South Carolina Bar

2017 South Carolina Bar Convention

Breakfast Ethics Seminar

#SocialMediaEthics

Sunday, January 22, 2017

presented by

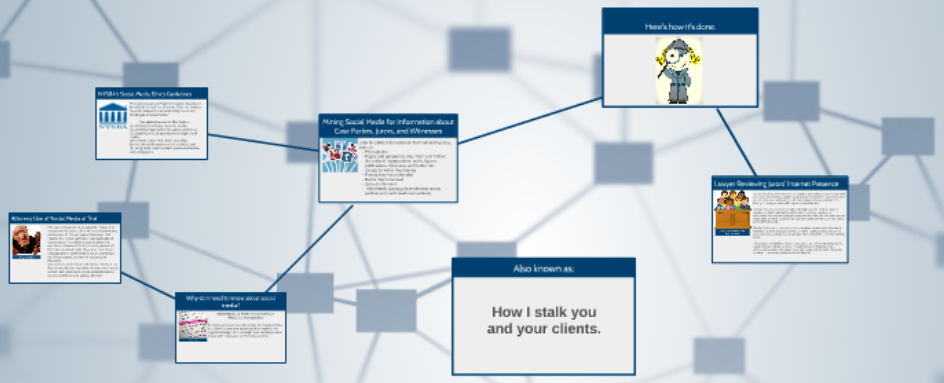
The South Carolina Bar
Continuing Legal Education Division

SC Supreme Court Commission on CLE Course No. 170433

South Carolina Bar

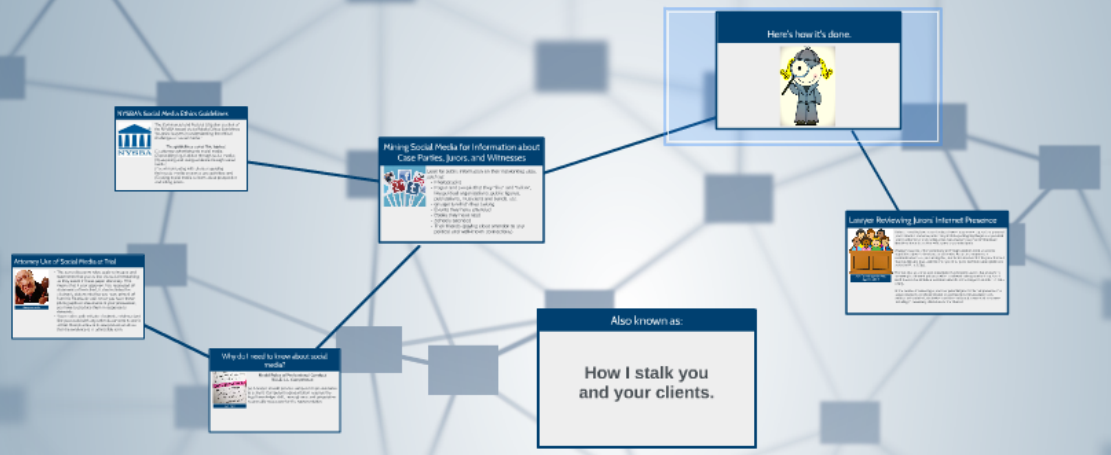
#SocialMediaEthics

Elizabeth M. Midgley
Buffalo, NY



#SocialMediaEthics

What's okay, what's not, and what the heck can you do.



#SocialMediaEthics

What's okay, what's not, and what the heck can you do.

Also known as:

How I stalk you and your clients.

Why do I need to know about social media?

Part 1200

Model Rules of Professional Conduct
RULE 1.1. Competence

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

NYSBA's Social Media Ethics Guidelines

The Commercial and Federal Litigation Section of the NYSBA issued Social Media Ethics Guidelines "to assist lawyers in understanding the ethical challenges of social media."

The guidelines cover five topics:

(1) attorney advertising via social media;
(2) providing legal advice through social media;
(3) acquiring and using evidence through social media;
(4) communicating with clients regarding their social media presence and activities; and
(5) using social media to learn about prospective and sitting jurors.

Lawyer Reviewing Jurors' Internet Presence

ABA Formal Opinion 466
(April 24, 2014)

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Mining Social Media for Information about Case Parties, Jurors, and Witnesses

Look for public information on their networking sites, such as:

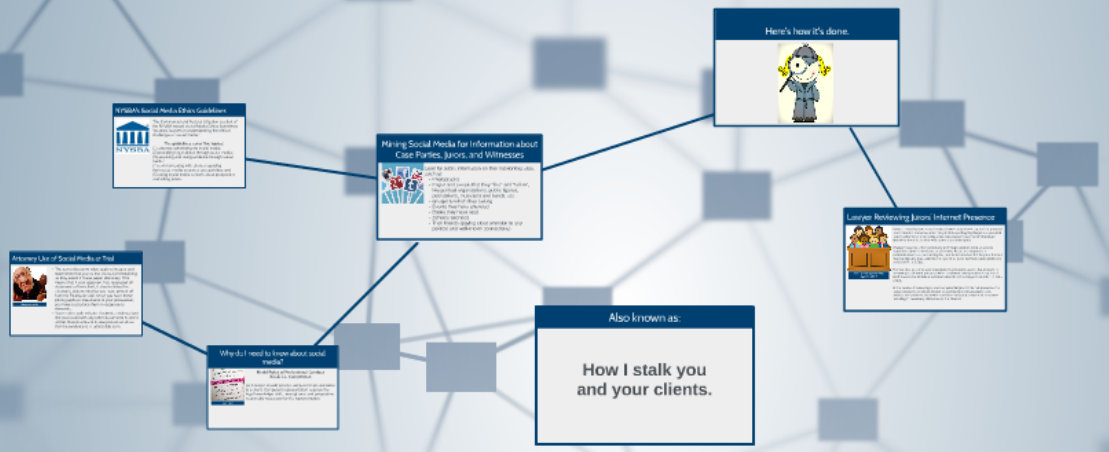
- Photographs
- Pages and people that they "like" and "follow", like political organizations, public figures, publications, musicians and bands, etc.
- Groups to which they belong
- Events they have attended
- Books they have read
- Schools attended
- Their friends (paying close attention to any political and well-known connections)

Here's how it's done.

Attorney Use of Social Media at Trial

Always remember

- The same discovery rules apply to images and statements that you collect via social networking as they would if it was paper discovery. This means that if your opponent has requested all statements of her client, it also includes the electronic statements that you have printed off from his Facebook wall. Once you have these photographs or statements in your possession, you have to produce them in response to demands.
- You need to authenticate electronic evidence just like you would with any other documents to use it at trial. Best practice is to use professionals so that the evidence is in admissible form.



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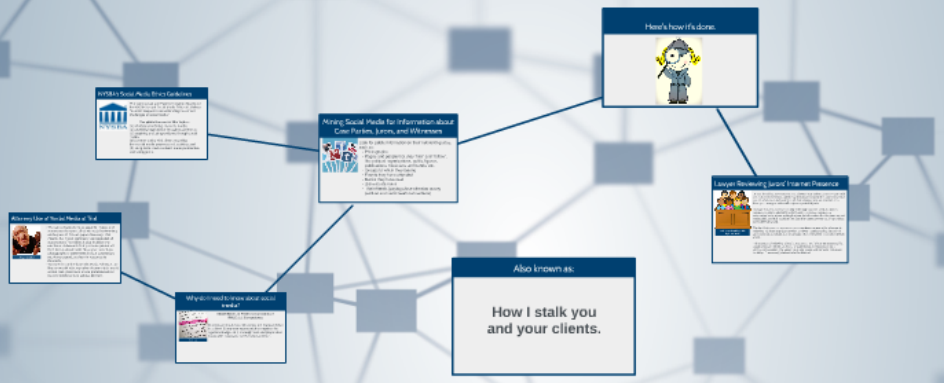
What's okay, what's not, and what the heck can you do.



#SocialMediaEthics

What's okay, what's not, and what the heck can you do.

10 Tips for Avoiding Ethical Lapses When Using Social Media

Christina Vassiliou Harvey, Mac R. McCoy, Brook Sneath

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You may be among the thousands of legal professionals flocking to social media sites like LinkedIn, Facebook, Twitter, or Google+ to expand your professional presence in the emerging digital frontier. If so, have you paused to consider how the ethics rules apply to your online activities? You should. Some of the ethical constraints that apply to your social media usage as a legal professional may surprise you. Moreover, legal ethics regulators across the country are beginning to pay close attention to what legal professionals are doing with social media, how they are doing it, and why they are doing it. The result is a patchwork quilt of ethics opinions and rule changes intended to clarify how the rules of professional conduct apply to social media activities.

This article provides 10 tips for avoiding ethical lapses while using social media as a legal professional. The authors cite primarily to the ABA Model Rules of Professional Conduct (RPC) and select ethics opinions from various states. In addition to considering the general information in this article, you should carefully review the ethics rules and ethics opinions adopted by the specific jurisdiction(s) in which you are licensed and in which your law firm maintains an office.

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ABA BUSINESS LAW SECTION

THE LAST LAUGH

"They moved my cubicle to my smartphone."

BLS TRIVIA QUESTION

Question: Which three states in the United States had the most nonprofit organizations registered with the National Center for Charitable Statistics in 2012?

