investigate matters.[21]

Ethical Guidelines for Attorneys

From an ethical standpoint, regarding social media and in particular legal blogging, cases have been analyzed under ABA Model Rule 7.1, which has been formally adopted or codified, or both, in many jurisdictions, and states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."[22] The rule adds that "[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." Additionally, Model Rule 1.6 states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . . ."[23]

Further, a recent NYCLA Opinion[24] opined that an attorney may advise clients as to what they should and should not post on social media; what existing postings they may or may not remove; and the particular implications of social media posts. The opinion also notes that there is no ethical constraint on advising a client to use the highest level of privacy/security settings available on Facebook/Twitter and that an attorney may properly review a client's social media pages and advise their client that certain materials may be used against the client for impeachment at trial.[25] While there is no ethical bar to "taking down" potentially negative posts from social media, the fact is that the posting is "generally preserved in cyberspace" or on the user's computer. As such, attorneys and their clients must tread carefully in the handling of this particular type of ESI.

How It Impacts Legal Marketing

Attorney Advertising (Expertise/Solicitation)

Today, LinkedIn or other professional social networking platforms like Avvo invite lawyers to identify "specialties" or expertise. But be careful. One may be mislabeled by others as having expertise in in an area one doesn't specialize in. Knowing failure to alter your LinkedIn page to delete these misrepresentative statements of your areas of expertise could result in problems down the line. Further, automatic features of some social media sites designed to facilitate convenient connections between users can potentially result in networking invitations being sent to persons who are not lawyers, family members, close personal friends or current or former clients. This could potentially constitute a prohibited solicitation, and automatic follow-up reminders could even constitute separate violations.

Communications With Represented Parties/Unrepresented Parties

Communications with represented parties are forbidden without first obtaining the consent of the represented party's lawyer. This prohibition extends to any agents who may act on the lawyer's behalf (such as secretaries, paralegals, private investigators, etc).[26] What this means in practical terms in the age of social media is that you should not send Facebook friend requests or LinkedIn invitations to represented parties, even if you're dying to get access to information on their Facebook page. However, you can freely view publicly accessible social

media, and this continues to be a useful tool for trial lawyers who are trying to get a handle on, for instance, the makeup of the members of his or her jury.

As with represented parties, the advice regarding unrepresented parties is similar: with regard to social media, be cautious. Underlying ABA RPC 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct) is a concern for protecting third parties against abusive lawyer conduct. The consensus, as noted above, is that publicly viewable social media is fair game. However, information safely nestled behind the third-party's privacy settings may not be obtained through subterfuge, trickery, dishonesty, deception, pretext, false pretenses or an alias.[27]

Legal Blogging

Blogs, which typically, refer to a web page devoted to the recording of personal reflections, comments and opinions would seem to be the embodiment of fully-protected speech for attorneys. But this is not necessarily the case, depending on the information contained in the blog.

Attorney blogs typically contain short news articles and informational essays on topics relating to the attorney's area of practice expertise. Additionally, in the internet age of lawyering, attorneys and law firms have often turned to social media as a means to opine on, report, share, and interpret decisions in their respective fields of practice. Use of a professional's blog, Twitter feed, or Facebook page provides an attorney or his or her law firm with an opportunity to disseminate criticism and commentary to a wider audience than could ever previously have been imagined. Because of the expansive networking and branding potential these blogs and social media postings afford attorneys, they have become a tool not only for "reporting" in the broad sense, but also of showing off an attorney's or firm's knowledge as a way to generate business and attract potential clients to a firm. For many, it has become a powerful and absolutely indispensable marketing tool. However, these legal blog posts can potentially leave attorneys open to defamation claims against them as individuals or against their law firms, and their Facebook posts and Tweets could just as easily leave them on the hook for a potential malpractice claim based on the contention that an attorney or a firm provided legal advice or representation in the course of a communication. These posts can also result in ethics violations if not handled with care.