1. Social Media Profiles and Posts May Constitute Legal Advertising

Many lawyers – including judges and in-house counsel – may not think of their social media profiles and posts as constituting legal advertisements. After all, legal advertising is limited to glossy brochures, highway billboards, bus benches, late-night television commercials, and the back of the phonebook, right? Wrong. In many jurisdictions, lawyer and law firm websites are deemed to be advertisements. Because social media profiles (including blogs, Facebook pages, and LinkedIn profiles) are by their nature websites, they too may constitute advertisements.

For example, the Florida Supreme Court recently overhauled that state's 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. Similarly, California Ethics Opinion 2012-186 concluded that the lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.

2. Avoid Making False or Misleading Statements

The ethical prohibition against making false or misleading statements pervades many of the ABA Model Rules, including RPC 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), 7.1 (Communication Concerning a Lawyer's Services), 7.4 (Communication of Fields of Practice and Specialization), and 8.4 (Misconduct), as well as the analogous state ethics rules. ABA Formal Opinion 10-457 concluded that lawyer websites must comply with the ABA Model Rules that prohibit false or misleading statements. The same obligation extends to social media websites.

South Carolina Ethics Opinion 12-03, for example, concluded that lawyers may not participate in websites designed to allow non-lawyer users to post legal questions where the website describes the attorneys answering those questions as "experts." Similarly, New York State Ethics Opinion 972 concluded that a lawyer may not list his or her practice areas under the heading "specialties" on a social media site unless the lawyer is appropriately certified as a specialist – and law firms may not do so at all.

Although most legal professionals are already appropriately sensitive to these restrictions, some social media activities may nevertheless give rise to unanticipated ethical lapses. A common example occurs when a lawyer creates a social media account and completes a profile without realizing that the social media platform will brand the lawyer to the public as an "expert" or a "specialist" or as having legal "expertise" or "specialties." Under RPC 7.4 and equivalent state ethics rules, lawyers are generally prohibited from

Question: According to the National Center for Charitable Statistics, how many tax-exempt nonprofit organizations were there in the United States as of April 2016?

A. 9,589,065
B. 1,097,689
C. 1,571,056
D. 2,907,056

IN THE NEXT ISSUE

Next month's *BLT* will feature an array of practical topics such as helpful tips for the preparation of 2015 Form 20-F, the interplay between corporate governance issues and litigation, and entity lifecycles. Sustainability will be the focus of the issue's mini-theme.

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SECTION NEWS

claiming to be a "specialist" in the law. The ethics rules in many states extend this restriction to use of terms like "expert" or "expertise." Nevertheless, many professional social networking platforms (e.g., LinkedIn and Avvo) may invite lawyers to identify "specialties" or "expertise" in their profiles, or the sites may by default identify and actively promote a lawyer to other users as an "expert" or "specialist" in the law. This is problematic because the lawyer completing his or her profile cannot always remove or avoid these labels.

3. Avoid Making Prohibited Solicitations

Solicitations by a lawyer or a law firm offering to provide legal services and motivated by pecuniary gain are restricted under RPC 7.3 and equivalent state ethics rules. Some, but not all, state analogues recognize limited exceptions for communications to other lawyers, family members, close personal friends, persons with whom the lawyer has a prior professional relationship, and/or persons who have specifically requested information from the lawyer.

By its very design, social media allows users to communicate with each other or the public at-large through one or more means. The rules prohibiting solicitations force legal professionals to evaluate – before sending any public or private social media communication to any other user – *whom* the intended recipient is and *why* the lawyer or law firm is communicating with that particular person. For example, a Facebook "friend request" or LinkedIn "invitation" that offers to provide legal services to a non-lawyer with whom the sending lawyer does not have an existing relationship may very well rise to the level of a prohibited solicitation.

Legal professionals may also unintentionally send prohibited solicitations merely by using certain automatic features of some social media sites that are designed to facilitate convenient connections between users. For instance, LinkedIn provides an option to import e-mail address books to LinkedIn for purposes of sending automatic or batch invitations. This may seem like an efficient option to minimize the time required to locate and connect with everyone you know on LinkedIn. However, sending automatic or batch invitations to everyone identified in your e-mail address book could result in networking invitations being sent to persons who are not lawyers, family members, close personal friends, current or former clients, or others with whom a lawyer may ethically communicate. Moreover, if these recipients do not accept the initial networking invitation, LinkedIn will automatically send two follow up reminders unless the initial invitation is affirmatively withdrawn. Each such reminder would conceivably constitute a separate violation of the rules prohibiting solicitations.

4. Do Not Disclose Privileged or Confidential Information

Fall issue of The Business Lawyer: Now Available
Non-CLE Webinar 11/2: 'Everything You Need to Know about Recent Consumer Bankruptcy Law Developments Affecting Businesses Operating in that Environment'
Free CLE 10/27: Professionalism and Legal Ethics: Do They Reinforce Each Other?
All News

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Nonprofit Organizations
Third Quarter, 2016

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Miscellaneous IT Related Legal News (MIRLN) 16 October - 5 November 2016 (v19.15)

Social media also creates a potential risk of disclosing (inadvertently or otherwise) privileged or confidential information, including the identities of current or former clients. The duty to protect privileged and confidential client information extends to current clients (RPC 1.6), former clients (RPC 1.9), and prospective clients (RPC 1.18). Consistent with these rules, ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients on websites. In a content-driven environment like social media where users are accustomed to casually commenting on day-to-day activities, including work-related activities, lawyers must be especially careful to avoid posting *any* information that could conceivably violate confidentiality obligations. This includes the casual use of geo-tagging in social media posts or photos that may inadvertently reveal your geographic location when traveling on confidential client business.

There are a few examples of lawyers who found themselves in ethical crosshairs after posting client information online. For example, in *In re Skinner*, 740 S.E.2d 171 (Ga. 2013), the Georgia Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under that state's rules) where a lawyer admitted to disclosing information online about a former client in response to negative reviews on consumer websites. In a more extreme example, the Illinois Supreme Court in *In re Peshek*, M.R. 23794 (Ill. May 18, 2010) 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. The Wisconsin Supreme Court imposed reciprocal discipline on the same attorney for the same misconduct. *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879 (Wis. 2011).

Interestingly, the Virginia Supreme Court held in *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013), that confidentiality obligations have limits when weighed against a lawyer's First Amendment protections. Specifically, the court held that although a lawyer's blog posts were commercial speech, the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients' consent where (1) the information related to closed cases and (2) the information was publicly available from court records and, therefore, the lawyer was free, like any other citizen, to disclose what actually transpired in the courtroom.

5. Do Not Assume You Can "Friend" Judges

In the offline world, it is inevitable that lawyers and judges will meet, network, and sometimes even become personal friends. These real-world professional and personal relationships are, of

course, subject to ethical constraints. So, too, are online interactions between lawyers and judges through social media (e.g., becoming Facebook "friends" or LinkedIn connections) subject to ethical constraints.

Different jurisdictions have adopted different standards for judges to follow. ABA Formal Opinion 462 recently concluded that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct and consider his or her ethical obligations on a case-by-case (and connection-by-connection) basis. Several states have adopted similar views, including Connecticut (Op. 2013-06), Kentucky (Op. JE-119), Maryland (Op. 2012-07), New York (Op. 13-39, 08-176), Ohio (Op. 2010-7), South Carolina (Op. 17-2009), and Tennessee (Op. 12-01).

In contrast, states like California (Op. 66), Florida, Massachusetts (Op. 2011-6), and Oklahoma (Op. 2011-3) have adopted a more restrictive view. Florida Ethics Opinion 2009-20, for example, concluded that a judge cannot friend lawyers on Facebook who may appear before the judge because doing so suggests that the lawyer is in a special position to influence the judge. Florida Ethics Opinion 2012-12 subsequently extended the same rationale to judges using LinkedIn and the more recent Opinion 2013-14 further cautioned judges about the risks of using Twitter. Consistent with these ethics opinions, a Florida court held that a trial judge presiding over a criminal case was required to recuse himself because the judge was Facebook friends with the prosecutor. *See Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).

6. Avoid Communications with Represented Parties

Under RPC 4.2 and equivalent state ethics rules, a lawyer is forbidden from communicating with a person whom the lawyer knows to be represented by counsel without first obtaining consent from the represented person's lawyer. Under RPC 8.4(a) and similar state rules, this prohibition extends to any agents (secretaries, paralegals, private investigators, etc.) who may act on the lawyer's behalf.

These bright-line restrictions effectively prohibit lawyers and their agents from engaging in social media communications with persons whom the lawyer knows to be represented by counsel. This means that a lawyer may not send Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content. In the corporate context, San Diego County Bar Association Opinion 2011-2 concluded that high-ranking employees of a corporation should be treated as represented parties and,

therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content.

On the other hand, viewing publicly accessible social media content that does not precipitate communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game. That was the conclusion reached by Oregon Ethics Opinions 2013-189 and 2005-164, which analogized viewing public social media content to reading a magazine article or a published book.

7. Be Cautious When Communicating with Unrepresented Third Parties

Underlying 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), and similar state ethics rules is concern for protecting third parties against abusive lawyer conduct. In a social media context, these rules require lawyers to be cautious in online interactions with unrepresented third parties. Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a litigation matter. As with represented parties, publicly viewable social media content is generally fair game. If, however, the information sought is safely nestled behind the third party's privacy settings, ethical constraints may limit the lawyer's options for obtaining it.

Of the jurisdictions that have addressed this issue, the consensus appears to be that a lawyer may not attempt to gain access to non-public social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias. For example, ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to circumvent social media users' privacy settings to reach non-public information. Ethics opinions by other bar associations, including the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), have gone one step further and concluded that lawyers must affirmatively disclose their reasons for communicating with the third party.