Recognizing that attorney blogging may constitute or may not constitute attorney advertising, depending on the circumstances, states have begun to promulgate ethical opinions on same. The California State Bar Committee on Professional Responsibility and Conduct Opinion 2012-186 looks at whether posts contain words of invitation or solicitation in determining whether blogging constitutes advertising. Additionally, regardless of specific content on the blog, the ABA has stated that a blog on an attorney's professional website will likely be found to be advertising even if it contains information and materials of general public interest.[28] And, the Florida Bar also fairly recently overhauled its own attorney advertising rules to make clear that lawyer and law firm websites (including social networking and video sharing sites) are subject to many of the restrictions applicable to other traditional forms of lawyer advertising.[29]

The key here, as outlined further below, is that a blog which does nothing more than tout the lawyer's successes can be considered commercial speech, subject to regulation. To be safe, in touting one's successes, a lawyer would be wise to note that case results depend upon a variety of factors unique to each case.[30]

Ethical Issues With Handling of Social Media

Client Confidentiality

ABA RPC 1.6, 1.9 and 1.18 provide that the duty to protect against disclosing of confidential information extends to current clients (1.6), former clients (1.9) and prospective clients (1.18). ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients on websites.

As an example of how this rule is applied, in *In re Skinner*,[31] the Georgia Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under the state's rules) where a lawyer admitted to disclosing information online about a former client in response to negative review on consumer websites. As another example, in *In re Peshek*[32], the Illinois Supreme Court suspended an assistant public defender from practice for 60 days for, among other things, blogging about clients and implying in at least one such post that a client may have committed perjury. On the other end of the spectrum, however, it is noteworthy that in *Hunter v. Va. State Bar*[33], a Virginia appeals court opined that the Bar cannot prohibit a lawyer from posting non-privileged information about clients and former clients without the client's consent where: (1) the information related to closed cases; and (2) the information was publicly available from court records.

In *In re: Vincent Paul Schmeltz*,[34], a Federal Court in Illinois ordered an attorney to show cause as to why he shouldn't be sanctioned for taking photos of evidence presented at a trial at which he was an observer and sharing the photos with his Twitter followers. In December of 2015, he was sanctioned for the conduct.

"**Friending" Judges/Adversaries**

While the friending of judges and adversaries is permitted, an attorney must be careful about same. Questions to ask oneself include whether you regularly appear before the judge and, if so, whether your friendship may imply a special ability to influence the judge in question.

Judicial Criticism in Pending Cases

A number of Courts have also looked at attorney's misuse of social media and have illuminated what this required "understanding" of social media entails. In *In re Joyce Nanine McCool*[35], unhappy with the various rulings made by judges in a custody proceeding and believing those rulings were wrong as a matter of law, the attorney involved drafted an online petition and posted same on the internet, along with a photo of the two girls in the custody proceeding itself. She also re-posted same to her own legal blog, and tweeted out to her followers the poll and its results. The Judges in her case filed a complaint with the state disciplinary committee alleging violations on a number of grounds, and the disciplinary

committee sanctioned her for her conduct, stating that she had used the internet, an online petition, and social media to spread information, some of which was false, misleading, and inflammatory, about judge's handling of and rulings in pending litigation, and that she had also done so in an effort to influence the judge's future rulings in pending litigation. Ultimately, the attorney in question was disbarred by the Louisiana state disciplinary committee for her social media conduct.

The Risks/Exposures Presented by Social Media

The benefits of blogging and sending out e-mail blasts to promote a law firm's achievements, or otherwise bring attention to the firm, are readily apparent. However, this type of promotional activity carries risk. When blogging or otherwise reporting on case developments, there is no question that there are substantial protections in place for expressions of opinion and fair reporting of court proceedings. But care must still be taken to ensure that the facts are not teased or twisted to make a blog more eye-catching or promote readership. So if you are not watching over what the lawyers in your firm are blogging about, you may want to start doing so.

Defamation

Defamation is defined as the making of a false statement of fact, which "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace."[36] The basic elements of a claim for defamation based on a writing are fairly universal throughout jurisdictions in the United States. For example, to establish libel under New York law, a plaintiff must prove five elements: "(1) a written defamatory factual statement [of and] concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special damages or per se actionability." [37] The same elements are regularly applied elsewhere.[38]

Due to the unique situation that blogs often present to a court, and the mixture of statements that they include that could be construed as either a fact or an opinion, a fair report of a judicial proceeding or simply an advertisement for a firm's accomplishments, the line of demarcation distinguishing defamatory conduct from conduct that is not has often been blurred.[39] These statements of mixed fact and opinion can make an otherwise non-actionable statement of opinion actionable as a claim for defamation. The actionable element of a "mixed opinion" is not the false opinion itself – it is the implication that the speaker knows certain facts, unknown to his audience, which supports his opinion and are detrimental to the person about whom he is speaking.[40]

Normally, there are several defenses that are available to defendants in defamation cases, including the defense of truth. However, courts have examined two defenses in particular that have factored prominently in the defense of these types of cases where lawyer reports on court proceedings and court rulings are involved: statements that are "non-actionable opinion" and statements that are protected by the "fair reporting privilege." New York and a number of other jurisdictions have statutes providing that a civil action cannot be maintained against a person or firm for the publication of a fair and true report of any judicial proceeding, which has become the defense of choice for bloggers -- courts have responded with a slew of pro-blogging rulings in more recent years (i.e. the fair report privilege).[41] In a nutshell, as long as a blog entry

is “substantially accurate,” a civil action cannot be maintained against a lawyer for the publication of a fair and true report of any judicial proceeding.

Potential Legal Malpractice Claims

From an ethical standpoint, legal blogging has been analyzed under ABA Model Rule 7.1, which has been formally adopted or codified, or both, in many jurisdictions, and states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The rule adds that "[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." Most importantly for our purposes here, Model Rule 1.6 states: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . . .”

IV. Growing Exposures for Participation in the Prosecution or Defense of Fraudulent or Frivolous Claims

New York Judiciary Law § 487 and Analogous Statutes

Under New York Judiciary Law § 487, an attorney or counselor who is either guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action. California (Cal Bus & Prof Code § 6128), Minnesota (Minn. Stat. § 481.071), Montana (37-61-406, MCA), North Dakota (N.D. Cent. Code, § 27-13-08) and Oklahoma (21 Okl. St. § 575), among other jurisdictions, each have passed almost identically worded statutes.

Case law, of which New York has the most developed, states that relief under a cause of action based upon Judiciary Law § 487 "is not lightly given," and requires a showing of "a chronic and extreme pattern of behavior" or “intentional egregious misconduct” on the part of the defendant attorneys that caused damages.[42] Allegations regarding an act of deceit or intent to deceive must be stated with particularity, and the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient.[43] Further, a plaintiff must demonstrate that a nexus exists between defendant's alleged conduct and any judicial determination.[44]

The Lawyer’s Duties and Responsibilities and Defending a §487-type Claim

In defending the § 487 type of claim, an attorney can argue that all but clearly willfully deceitful statements and/or egregious conduct are going to be insufficient to trigger liability under §487. By confining the reach of the statute to intentional, egregious misconduct, this rigorous standard affords attorneys wide latitude in the course of litigation to engage in written and oral expression consistent with responsible, vigorous advocacy, thus excluding from liability in most instances even the most aggressive statements and representations in support of your client’s position.[45]

Further, as §487 claims based on fraud must be pled with particularity[46], the failure of the pleadings to state any factual basis for assuming or presuming knowledge of the alleged fraud or intent by the attorney to engage in deceit in relying upon same often provides grounds for dismissal for this reason as well. Additionally, the New York Court of Appeals has concluded, in a judicial gloss on the statute's language, that it is not sufficient for purposes of establishing a § 487 claim to identify a single instance of alleged fraud or deceitful conduct, but rather that there has been "a chronic and extreme pattern of legal delinquency," unless "intentional egregious misconduct" has been alleged.[47]

Additionally, Judiciary Law § 487 authorizes an award of damages only to "the party injured." As such, an injury to the plaintiff resulting from the alleged deceitful conduct of the defendant attorney is an essential element of a cause of action based on a violation of that statute.[48] Thus, it is not sufficient to allege fraudulent or deceitful conduct; a causal nexus between that conduct and an injury suffered by the plaintiff as a result must also be alleged and proven.[49]

V. The Cost Risk Associated with Small Exposure but Difficult-To-Resolve Legal Malpractice Claims

Identifying the Problem and Inflection Points

One of the consistently difficult legal malpractice issues to address arises in the context of the attorney accused of malpractice who is insistent on receiving his day in court, or taking the case all the way to verdict, notwithstanding the fact that the settlement value of the case is many multiples in value less than the cost of proving the lawyer's conduct met the requisite standard of care in the circumstances, or the plaintiff would have been unable to prove that "but for" the lawyer's alleged negligence he would have prevailed in the underlying litigation. Unfortunately, far more often than would be expected, cases one would think could be quickly and cost effectively resolved can become impossible to settle where, for example, the Plaintiff's lawyer in a dog bite case refuses to admit any wrongdoing; or the defendant attorney has a vested interest in any possible recovery in an ongoing litigation he was replaced as counsel on because of alleged malpractice. Another situation where this situation presents itself is in situations where the insurer has agreed to pay defense costs from dollar one, but any settlement will have to first be paid out of the insured lawyer's deductible. In this instance, the lawyer may be perversely incentivized to fight a very limited value case all the way through trial rather than agree to fund a settlement. In such circumstances, insurers can often find themselves in protracted, costly court battles over cases that should by all rights have been settled within minutes of the receipt of the complaint. What can be done?