8. Beware of Inadvertently Creating Attorney-Client Relationships

An attorney-client relationship may be formed through electronic communications, including social media communications. ABA Formal Opinion 10-457 recognized that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under RPC 1.18. The

interactive nature of social media (e.g., inviting and responding to comments to a blog post, engaging in Twitter conversations, or responding to legal questions posted by users on a message board or a law firm's Facebook page) creates a real risk of inadvertently forming attorney-client relationships with non-lawyers, especially when the objective purpose of the communication from the consumer's perspective is to consult with the lawyer about the possibility of forming a lawyer-client relationship regarding a specific matter or legal need. Of course, if an attorney-client relationship attaches, so, too, do the attendant obligations to maintain the confidentiality of client information and to avoid conflicts of interest.

Depending upon the ethics rules in the jurisdiction(s) where the communication takes place, use of appropriate disclaimers in a lawyer's or a law firm's social media profile or in connection with specific posts may help avoid inadvertently creating attorney-client relationships, so long as the lawyer's or law firm's online conduct is consistent with the disclaimer. In that respect, South Carolina Ethics Opinion 12-03 concluded that "[a]ttempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice is patently unfair and misleading to laypersons."

9. Beware of Potential Unauthorized Practice Violations

A public social media post (like a public Tweet) knows no geographic boundaries. Public social media content is accessible to everyone on the planet who has an Internet connection. If legal professionals elect to interact with non-lawyer social media users, then they must be mindful that their activities may be subject not only to the ethics rules of the jurisdictions in which they are licensed, but also potentially the ethics rules in any jurisdiction where the recipient(s) of any communication is(are) located. Under RPC 5.5 and similar state ethics rules, lawyers are not permitted to practice law in jurisdictions where they are not admitted to practice. Moreover, under RPC 8.5 and analogous state rules, a lawyer may be disciplined in any jurisdiction where he or she is admitted to practice (irrespective of where the conduct at issue takes place) or in any jurisdiction where he or she provides or offers to provide legal services. It is prudent, therefore, for lawyers to avoid online activities that could be construed as the unauthorized practice of law in any jurisdiction(s) where the lawyer is not admitted to practice.

10. Tread Cautiously with Testimonials, Endorsements, and Ratings

Many social media platforms like LinkedIn and Avvo heavily promote the use of testimonials, endorsements, and ratings (either

by peers or consumers). These features are typically designed by social media companies with one-size-fits-all functionality and little or no attention given to variations in state ethics rules. Some jurisdictions prohibit or severely restrict lawyers' use of testimonials and endorsements. They may also require testimonials and endorsements to be accompanied by specific disclaimers. South Carolina Ethics Opinion 09-10, for example, provides that (1) lawyers cannot solicit or allow publication of testimonials on websites and (2) lawyers cannot solicit or allow publication of endorsements unless presented in a way that would not be misleading or likely to create unjustified expectations. The opinion also concluded that lawyers who claim their profiles on social media sites like LinkedIn and Avvo (which include functions for endorsements, testimonials, and ratings) are responsible for conforming all of the information on their profiles to the ethics rules.

Lawyers must, therefore, pay careful attention to whether their use of any endorsement, testimonial, or rating features of a social networking site is capable of complying with the ethics rules that apply in the state(s) where they are licensed. If not, then the lawyer may have no choice but to remove that content from his or her profile.

Conclusion

Despite the risks associated with using social media as a legal professional, the unprecedented opportunities this revolutionary technology brings to the legal profession to, among other things, promote greater competency, foster community, and educate the public about the law and the availability of legal services justify the effort necessary to learn how to use the technology in an ethical manner. E-mail technology likely had its early detractors and, yet, virtually all lawyers are now highly dependent on e-mail in their daily law practice. Ten years from now, we may similarly view social media as an essential tool for the practice of law.

AMERICAN BAR ASSOCIATION

Section of State and Local Government Law

2015 ABA Annual Meeting

ATTORNEY ETHICS & SOCIAL MEDIA

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A study by the American Bar Association about five years ago estimated that more than half of all attorneys belong to at least one social media site.[1] That number has certainly grown since then and will continue to grow.[2] Attorneys are just as likely to use social media in their everyday lives as non-attorneys. They post pictures on Instagram and snap chat, "check in" on Facebook, and tweet about politics, music, and what they ate for dinner just like everyone else. But, where a hasty post or comment might lead only to embarrassment for some, a seemingly innocent disclosure by an attorney could lead to serious ethical repercussions.

I. Benefits of Social Media

Social media offers users a diverse array of benefits.[3] Attorneys can "reach out directly to their constituents, take a more active role in shaping their public image, and overcome longstanding institutional barriers."[4] Social networking also provides attorneys with opportunities to network within the legal field, as well as to market their practice to potential clients. Social media provides attorneys a unique advantage in building relationships with others that might otherwise be impossible or impractical because of barriers like distance and time.

How are attorneys taking advantage of these benefits? Attorneys are blogging, tweeting, and posting on a variety of social networking sites, both personally and professionally. Like others, attorneys have set up personal, professional, and even law firm profiles on sites such as Facebook, Twitter, and LinkedIn. Attorneys and law firms are also increasingly establishing legal-oriented blogs where they post summaries of cases and new laws. As new social networking sites are established, it is likely that attorneys will follow online trends and find new ways to establish a presence on social media.

II. Social Media and Ethics

Attorneys are in a unique position because of their special ethical obligations. Thus, they must be careful in their use of social media to avoid engaging in any unprofessional or unethical conduct. While some might argue that the rules of ethics (designed for print and verbal mediums) do not carry over into emerging technologies, at least one commentator reminds us that:

> Fifteen years ago people were saying the same thing about e-mail. Eighty years ago they were worried about telephones. Any time there's a new form of communication, there's fear. Yes, social media are different, but there's no reason we can't apply the same rules we've used before.[5]

Because each jurisdiction has its own ethical rules in place for attorneys practicing in their state, it is important that attorneys consult their own applicable rules and opinions. This article offers an

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[1] Am. Bar Ass'n, *2010 Legal Technology Survey Report*, 4 WEB & COMMC'N TECH. 23–24 (2010).

[2] John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 12, 2009.

[3] Patricia E. Salkin & Julie A. Tappendorf, "Social Media and Local Governments: Navigating the New Public Square" (ABA Press, 2013).

[4] Stephen Stine & Joshua Poje, *The Good, the Bad and the Ugly of Blogging, Microblogging and Social Networking for Public Attorneys*, 17 PUB. LAW. 13, 18 (2009).

[5] Helen W. Gunnarsson, *Legal Technology/Ethics: Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically*, IL Bar Journal, Vol. 99, No. 10, Page 500 (Oct. 2011).

overview of the more common ways social media use could lead to ethical violations using the ABA Model Rules of Professional Conduct as a general reference.

III. Giving Legal Advice Outside Your Jurisdiction

Attorneys can only practice law in jurisdictions in which they are licensed, with very few exceptions. Model Rule 5.5 states: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Obviously, state lines can become blurred in a social media setting. Accessing a blog written by an attorney in another state (or country for that matter) takes just as much time as accessing one from right down the street. While ease of access and availability of information are arguably the most beneficial aspects of social media, they present particular problems for attorneys.

Facebook "comments," "Ask a Lawyer" sites, and blogs with reciprocal features are just a few examples of situations where attorneys might find themselves unknowingly yet unethically advising someone who does not live within their licensed jurisdiction. The key is to know when you are providing legal information (which would probably not trigger jurisdictional restrictions), as opposed to providing legal advice (which would). The D.C. Bar Association distinguished between the two as follows: legal information "involves discussion of legal principles, trends, and considerations," while legal advice involves "offering recommendations tailored to the unique facts of a particular person's circumstances."[6] Thus, an attorney who simply summarizes cases and legislation on a blog is not likely to implicate Model Rule 5.5. However, attorneys should be careful not to answer specific legal questions outside their practicing jurisdiction and instead should focus on providing more generalized information.

Physical presence in the non-licensed jurisdiction is not required to trigger a violation. An attorney has committed an ethical violation when he has "established an office *or other systematic and continuous presence in this jurisdiction*" outside the jurisdiction in which he is licensed. Ongoing electronic communications could certainly be considered a violation.

IV. Forming Attorney-Client Relationships

Attorneys should also be careful not to inadvertently form attorney-client relationships through online activities. Model Rule 1.18 provides that, "a person who discusses with a lawyer the possibility of forming a attorney-client relationship with respect to a matter is a prospective client." Moreover, an attorney-client relationship could be inadvertently formed if a client "reasonably relies" on what they believe to be the attorney's legal advice through social media.[7] Thus, when using social media, attorneys should not only speak in generalized terms, but also post explicit disclaimers stating that any interaction does not form an attorney-client relationship in order to inform the user and ultimately rebut any reasonable belief that one exists.[8]

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[6] D.C. Bar Legal Ethics Commission Opinion 316 (2002).

[7] Patricia E. Salkin, *Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations*, 31 PACE L. REV. 54, 82 (2011).

[8] Michael E. Lackey Jr. & Joseph P. Minta, *Attorneys and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 164 (2012); Model Rules of Prof'l Conduct R. 1.18 cmt. 2.

Compliance with this rule can be complicated for attorneys who represent organizations or government entities. The important thing to remember is that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This duty also applies to governments, although the model rules do concede that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules." Government or organizational attorneys using social media should take the same measures mentioned above - post a disclaimer and avoid engaging in any kind of advice to non-clients that could produce a reasonable expectation on their part that an attorney-client relationship is formed.