Ethical and Practical Concerns Presented by the Tripartite Relationship

In these instances, claims personnel can be caught in a conundrum. On the one hand, the insured has a duty to cooperate, and the urge can be strong to pressure the insured to settle. Further, typically the LPL policy providing a defense will contain language that permits the insured to withhold consent to settlement, but afford the insurer protection against unreasonable withholding of consent by allowing the insurer to withdraw the defense from the

date of what is believed to be unreasonable withholding of consent to a reasonable settlement demand, as well as to place a cap on the insurer's responsibility for any liability award above the offered settlement amount. This is typically referred to as the "hammer" clause. The problem is that insurers are not looking to take actions which would place themselves in an adversary relationship with their insureds, if this can be avoided. Further, the question of what can be considered "reasonable" in terms of settlement value can be a grey area, subject to different interpretations in the circumstances of each case. And there is a risk that if the insurer withdraws its defense it can potentially become bogged down in a coverage action, and as a consequence put itself at risk of a potential bad faith claim if the now unrepresented lawyer is subjected to liability that would not have likely existed otherwise had a defense continued to be afforded to him.

The added complication is that the defense counsel retained by the insurer has a duty to represent the insured, not work in cahoots with the insurer to keep the insurer's defense costs down. However, there is going to be a natural urge on the part of defense counsel to justify the insurer's choice of him in making defense assignments, and show that he can get cases resolved efficiently and cost-effectively. Coupled with a natural desire on the part of professionals who work regularly with each other to try to be helpful to their counterparts, there is a danger that defense counsel can be subtly swayed to go outside his lane, pressure the insured to settle, and forget that his role is to represent the insured, his client, not the wants and desires of the claims representative.

The Way Forward Through Mediation

In these instances, early mediation can be a very effective tool in the toolkit. By paying for the cost of mediation, the insurer is signaling to the insured that it is not just looking to close a case; it is looking to find a resolution that the insured will be comfortable with. It also allows the insured to obtain his/her day in court, so to speak. Further, it allows a truly neutral party to be the voice of reason, explaining that defending a nuisance value case through trial can work to engender greater costs later, by developing a loss history for the insured that is out of whack with the real value of the legal malpractice claim.

Additionally, mediation is relatively inexpensive, with most sessions lasting no more than one or two days. And many courts, both state and federal, offer ADR programs that are free for the first 2-4 hours.

Statistics bear out the effectiveness of mediation, as most mediators report 80– to 90–percent success rates.[50] This figure is supported by the fact that approximately 85 percent of commercial matters submitted to mediation result in a written settlement agreement.[51] Of course, mediation success inherently depends upon the disputants' commitment to the mediation process and the abilities of the mediator and disputant to communicate effectively with each other concerning the dispute.[52] However, it is clear that in the context of the small value, high conflict, potentially substantial defense cost LPL litigation, mediation can be an extremely important resolution tool.

VI. Conclusion

The path ahead for LPL claims seems most definitely to be at a major crossroads, with the indelible impact of social media and ESI presenting the greatest area of concern. There are new issues to be dealt with, and attendant risks presented thereby. In addition, nagging and continuing concerns exist with regard to issues presented in representing clients alleged to have been engaged in fraudulent and deceitful conduct, and using the courts to further their schemes, as well as in trying to resolve small value, but high conflict and emotionally charged malpractice claims. The legal malpractice defense lawyer, and the LPL claims representative, would be well advised to take a long, careful look at the issues before making the crossing.

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[2] Michael R. Arkfeld, "Proliferation of 'Electronically Stored Information' (ESI) and Reimbursable Private Cloud Computing Costs" (LexisNexis 2011) (citing Wikibon Blog, Information Explosion and Cloud Storage), http://wikibon.org/blog/cloud-storage/.

[3] *Id*. (citing Peter Lyman & Hal R. Varian, "How Much Information," University of California at Berkeley, School of Information Management and Systems (Oct. 27, 2003), http://www.sims.berkeley.edu/how-much-info-2003.

[4] *Id*. (citing Big Data Explosion & Emerging Business Patterns, http://tinyurl.com/3apmc9p).

[5] E-Discovery: Why Should Lawyers Embrace It? ESI Special Marster Craig Ball Says Evidence is More Than Paper, http://www.dcbar.org/blog/post.cfm/craig-ball-ediscovery-expert-lawyers-in-dc#sthash.9uEWrzkO.dpuf (April 13, 2016).

[6] The Commercial Division for the Supreme Court, Nassau County has built on New York's Unifrom Rules for the Trial Courts, and developed the most sophisticated rules concerning discovery of ESI in the State of New York. That court also publishes a comprehensive set of guidelines for ESI (the "Nassau Guidelines"). http://www.nycourts.gov/courts/comdiv/pdfs/nassau-e-filing_guidelines.pdf.

[7] *See, e.g.*, *Mosley v Conte*, 2010 N.Y. Misc. LEXIS 4313, at *17 (Sup. Ct. N.Y. County Aug. 17, 2010); *Delta Financial Corp. v. Morrison*, 13 Misc. 3d 604, 608, 819 N.Y.S.2d 908, 912 (Sup. Ct. Nassau County 2006).

[8] *See* "Nassau Guidelines", http://www.nycourts.gov/courts/comdiv/pdfs/nassau-e-filing_guidelines.pdf.

[9] California State Bar Opinion No. 2015-193 (ESI Handling Competency).

[10] Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the NYSBA (updated June 9, 2015)

[11] California State Bar Opinion No. 2015-193 (ESI Handling Competency).

[12] Mass. Gen. L. Ch. 93 H, 201 CMR 17.

[13] The Growth of Social Media v 3.0, https://www.searchenginejournal.com/growth-social-media-v-3-0-infographic/155115/.

[14] *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

[15] *See*, *e.g.*, *Gatto v. United Air Lines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285 (D.N.J. Mar. 25, 2013).

[16] *See*, *e.g.*, *Apple Inc. v. Samsung Elecs. Co.(Apple I)*, 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012), rev'd on other grounds, *Apple Inc. v. Samsung Elecs. Co. (Apple II)*, 888 F. Supp. 2d 976 (N.D. Cal. 2012).

[17] *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543, 547-548 (N.Y. 2015) (citations omitted).
[18] *Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 (S.D.N.Y. 2003).
[19] *Painter v. Atwood*, 2014 U.S. Dist. LEXIS 35060 (D. Nev. March 18, 2014) (Court sanctions counsel where counsel should have informed client of duty to preserve evidence, including Facebook materials and text messages); *Gatto v. United Airlines*, 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013) (evidence deemed spoliated, and Defendants entitled to adverse inference instruction because even if deletion of Facebook account wasn't intentional, the deactivation of the account was successful and failed to preserve relevant evidence); *Allied Concrete Co. v. Lester*, 736 S.E. 2d 699 (Va. 2013) (significant sanctions awarded against counsel and client where Plaintiff's attorney, through his paralegal, instructed his client to "clean up" photos from Facebook account and client simply deleted account and answered request for discoverable information fromsame with response that he had no Faccebook account).
[20] *Id*.
[21] Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the NYSBA (updated June 9, 2015) (NYRPC 1.1(a) and (b)).
[22] *In re Hubbard*, 2013 U.S. Dist. Lexis 14949, 12–13 (S.D. Cal. Feb. 4, 2013); *Accord Mustang Enters. v. Plug-In Storage Sys.*, 874 F. Supp. 881, 885 (N.D. Ill. 1995).
[23] *See United States ex rel. Holmes v. Northrop Grumman Corp.*, 2016 U.S. App. Lexis 5370 (5th Cir. Mar. 23, 2016) (quoting ABA Model Rule 1.6(a)); *McClure v. Thompson*, 323 F.3d 1233, 1242 (9th Cir. 2003); *Nat'l Fedn. of Indep. Bus. v. Perez*, 2016 U.S. Dist. Lexis 89694, at *25 (N.D. Tex. June 27, 2016).
[24] NYCLA Opinion 745 (2013) (advising a client on social media posts).
[25] *Id*.
[26] *See, e.g.*, *John J. Robertelli v. The New Jersey Office of Attorney Ethics* (A-62-14) (075584) (N.J. (2016)).
[27] *See* NY State Bar Op. 843 (2010); NYC Op. 2010-2 (2010).
[28] ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 10-457 (2010).
[29] Summary of Changes to Advertising, *In re: Amendments to the Rules Regulating The Florida Bar – Subchapter 4-7, Lawyer Advertising Rules*, 38 Fla. L. Weekly S47 (Fla. Jan. 31, 2013), http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/DDEE1897BE68E11E85257B0A007B517D/$FILE/Summary%20of%20Changes%20to%20the%20Ad%20Rules.pdf?OpenElement.
[30] *Hunter v. Va. State Bar*, 744 S.E.2d 611 (Va. 2013) (attorney/firm ordered to include disclaimer about outcome dependent on a variety of factors unique to each case).
[31] 740 S.E.2d 17 (Ga. 2013).
[32] M.R. 23794 (Ill., May 18,2010).
[33] 744 S.E.2d 611 (Va. 2013).
[34] (N.D. Ill. 2015).
[35] (La. 2015).
[36] *Sandals Resorts Intl. Ltd. v Google, Inc.*, 925 N.Y.S.2d 407, 412 (N.Y. App. Div. 2011); *see also* Restatement of Torts (2d) § 559.
[37] *Sorvillo v. St. Francis Preparatory Sch.*, 2015 U.S. App. Lexis 6424, 2-3 (2d Cir. Apr. 20, 2015); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (applying New York law).
[38] *See Armstrong v. Shirvell*, 596 Fed. Appx. 433, 441 (6th Cir. 2015) (applying Mich. law); *Hogan v. Winder*, 762 F.3d 1096, 1105 (10th Cir. 2014) (applying Utah law).
[39] *Sang v. Hai*, 951 F. Supp. 2d 504 (S.D.N.Y. 2013).
[40] *Rand v. New York Times Co.*, 430 N.Y.2d 271, 274 (App. Div. 1st Dep't 1980).
[41] *See*, *e.g.*, *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP*, 247 Cal. App. 4th 87 (Cal. Ct. App. 2016) (deciding that the fair reporting privilege shielded an firm blog from claim of defamation; *Katz v. Lester Schwab Katz & Dwyer, LLP*, 2014 N.Y. Misc. Lexis 5362 (N.Y. Sup. Ct. Dec. 4, 2014) (accord).
[42] *Facebook, Inc. v DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (N.Y. App. Div. 1st Dep't 2015) (citing *Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 A.D.3d 600, 601 (N.Y. App. Div. 1st Dep't 2014).
[43] *Facebook, Inc. v DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (N.Y. App. Div. 1st Dep't 2015) (citing *Armstrong v Blank Rome LLP*, 126 AD3d 427, 427 (N.Y. App. Div. 1st Dep't 2015)).
[44] *Sanko v Roth*, 2016 N.Y. Misc. LEXIS 1874 (N.Y. Sup. Ct. May 17, 2016).