V. Advertising and Solicitation

Model Rule 7.1 restricts the content of attorney advertisements, prohibiting attorneys from making "false or misleading communication about the lawyer or the lawyer's services." The rule defines a false or misleading communication as one containing "a material misrepresentation of fact or law" or one omitting "a fact necessary to make the statement considered as a whole not materially misleading." Attorneys should understand that truthful information may nevertheless violate this rule it "omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading" or when there is a "substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

Model Rule 7.2 restricts the ways in which an attorney may advertise, prohibiting "in‑person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain," with limited exceptions for the person contacted being a lawyer or one with a family, close personal, or prior professional relationship with the contacting attorney. The rule goes on to prohibit such contact even for the exceptions previously mentioned "when the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or the solicitation involves coercion, duress or harassment."

Whether social media sites are equivalent to "in-person" solicitation is up for debate. The answer varies from state to state, so it is important to research any applicable local opinions. For example, the Philadelphia Bar Association issued an advisory opinion holding that attorney participation in some social media forums where users are discussing legal problems is inappropriate where the attorney invites the users to send a message for further legal advice. However, the bar association found that blogs, emails, and chat rooms are not similarly prohibited.[9] The bar opinion was based on a state rule similar to the Model Rule 7.1, that forbids in-person, over-the-phone, or real time electronic communication. The bar distinguished between "socially awkward moments" that can arise when a prospective client is in such close proximity through social media as to be the equivalent of an in-person solicitation, from those sites which allow users to ignore any advances and take their time to think and respond – the justification being that those seeking legal advice are often vulnerable and should not be taken advantage of.

[9] Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (June 2010).

Taking a contrary view is the California Bar Association which issued an advisory opinion holding that communications occurring in chat rooms are different than communications occurring in-person or over the phone and would not violate the state rule prohibiting communications that intrude or cause duress.[10]

Even if local rules do not restrict a particular online communication, you should check the purpose of the social media forum before using it to advertise services. You should also incorporate any state-specific advertising language into online advertisements and social media sites such as those requiring inclusion of the words "Advertising Material" as well as the name and office address of at least one lawyer or law firm responsible for the online content.

VI. Using Social Media in Litigation

Attorneys are charged with being "zealous advocates" of their clients. To fulfill this role, it may be tempting for attorneys to use any avenue possible during litigation, such as "friending" witnesses, parties, and jurors though Facebook to collect personal information. Ethical guidelines might restrict these activities, however. For example, Model Rule 8.4 prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation," sometimes directly conflicting with the charge of advocacy. As such, attorneys must be careful not to engage in unethical behavior even if it would benefit the client.

A number of state bars have issued opinions on attorney use of social media during litigation with regards to deceptive actions. For example, the Philadelphia Bar Association held that it was an ethical violation to "friend" a party or witness without disclosing the attorney's identification, regardless of whether or not the party or witness would usually accept friend requests without any disclosure.[11] Likewise, the San Diego Bar Association held that "friending" potential witnesses could not be done with the intention to deceive the witness and could be considered an improper *ex parte* communication.[12] Similarly, the New York Bar Association held that "friending" an individual under false pretenses to obtain evidence was an unethical deception.[13]

Ethical considerations might also restrict attorneys from "friending" or otherwise accessing jurors through social media. For instance, the New York Bar Association issued an opinion holding that it is unethical for attorneys or those working on the attorney's behalf to make friend requests of jurors, extending even to reviewing the juror's comments, pages, or posts when the attorney is aware that the juror would be disclosed to those reviews.

Along the same lines, attorneys run the risk of engaging in improper *ex parte* communications and conflicts of interest though online relationships with judges. Model Rule 3.5 prohibits attorneys from contributing to a violation of the ABA's Model Code of Judicial Conduct. States vary as to whether or not judges can be "friends" with attorneys on social media sites, so attorneys should consult the bar association opinions in their particular jurisdiction before accepting or soliciting a friend request with a judge.

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[10] Cal. Bar Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004).
[11] Phila. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsbility, Op. 2009-02 (Mar. 2009).
[12] San Diego County Bar Legal Ethics Comm., Op. 2011-2 (May 24, 2011).
[13] N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Op. 2010-02 (Sept. 2010).

Attorneys should also be aware of how these "friendships" can affect their client representation. In a recent Florida case, an appellate court disqualified the sitting judge in a criminal case because he was Facebook "friends" with the prosecutor.[14] The defendant filed a motion to disqualify the trial judge, which was denied. On appeal, the appellate court looked to a bar association opinion prohibiting judges from "friending" lawyers who appear before the judge on social media sites and from allowing lawyers to add judges as friends. The court found the motion to disqualify well-founded because it raised sufficient facts to "prompt a reasonably prudent person to fear that he could not get a fair and impartial trial."

VII. Revealing Information

Model Rule 1.6 prohibits an attorney from revealing "information relating to the representation of a client," with certain exceptions. Posting personal information online often seems innocent enough such as divulging seemingly unimportant details about one's day.

People read what you post, and the seemingly informal forum of a social media site is no shield for ethical violations of improper client disclosures. An Illinois public defender found this out the hard way, being found to have unethically revealed confidential details about a case when she posted comments such as, "This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch'" and "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?"[15] She lost her job.

Attorneys must also be careful what they post with regard to their own personal life. For example, a Texas attorney requested and received a continuance because her father had passed away. The judge who granted her continuance was subsequently notified of comments on Facebook chronicling days of drinking and partying.[16] Another attorney was summoned to appear before the Florida Bar and fined $1,200 for calling a judge an "Evil, Unfair Witch" on the attorney's blog.[17]

Attorneys should also warn their clients about revealing information through social media during a pending case, as doing so could result in the client unknowingly waiving the attorney-client privilege, and opening up information for discovery. This happened in a 2010 case where the client discussed attorney-client conversations in his e-mails, blogs, and instant messages with family and friends. The court ultimately found that the client had waived his attorney-client privilege, entitling the opposition to discovery of the information disclosed online, including his motivation for pursuing litigation, the litigation strategy, and other facts surrounding the case.[18]

VIII. Responsibility for Employee Activities

The Model Rules require attorneys to supervise employees and support staff. For example, Model Rule 5.3 provides that "a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer," and holds the attorney responsible for any violation of the Rules by the non-lawyer

[14] *Domville v. State*, No. 4D12-556 (Fla. Dist. Ct. App. Sept. 5, 2012).
[15] Schwartz, supra note 3.
[16] Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J. (July 31, 2009).
[17] Schwartz, supra note 3.
[18] *Lenz v. Universal Music Corp*., 572 F. Supp. 2d 1150 (N.D. Cal. 2010).

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." As a result, attorneys cannot claim immunity from ethical rules simply because they personally do not engage in social media because they may be held responsible for their employees' social media activities.

IX. Conclusion

Given the growing use of social media, attorneys must learn to weigh the benefits of networking, advertising, socializing, and zealous advocacy against the ethical rules restricting the profession. At stake are attorneys' careers, clients' interests, and the integrity of the legal process. First, be careful what you post online - this is good advice for everyone, but particularly for attorneys who have special ethical obligations. Second, law firms and other employers (including governments) should consider establishing and adopting a well-crafted social media policy that addresses the legal and ethical issues that arise with their employees' use of social media, and train their employees (and themselves) on the appropriate use of social media.

Finally, attorneys should be aware of their other role in the social media arena – that of advising their clients on appropriate use of social media. Thus, they must not only be aware of their own ethical obligations, they must also be knowledgeable about all of the ethical and legal issues with government use of social media, including regulating and monitoring employee usage, copyright protection, and a variety of other issues.[19]

4847-7192-9893, v. 1

[19] For a study of the legal and ethical issues with government use of social media, see Patricia Salkin & Julie Tappendorf," "Social Media and Local Governments: Navigating the New Public Square" (ABA Press, 2013).

Social Media for Lawyers

Social Media

Social media offers marketing and networking opportunities, but also raises new legal and ethical challenges.

Social Media 101

Social media has changed the way we communicate and connect on a personal level, and it's now increasingly relevant in the communications between lawyers, their clients and the courts.

Taking control of your online presence is a necessity, and there are few better ways to do so than social media. Used carefully, social media can give your firm a voice, amplify your professional reputation, and help drive new business.

But that isn't the whole story with social media. Social media now represents a ripe source of electronic evidence for litigators and potential sources of risk for those advising businesses.

Explore these resources collected from the ABA Legal Technology Resource Center and ABA Law Practice Management for tips, tricks and best practices to get your firm on board with social media.

And for the latest legal technology news and tips, keep an eye on our blog: Law Technology Today.

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Legal and Ethical Issues

Twitter

Facebook

LinkedIn

Eight Things to Learn from Social Media Rock Stars
Larry Port
Been reluctant to dip your toes in the social media waters? Use these eight tips from the pros to learn how Facebook, Twitter, and LinkedIn can help your practice.

Practice Management Advice: Choosing Social Media for Client Development
Catherine Sanders Reach
If you have avoided social media because it seemed like too much work, consider the platforms' ability to connect you to your target market.

Social Media Networking For Lawyers: A Practical Guide to Facebook, LinkedIn, Twitter and Blogging
Simon Chester and Daniel Del Gobbo
Learn how you can use one or more of the main four social media channels to connect with clients and market your services.

Learn More: Useful Social Media Resources
Dan Pinnington and Steve Matthews
A collection of great resources to help you learn more about social media.

How Should Law Firms Approach Social Media
Simon Chester and Daniel Del Gobbo
Learn how to get your firm started on the right foot by putting proper policy and procedures in place.

How to Create a Law Firm Social Media Policy
Simon Chester and Daniel Del Gobbo
All law firms should develop a social media policy that encourages the use of these new and emerging tools in innovative ways.

When is Too Much Information Really TMI?
Jared Correia
There is some truth to the often-repeated complaint of those looking for the best excuse against using social media: 'I don't care what you had for breakfast this morning.'

10 Reasons to Use Google+
Denise Howell
Given all of the other social media sites you use, you may not be looking to add yet another social media tool to your repertoire. But here's why Google+ is one worth checking out.

When to Engage (or not) in the Social Media Conversation
John Hellerman and Rudy Burwell
It's important for law firms to remember that threats to the firm's reputation come from within as frequently as they do from the outside.

Lawyers and Social Media: Can Legal Advice Be Crowdsourced?
Jordan Furlong
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Phillip Hampton
Great tips and tools you can use to manage your social media presence.

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Kerry Scott Boll
Sending a message that you care about what people say about you and your brand, and more importantly, having the means to respond to those same people.

Cultivating Online Relationships
Allison Shields
Ready to incorporate social networking into your marketing and business development repertoires?

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Molly DiBianca
Be sure to educate your employees on the proper use of social media tools now instead of doing damage control later.

Niche to Meet You: Tips for New-Breed Opportunity Makers
Ari L. Kaplan

Social media tools give you plenty of ways to offer your colleagues and clients small, yet genuine, opportunities for creative collaboration.

So You Never Have to Admit You Don't Know
Dayna Steele
Some simple social media terms to know and steps you can take to ensure that you're in the know.

Tips From a Fellow Attorney: Developing Your Personal Brand, One Personal Relationship at a Time
Bull Ferreira
Even the best online presence and contacts won't help you get business if you don't have the basic interpersonal skills and techniques to connect with others.

Not Your Marketer's Social Media: Ten Ways Lawyers Can Benefit from Non-Marketing Uses of Social Media
Dennis Kennedy and Tom Mighell
LinkedIn. Facebook. Twitter. Social media as a marketing vehicle is all the rage. But if you take a good look, you'll find lawyers benefiting from social media in many ways.

Further Reading

Twitter in One Hour for Lawyers

Demystify one of the most important social media tools available today.

Social Media as Evidence

The "smoking gun" document these days may well be a Tweet. Learn about social media as evidence.

LinkedIn in One Hour for Lawyers

Learn to create, nurture and expand your business network with LinkedIn.

SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED JUNE 9, 2015

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Opinions expressed are those of the Section preparing these Guidelines and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

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INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the increased use of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association, which authored these social media ethics guidelines in 2014 to assist lawyers in understanding the ethical challenges of social media, is updating them to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the "Guidelines"). In particular, these Guidelines add new sections on lawyers' competence,[1] the retention of social media by lawyers, client confidences, the tracking of client social media, communications by lawyers with judges, and lawyers' use of LinkedIn.

These Guidelines are guiding principles and are not "best practices." The world of social media is a nascent area that is rapidly changing and "best practices" will continue to evolve to keep pace with such developments. Moreover, there can be no single set of "best practices" where there are multiple ethics codes throughout the United States that govern lawyers' conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer's permitted use of social media may differ due to varying jurisdictions' different social mores, population bases and historical approaches to their own ethics rules and opinions.

These Guidelines are predicated upon the New York Rules of Professional Conduct ("NYRPC")[2] and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction's ethics opinion differs from the interpretation of the NYRPC by New York ethics authorities. In New York State, ethics opinions are issued not just by the New York State Bar Association, but also by local bar associations located throughout the State.[3]

Lawyers need to appreciate that social media communications that reach across multiple jurisdictions may implicate other states' ethics rules. Lawyers should ensure compliance with the ethical requirements of each jurisdiction in which they practice, which may vary considerably.

One of the best ways for lawyers to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person's social

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[1] As of April 2015, fourteen states have included a duty of competence in technology in their ethical codes. http://www.lawsitesblog.com/2015/03/mass-becomes-14th-state-to-adopt-duty-of-technology-competence.html (Retrieved on April 26, 2015).

[2] https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

[3] A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but may be used as a defense in certain circumstances.

media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer's research may have ethical consequences.

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet "community," attorney advertising rules and other ethical rules must be considered when a lawyer uses social media. It is not always readily apparent whether a lawyer's social media communications may constitute regulated "attorney advertising." Similarly, privileged or confidential information may be unintentionally divulged beyond the intended recipient when a lawyer communicates to a group using social media. Lawyers also must be cognizant when a social media communication might create an unintended attorney-client relationship. There are also ethical obligations with regard to a lawyer counseling clients about their social media posts and the removal or deletion of them, especially if such posts are subject to litigation or regulatory preservation obligations.

Throughout these Guidelines, the terms "website," "account," "profile," and "post" are referenced in order to highlight sources of electronic data that might be viewed by a lawyer. The definition of these terms no doubt will change and new ones will be created as technology advances. However, such terms for purposes of complying with these Guidelines are functionally interchangeable and a reference to one should be viewed as a reference to each for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each Guideline. Finally, definitions of certain terminology used in the Guidelines are set forth in the Appendix.

1. ATTORNEY COMPETENCE

Guideline No. 1: Attorneys' Social Media Competence

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 communication, an advertising tool and a means to research and investigate matters.

NYRPC 1.1(a) and (b).

Comment: NYRPC 1.1(a) provides "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use. This is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Opinion 466 (2014)[4] states:

> As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network.[5]

A lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the use of social media. "[A lawyer must] understand the functionality of any social media service she intends to use for . . . research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site."[6]

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[4] American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

[5] Competence may require understanding the often lengthy and unclear "terms of service" of a social media platform and whether the platform's features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such social media platform actually functions.

[5] Ass'n of the Bar of the City of New York Comm. on Prof'l and Jud. Ethics ("NYCBA"), Formal Op. 2012-2 (2012).

[6] Id.

Indeed, the comment to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (emphasis added).[7]

As NYRPC 1.1 (b) requires, "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." While a lawyer may not delegate his obligation to be competent, he or she may rely, as appropriate, on professionals in the field of electronic discovery and social media to assist in obtaining such competence.

[7] ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8; See N.H. Bar Ass'n, Ethics Corner (June 21, 2013) (lawyers "[have] a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation").

2. ATTORNEY ADVERTISING

Guideline No. 2.A: Applicability of Advertising Rules

A lawyer's social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules.[8] Hybrid accounts may need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm.[9]

NYRPC 1.0, 7.1, 7.3.

> *Comment*: In the case of a lawyer's profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.
>
> The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[10] According to NYCLA, Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."[11]
>
> NYCLA, Formal Op. 748 addresses the types of content on LinkedIn that may be considered "attorney advertising" and provides:
>
> > [i]f an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other

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[8] See also Virginia State Bar, *Quick Facts about Legal Ethics and Social Networking* (last updated Feb. 22, 2011); Cal. State Bar Standing Comm. on Prof'l Resp. and Conduct, Formal Op. No. 2012-186 (2012).

[9] NYRPC 1.0.(a) defines "Advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."

[10] New York County Lawyers' Association ("NYCLA"), Formal Op. 748 (2015).

[11] Id.

> lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." *See* RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[12] An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).[13]

An attorney's ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a "tweet") is deemed attorney advertising, the rules require that a lawyer must include disclaimers similar to those described in NYCLA Formal Op. 748.[14]

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's 140 character limit (which in practice may be even less than 140 characters when including links, user handles or hashtags) may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, consideration should be given to only posting tweets that would not be categorized as attorney advertising.[15]

Rule 7.1(k) of the NYRPC provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication" and specifies another retention scheme for websites.[16] Rule 1.0(c) of the NYPRC defines "computer-accessed communication" as any communication made by or on behalf of a lawyer or law firm that is disseminated through "the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet

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12 NYRPC 7.1(e)(3) provides: "[p]rior results do not guarantee a similar outcome".

13 NYCLA, Formal Op. 748.

14 New York State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA"), Op. 1009 (2014).

15 NYSBA, Op. 1009.

16 Id.

presences, and any attachments or links related thereto."[17] Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."[18]

In accordance with NYSBA, Op. 1009, to the extent that a social media post is found to be a "solicitation," it is subject to filing requirements if directed to recipients in New York. Social media posts, like tweets, may or may not be prohibited "real-time or interactive" communications. That would depend on whether they are broadly distributed and/or whether the communications are more akin to asynchronous email or website postings or in functionality closer to prohibited instant messaging or chat rooms involving "real-time" or "live" responses. Practitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially "live" or real-time tools.

Guideline No. 2.B: **Prohibited use of the term "Specialists" on Social Media**

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[19]

NYRPC 7.1, 7.4.

Comment: Although LinkedIn's headings no longer include the term "Specialties," lawyers still need to be cognizant of the prohibition on claiming to be a "specialist" when creating a social media profile. To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer's experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.[20]

A lawyer shall not list information under the ethically prohibited heading of "specialist" in any social media network unless appropriately certified as such. With respect to skills or practice areas on a lawyer's profile under a heading such as "Experience" or "Skills," such information does not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4.[21] Also, a lawyer may include

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17 Id.

18 Id.

19 See NYSBA, Op. 972 (2013).

20 See also Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2012-8 (2012) (citing Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 85-170 (1985)).

21 NYCLA, Formal Op. 748.

information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings including "expert."