[45] *Alliance Network, LLC v. Sidley Austin LLP*, 987 N.Y.S.2d 794, 803 (Sup. Ct. N.Y. Cty. 2014) (quoting *O'Callaghan v. Sifre*, 537 F.Supp.2d 594, 596 (S.D.N.Y. 2008)).
[46] *Briarpatch Ltd., L.P. v. Frankfurt, Garbus, Klein & Selz, P.C.*, 787 N.Y.S.2d 267, 268 (App. Div. 1st Dep't 2004); *see also Herschman v Kern, Augustine, Conroy & Schoppmann*, No. 100348/2011, 2012 N.Y. Misc. LEXIS 3616, at *18-19 (Sup. Ct. N.Y. Cty. July 23, 2012) (accord); *Seldon v Lewis, Brisbois Bisgaard & Smith, LLP*, No. 111916/10, 2012 N.Y. Misc. LEXIS 5432, at *8-9 (Sup. Ct. N.Y. Cty. Oct. 11, 2012) (accord)).
[47] *Ray v. Watnick*, 2016 U.S. Dist. LEXIS 55376, at *15-17 (S.D.N.Y. Apr. 26, 2016).
[48] *Rozen v. Russ & Russ, P.C.*, 908 N.Y.S.2d 217, 220 (App. Div. 2d Dep't 2010).
[49] *Weisman, Celler, Spett & Modlin v. Chadbourne & Parke*, 271 A.D.2d 329, 330-331 (N.Y. App. Div. 1st Dep't 2000).
[50] Electronic Journals of the U.S. Department of State, "Mediation and the Courts" http://usa.usembassy.de/etexts/gov/ijde1299.pdf.
[51] Dispute Resolution Statistics, http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics.
[52] Jack G. Marcil and Nicholas D. Thornton, Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success, http://www.americanjournalofmediation.com/docs/Avoiding%20Pitfalls%20-%20Common%20Reasons%20for%20Mediation%20Failure%20and%20Solutions%20for%20Success.pdf.