A limited exception to identification as a specialist may exist for lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example, identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.[22]

Guideline No. 2.C: Lawyer's Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer's Social Media Page

A lawyer that maintains social media profiles must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media network, account, blog or profile.[23]

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she must ask that person to remove it.[24]

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: While a lawyer is not responsible for a post made by a person who is not an agent of the lawyer, a lawyer's obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer's social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than typical communications to which ethics rules have historically applied, they apply with the same force and effect to social media postings.

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[22] See NYRPC Rule 7.4.

[23] See also Fl. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised Apr. 16, 2013).

[24] See NYCLA, Formal Op. 748. See also Phila. Bar Assn. Prof'l Guidance Comm., Op. 2012-8; Virginia State Bar, *Quick Facts about Legal Ethics and Social Networking*

Guideline No. 2.D: **Attorney Endorsements**

A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.

NYRPC 7.1, 7.2, 7.3, 7.4.

> *Comment*: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must, as noted above, monitor and verify that posts about them made to profile(s) the lawyer controls[25] are accurate. "Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists," as well as to confirm the accuracy of any endorsements or recommendations.[26] A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.[27] It should be noted that certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

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[25] Lawyers should also be cognizant of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers.

[26] NYCLA, Formal Op. 748.

[27] See NYCLA, Formal Op. 748. See also Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-300; North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

> *Comment*: An attorney-client relationship must knowingly be entered into by a client and lawyer, and informal communications over social media could unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

Guideline No. 3.B: Public Solicitation is Prohibited through "Live" Communications

Due to the "live" nature of real-time or interactive computer-accessed communications,[28] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[29] business from the public through such means.[30] If a potential client[31] initiates a specific request seeking to

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[28] "Computer-accessed communication" is defined by NYRPC 1.0(c) as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." Official Comment 9 to NYRPC 7.3 advises: "Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

[29] "Solicitation" means "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client." NYRPC 7.3(b).

[30] See NYSBA, Op. 899 (2011). Ethics opinions in a number of states have addressed chat room communications. See also Ill. State Bar Ass'n, Op. 96-10 (1997); Michigan Standing Comm. on Prof'l and Jud. Ethics, Op. RI-276 (1996); Utah State Bar Ethics Advisory Opinion Comm., Op. 96-10 (1997); Va. Bar Ass'n Standing Comm. on Advertising, Op. A-0110 (1998); W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998).

retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and attorney communications via a website or over social media platforms, such as Twitter,[32] may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client -- although the ethics rules would otherwise apply to such communications.

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

> *Comment*: Answering general questions[33] on the Internet is analogous to writing for any publication on a legal topic.[34] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a 'specific request' to retain the lawyer."[35] In responding to questions,[36] a lawyer may not provide answers that appear applicable to all

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The Philadelphia Bar Ass'n, however, has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania's ethics rules. See Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (2010).

[31] Individuals attempting to defraud a lawyer by posing as potential clients are not owed a duty of confidentiality. See NYCBA, Formal Op. 2015-3 ("An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney. However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.").

[32] Whether a Twitter or Reddit communication is a "real-time or interactive" computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See NYSBA, Op. 1009 and page 7 *supra*.

[33] Where "the inquiring attorney has 'become aware of a potential case, and wants to find plaintiffs,' and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, see Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer's post might be subject to the blackout period (i.e., cooling off period) on solicitations relating to "a specific incident involving potential claims for personal injury or wrongful death," see Rule 7.3(e)." NYSBA, Op. 1049 (2015).

[34] See NYSBA, Op. 899.

[35] See id.

[36] See NYSBA, Op. 1049 ("We further conclude that a communication that merely discussed the client's legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute "advertising." In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as "advertising" on the "first page" of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. See Rule 7.1(f), (h), (k).").

apparently similar individual problems because variations in underlying facts might result in a different answer.[37] A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[38] As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.[39] However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer's actual response should not be made through a real time communication.[40]

Guideline No. 3.C: Retention of Social Media Communications with Clients

If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

NYRPC 1.1, 1.15.

Comment: A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or representation...". Rule 1.0(n), Terminology. The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a

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[37] Id.

[38] See id.

[39] See NYSBA, Op. 1049 ("When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b). Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute 'solicitation.'").

[40] Id.

representation."[41] The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, such as chats and instant messages, which the lawyer believes need to be saved.[42] However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without the knowledge of the lawyer.[43] Casual communications may be deleted without impacting ethical rules.[44]

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

> As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.
>
> We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to

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41 See NYCBA, Formal Op. 2008-1 (2008).

42 Id.

43 Id. See also Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300 (the Pennsylvania Bar Assn. has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, an attorney "should retain records of those communications containing legal advice.").

44 Id.

> protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.[45]

A lawyer shall not deactivate a social media account, which contains communications with clients, unless those communications have been appropriately preserved.

[45] NYSBA, Op. 623 opines that, with respect to documents *belonging to the lawyer*, a lawyer may destroy all those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise require, and (ii) in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents."

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

Guideline No. 4.A: Viewing a Public Portion of a Social Media Website

A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a person's social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.[46] "Public" means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. In New York, such automatic messages, as noted below, sent to a juror by a lawyer or her agent that notified the juror of the identity of who viewed her profile may constitute an ethical violation.[47] Conversely, the ABA opined that such a "passive review" of a juror's social media does not constitute an ethical violation.[48] The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Drawing upon the ethical opinions addressing issues concerning social media communications with jurors, when an attorney views the social media site of a represented witness or a represented opposing party, he or she should be aware of which networks[49] might automatically notify the owner of that account of his or her viewing, as this could be viewed an improper communication with someone who is represented by counsel.

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[46] See NYSBA, Op. 843 (2010).

[47] See NYCLA, Formal Op. 743 ; NYCBA, Formal Op. 2012-2.

[48] See American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.

[49] One network that sends automatic notifications that someone has viewed one's profile is LinkedIn.

Guideline No. 4.B: Contacting an Unrepresented Party to View a Restricted Social Media Website

A lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile.[50] However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.

NYRPC 4.1, 4.3, 8.4.

Comment: It is permissible for a lawyer to join a social media network to obtain information concerning a witness.[51] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using "deception."[52]

In New York, there is no "deception" when a lawyer utilizes her "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account.[53] In New York, the lawyer is **not** required to disclose the reasons for making the "friend" request.[54]

The New Hampshire Bar Association, however, requires that a request to a "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[55] In Massachusetts, "it is not permissible for the lawyer who is seeking information about an unrepresented party to access the personal website of X and ask X to "friend" her without disclosing that the requester is the lawyer for a potential plaintiff."[56] The San Diego Bar requires disclosure of the lawyer's "affiliation and the purpose for the request."[57] The Philadelphia Bar Association notes that the failure to disclose that

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50 For example, this may include: (1) sending a "friend" request on Facebook, 2) requesting to be connected to someone on LinkedIn; or 3) following someone on Instagram.

51 See also N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

52 NYCBA, Formal Op. 2010-2 (2010).

53 Id.

54 See id.

55 N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

56 Massachusetts Bar Ass'n. Comm. on Prof Ethics Op. 2014-5 (2014).

57 San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011).

the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact."[58]

In Oregon, there is an opinion that if the person being sought out on social media "asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[59]

Guideline No. 4.C: Viewing a Represented Party's Restricted Social Media Website

A lawyer shall not contact a represented person to seek to review the restricted portion of the person's social media profile unless an express authorization has been furnished by the person's counsel.

NYRPC 4.1, 4.2.

Comment: It is significant to note that, unlike an unrepresented individual, the ethics rules are different when the person being contacted in order to obtain private social media content is "represented" by a lawyer, and such a communication is categorically prohibited.

Whether a person is represented by a lawyer, individually or through corporate counsel, is sometimes not clear under the facts and applicable case law.

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible."[60]

Caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person that the lawyer has a "right" to view, such as a professional group where both the lawyer and represented person are members or as a result of being a "friend" of a "friend" of such represented person.

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58 Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009).

59 Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

60 Id. See San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2.

Guideline No. 4.D: Lawyer's Use of Agents to Contact a Represented Party

As it relates to viewing a person's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.

NYRPC 5.3, 8.4.

> *Comment*: This would include, *inter alia*, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent[61] and could, as well, apply to the lawyer's client.[62]

[61] See NYCBA, Formal Op. 2010-2 (2010).

[62] See also N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

5. COMMUNICATING WITH CLIENTS

Guideline No. 5.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings.[63] A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations.[64] Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

> *Comment*: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[65] or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,[66] there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."[67] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after a litigation has commenced, as long as

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63 Mark A. Berman, "Counseling a Client to Change Her Privacy Settings on Her Social Media Account," New York Legal Ethics Reporter, Feb. 2015, http://www.newyorklegalethics.com/counseling-a-client-to-change-her-privacy-settings-on-her-social-media-account/.

64 NYCLA, Formal Op. 745 (2013). See Philadelphia Bar Ass'n. Guidance Comm. Op. 2014-5 (2014).

65 VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012).

66 New York has not opined on a lawyer's obligation to produce a website link that a client has utilized, but Philadelphia Bar Ass'n. Guidance Comm. Op. 2014-5, noted that, with respect to a website link utilized by a client, if it is appropriately requested in discovery, a lawyer "must make reasonable efforts to obtain a link or other [social media] content if the lawyer knows or reasonably believes it has not been produced by the client."

67 NYCLA, Formal Op. 745.

social media is appropriately preserved in the proper format and such is not a violation of law or a court order.[68]

A lawyer needs to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology. This similarly is the case if a "live" posting is simply made "unlive."

Guideline No. 5.B: Adding New Social Media Content

A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."[69]

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer may review what a client plans to publish on a social media website in advance of publication[70] and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person's perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.

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68 North Carolina State Bar 2014 Formal Ethics Op. 5 (2014); Phila. Bar Ass'n Guidance Comm. Op. 2014-5 (2014); Florida Bar Professional Ethics Committee, Proposed Advisory Opinion 14-1 (Jan. 23, 2015)

69 NYCLA, Formal Op. 745.

70 As social media-related evidence has increased in use in litigation, a lawyer may consider periodically following or checking her client's social media communications, especially in matters where posts on social media would be relevant to her client's claims or defenses. Following a client's social media use could involve connecting with the client by establishing a LinkedIn connection, "following" the client on Twitter, or "friending" her on Facebook. Whether to follow a client's postings should be discussed with the client in advance. Monitoring a client's social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client's posts on existing or future litigation or on their implication for other issues relating to the lawyer's representation of the client

Pennsylvania Bar Ass'n Ethics Comm., Formal Op. 2014-300 notes "tracking a client's activity on social media may be appropriate for an attorney to remain informed about the developments bearing on the client's legal dispute" and "an attorney can reasonably expect that opposing counsel will monitor a client's social media account."

Guideline No. 5.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.[71]

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

> *Comment*: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[72] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[73] See also NYRPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.").

Guideline No. 5.D. A Lawyer's Use of Client-Provided Social Media Information

A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain private information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

NYRPC 4.2.

> *Comment*: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[74] New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."[75]

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71 NYCLA, Formal Op. 745.

72 NYRPC 3.1(a).

73 NYRPC 3.1(b)(3).

74 NYCBA, Formal Op. 2002-3 (2002).

75 Id.

NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not "cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,"

> a lawyer may cause a client to communicate with a represented person . . . and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Thus, lawyers need to use caution when communicating with a client about her connecting to or "friending" a represented person and obtaining private information from that represented person's social media site.

New Hampshire opines that a lawyer's client may, for instance, send a "friend" request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations.[76] In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[77]

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."[78]

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76 N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

77 Id.

78 ABA, Formal Op. 11-461 (2011).

Guideline No. 5.E: Maintaining Client Confidences and Confidential Information

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media communications and communications made on a lawyer's website or blog must comply with these limitations.[79] This prohibition applies regardless of whether the confidential client information is positive or celebratory, negative or even to something as innocuous as where a client was on a certain day.

Where a lawyer learns that a client has posted a review of her services on a website or on social media, if the lawyer chooses to respond to the client's online review, the lawyer shall not reveal confidential information relating to the representation of the client. This prohibition applies, even if the lawyer is attempting to respond to unflattering comments posted by the client.

NYRPC 1.6, 1.9(c).

> *Comment:* A lawyer is prohibited, absent some recognized exemption, from disclosing client confidences and confidential information of a client. Under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6,[80] which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary … to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."[81] NYSBA Opinion 1032 applies such self-defense exception to "claims" and "charges" in formal proceedings or a "material threat of a proceeding," which "typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other

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79 NYRPC 1.6.

80 Comment 17 to NYRPC Rule 1.6 provides:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

81 NYSBA Op. 1032 (2014).

procedure that can result in a sanction" and the self-defense exception does not apply to a "negative web posting."[82] As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on websites such as Avvo, Yelp or Martindale Hubbell.[83]

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception."[84] Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events."[85]

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82 NYSBA, Opinion 1032.

83 See Michmerhuizen, Susan "Client reviews: Your Thumbs Down May Come Back Around."*Americanbar.org*. Your ABA, September 2014. Web. 3 March 2015.

84 Pennsylvania Bar Association Ethics Committee, Formal Op. 2014-300.

85 Pennsylvania Bar Association Ethics Committee Opinion 2014-200.

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

Guideline No. 6.A: Lawyers May Conduct Social Media Research

A lawyer may research a prospective or sitting juror's public social media profile, and posts.

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[86]
>
> The ABA issued Formal Opinion 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[87] There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[88] However, Opinion 466 does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[89]

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86 See NYCBA Formal Op. 2012-2 (2012).

87 See American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.

88 Id.

89 Id.

Guideline No. 6.B: A Juror's Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.[90]

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[91]

Contact by a lawyer with jurors through social media is forbidden. For example, ABA, Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.[92] This type of communication would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[93]

NYCLA, Formal Op. 743 and NYCBA, Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation. New York ethics opinions also draw a distinction between public and private juror information.[94] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).

In contrast to the above New York opinions, ABA, Formal Op. 466 opined that "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does *not* constitute a communication from the lawyer in violation" of the Rules of Professional Conduct (emphasis added).[95] According to ABA, Formal Op. 466, this type of notice is "akin to a neighbor's recognizing a lawyer's car driving down the

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90 See NYCLA, Formal Op. 743 (2011); NYCBA, Formal Op. 2012-2; see also Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 (2013).

91 Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, 85 N.Y. St. B.A.J. 50 (2013).

92 See ABA, Formal Op. 14-466.

93 Id.

94 Id.

95 See ABA Formal Op. 14-466.

juror's street and telling the juror that the lawyer had been seen driving down the street."[96]

While ABA, Formal Op. 466 noted that an automatic notice[97] sent to a juror, from a lawyer passively viewing a juror's social media network does not constitute an improper communication, a lawyer must: (1) "be aware of these automatic, subscriber-notification procedures" and (2) make sure "that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[98] Moreover, ABA, Formal Op. 466 suggests that "judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds," including a juror's or potential juror's social media presence.[99]

The American Bar Association's view has been criticized on the basis of the possible impact such communication might have on a juror's state of mind and has been deemed more analogous to the improper communication where, for instance, "[a] lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial knowing that a neighbor will advise the juror of this drive-by and the signage."[100]

A lawyer must take measures to ensure that a lawyer's social media research does not come to the attention of the juror or prospective juror. Accordingly, due to the ethics opinions issued in New York on this topic, a lawyer in New York when reviewing social media to perform juror research needs to perform such research in a way that does not leave any "footprint" or notify the juror that the lawyer or her agent has been viewing the juror's social media profile. [101]

The New York opinions cited above draw a distinction between public and private juror information.[102] They opine that viewing the public portion of a social

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[96] Id. See Pennsylvania Bar Ass'n Ethics Comm., Formal Op. 2014-300 ("[t]here is no *ex parte* communications if the social networking website independently notifies users when the page has been viewed.").

[97] For instance, currently, if a lawyer logs into LinkedIn, as it is currently configured, and performs a search and clicks on a link to a LinkedIn profile of a juror, an automatic message may well be sent by LinkedIn to the juror whose profile was viewed advising of the identity of the LinkedIn subscriber who viewed the juror's profile. In order for that reviewer's profile not to be identified through LinkedIn, that person must change her settings so that she is anonymous or, alternatively, to be fully logged out of her LinkedIn account.

[98] Id.

[99] Id.

[100] See Mark A. Berman, Ignatius A. Grande, and Ronald J. Hedges, "Why American Bar Association Opinion on Jurors and Social Media Falls Short," New York Law Journal (May 5, 2014).

[101] See NYCBA, Formal Op. 2012-2 and NYCLA, Formal Op. 743.

[102] See Id.

media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror's profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

The American Bar Association and New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror's view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members or whether access can be obtained, for instance, by being a "friend" of a "friend" of a juror on Facebook.

Guideline No. 6.C: <u>Deceit Shall Not Be Used to View a Juror's Social Media</u>.

A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: An "attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable."[103]

Guideline No. 6.D: <u>Juror Contact During Trial</u>

After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.

A lawyer must exercise extreme caution when "passively" monitoring a sitting juror's social media presence. The lawyer needs to be aware of how any social media service operates, especially whether that service would notify the juror of such monitoring or the juror could otherwise become aware of such monitoring or viewing by lawyer. Further, the lawyer's review of the juror's social media shall not

[103] <u>See Id.</u>

burden or embarrass the juror or burden or delay the proceeding.

These later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.[104]

> [W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.[105]

ABA, Formal Op. 466 permits passive review of juror social media postings, in which an automated response is sent to the juror, of a reviewer's Internet "presence," even during trial absent court instructions prohibiting such conduct. In one New York case, the review by a lawyer of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this to the attention of the court stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."[106] This case demonstrates that a lawyer must take caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.[107]

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA, Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."[108]

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104 Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.

105 See NYCBA, Formal Op. 2012-2.

106 See Richard Vanderford, "LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial," Law360 (Sept. 27, 2013).

107 Id.

108 ABA, Formal Op. 14-466.

Guideline No. 6.E: **Juror Misconduct**

In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[109]

NYRPC 3.5, 8.4.

> *Comments*: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[110]
>
> New York, however, provides that "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge."[111] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[112] "Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney."[113]

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109 See NYCLA, Op. 743; NYCBA, Op. 2012-2.

110 See ABA, Formal Op. 14-466.

111 NYRPC 3.5(d).

112 NYCBA, Op. 2012-2.

113 Id. See Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300 ("a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.

NYRPC 3.5, 8.2 and 8.4.

> *Comment*: There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should not be surprised that any such communication is fraught with peril as the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether retweeting a judge's own tweets would be improper.
>
> A lawyer may communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"[114] which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."[115]

It should be noted that New York Advisory Opinion 08-176 (Jan. 29, 2009) provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."[116] New York Advisory Committee on Judicial Ethics Opinion 08-176 further opines that:

> [A] judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online

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114 Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300.

115 NYRPC 3.5(a)(1).

116 New York Advisory Committee on Judicial Ethics Opinion 08-176

> connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

See New York Advisory Committee on Judicial Ethics Opinion 13-39 (May 28, 2013) ("the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously 'friended' certain individuals who are now involved in some manner in a pending action.").

APPENDIX

DEFINITIONS

Social Media (also called a social network): An Internet-based service allowing people to share content and respond to postings by others. Popular examples include Facebook, Twitter, YouTube, Google+, LinkedIn, Foursquare, Pinterest, Instagram, Snapchat, Yik Yak and Reddit. Social media may be viewed via websites, mobile or desktop applications, text messaging or other electronic means.

Restricted: Information that is not available to a person viewing a social media account because an existing on-line relationship between the account holder and the person seeking to view it is lacking (whether directly, *e.g.*, a direct Facebook "friend," or indirectly, *e.g.*, a Facebook "friend of a friend"). Note that content intended to be "restricted" may be "public" through user error in seeking to protect such content, through re-posting by another member of that social media network, or as a result of how the content is made available by the social media network or due to technological change.

Public: Information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible to non-members.

Friending: The process through which the member of a social media network designates another person as a "friend" in response to a request to access Restricted Information. "Friending" may enable a member's "friends" to view the member's restricted content. "Friending" may also create a publicly viewable identification of the relationship between the two users. "Friending" is the term used by Facebook, but other social media networks use analogous concepts such as "Circles" on Google+ or "Follower" on Twitter or "Connections" on LinkedIn.

Posting or Post: Uploading public or restricted content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (*e.g.*, "Tweets" on Twitter).

Profile: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person's ability to view specified aspects of a member's account or profile. A profile contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.

INSIDETRACK

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Social Media Discovery: Changing the Face of Civil Litigation

Learn how social media can help your case, and what attorneys must do to find it, obtain it, and use it to their advantage.

AMY J. DOYLE & ANN S. JACOBS

Sept. 7, 2016 – The use of social media has exploded in the last 10 years, changing the landscape of civil litigation. In today's age of chat groups, Twitter, and Facebook, social media can be a treasure trove of relevant information for the defense. Given the wealth of potential information, discovery of social media may also be more beneficial and less costly than traditional surveillance.

The majority of attorneys may not be using social media to their benefit. In addition, attorneys and claims professionals must consider social media at the outset of a claim or lawsuit or risk losing the information forever. The key is to find it, obtain it, preserve it, and use it to your advantage.

Collecting and preserving social media, however, poses significant challenges and evidentiary issues that are not always understood or clearly defined by the courts. While social media has changed the way we live, connect, and communicate, the laws and guidance from the courts has been slow to develop.

For instance, when social media first burst on the scene, circuit court judges would frequently order the entirety of a person's social media account to be produced. Because of a lack of understanding of what social media was, the information contained on it, and the scope and breadth of its use, courts would simply order production of everything.

That sort of blanket order is now the exception rather than the rule. As judges themselves have begun using social media, there is a greater understanding of what it is and how it is used. Most courts now view social media content as being no different than other evidence, requiring it to be relevant, authenticated, and admissible at trial.

Understanding the Format and Devices

Given the technological world we live in, it is important to understand the social media formats and the types of information maintained on those types of accounts. Some of the more recognized social media formats include Facebook, YouTube, Twitter, Instagram, Flickr, Vine, Snapchat, and Tumblr.

What is trending today may be different six months or a year from now. It also is important to recognize the ever-changing devices that collect and maintain information. Data collected with an exercise bracelet, such as

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a Fitbit, may prove to be highly relevant to both plaintiffs and defendants in a case claiming a severe disability.

It is also important to be aware of the pitfalls of too much confidence in social media. Careful evaluation of the information is still required.

For example, while a Fitbit or similar device can show the number of steps a person took, some devices show movement simply through repeated hand movements such as crocheting. Understanding the devices and what their data actually shows is important.

Pre-suit Discovery

In order to take advantage of social media, it is important to identify a claimant's social media accounts as early as possible. When a potential suit becomes known, it is advisable to complete a social media search of the claimant, friends of the claimant, and other potential witnesses.

Google is your friend. Do not be afraid to do a pre-suit Google search for a claimant's social media accounts. Many account settings are "public," which will allow anyone to view their content. A search should also be done of the claimant's social media "friends." Often times, a "friend" will comment, message or post a photo or video about the claimant, which may be relevant to the case.

A "friend" can also provide information as to his or her bias or the identity of other potential witnesses. Even if the account settings are not public, one can at least learn of the existence of the accounts. This information can be useful during the discovery process. Downloading or saving a screen capture of the social media accounts and the details of the account may become important later when dealing with spoliation claims.

> *Attorneys should ask for social media content if they have reason to believe it contains information relevant to the case, says Ann Jacobs, a personal injury lawyer with Jacobs Injury Law S.C. in Milwaukee. What lawyers can (and can't) access during the discovery phase.*

Formal Discovery/Relevancy

Begin any discovery of social media with an inquiry about what accounts the individual maintains. Once identified, if the privacy settings on the social media accounts are on private, a party will have to use formal discovery to obtain access to the information. A person's social media account is not off limits simply because the information is contained under a private setting.

Courts, however, have struggled to determine what information should be produced when social media requests are made. Courts generally have taken a restricted view with respect to social media discovery and are wary of fishing expeditions taken under the guise of discovery requests.

There is a growing recognition that because social media accounts include information that would never (or very unlikely) be discoverable – such as religious orientation, political views, family matters, and so on – caution must be taken in demanding its release.

Social media is not discoverable simply because such accounts exist. Rather, the information must be relevant and material to the issues in the case. If a party can show relevance or that there is reason to believe certain information may lead to the discovery of relevant evidence, a judge is more likely to approve a request to obtain private social media postings, photographs, or videos.

In order to avoid fishing expedition objections, prepare to show relevance of the discovery request in light of the facts and issues of the case. Courts have routinely denied discovery requests for being overbroad in that they request *all* information contained in the social media account.

For the very connected person, who perhaps posts 10-20 times per day on social media, a discovery request for, say, five years of past postings would mean literally tens of thousands of posts. Such broad requests, without more specificity, are usually denied.

A social media request should be specific, narrowly tailored with date parameters, and be relevant to the injuries, claims, and issues in the case. For example, photographs taken several years prior to the accident or those that do not even include the plaintiff may not be relevant to the case.

Establish relevance of information through public postings or photographs that contradict or call into question a claim or injury being alleged. Similarly, a request for postings occurring on or around the date of the incident (looking for postings relating to liability) will likely be seen as narrowly tailored.

After all, if the parties were on their devices posting content when they should have been driving, or posting their reaction to the event at issue, that would be very relevant to the claim.

At the onset of the case, consider sending a preservation letter to a claimant's counsel or defendant's insurance company requesting preservation of social media accounts and their content to ensure the information is not deleted before a formal discovery is commenced. Warn clients and insureds not to delete photos or postings relating to the accident/claim.

Requests to Parties

Generally, direct discovery requests to the party, not to the social media network. Under the Stored Communications Act, 18 U.S.C. §§ 2701-2712, social media sites cannot disclose non-public content without a user's consent.

Therefore, requesting a social media site to produce social media content, even with a valid subpoena or court order, has been largely unsuccessful. As such, attempts to obtain social media information should first be initiated through traditional discovery requests directed to the opposing party.

If the attorney is seeking information that may have been deleted or made unavailable (think 'disappeared' Snap-Chat videos), consider consulting an expert as to whether the information can be recovered and how.

Authentication

Since social media is viewed the same as documents, photographs, or other traditional evidence, attorneys should consider how it will be authenticated.

Courts have routinely precluded evidence found online without any attempt to authenticate how or where the information was obtained. It is important to document procedures taken and information or accounts identified with dates, times, and information downloaded. It may be too late to wait until the time of trial to determine how to authenticate information found online several years earlier.

The most practical way to authenticate information is from the testimony of the witness who has knowledge of the social media account. Authentication also can be established by stipulation of the parties. At a minimum, obtain an affidavit of the individual in your office who initially viewed the account and how the information was preserved.

Information as to the number of accounts identified and the details of those accounts, including the number of photographs or posts on any given date, may also be significant to a claim of spoliation. The fact that it is social media does not change the need for authentication and proper investigation.

Ethical Considerations

Various ethical considerations come into play when considering discovery of social media. A party has a duty to preserve information that is relevant to litigation. A party or even their attorney can be sanctioned for destruction of social media accounts or information. Increasing privacy settings is not spoliation. It is simply prudent behavior. On the other hand, deleting accident-related photos (without creating backups or otherwise preserving them) can be spoliation.

In addition, do not engage in prohibited communications in order to gain access to an otherwise private or secure social media account. "Friending" or otherwise making contact with a represented party is generally prohibited under rules of professional conduct. It also has been found unethical for an attorney to use a third party, such as an assistant, to friend a plaintiff.

Not only can it be prohibited contact, it can be seen as dishonest and, therefore, a violation of attorney ethics. This also precludes friending a friend of the target in order to see the target's postings. Even before a party has legal representation, care must be taken in contacting or friending a claimant.

However, an attorney may investigate a social media account as long as the profile is publically available. To obtain information or evidence on private social media profiles, use the formal discovery process.

Conclusion

Social media has a treasure trove of relevant information for both plaintiffs and defendants. However, it is no different than any other discovery. Requests must be for relevant, discoverable information. Well-formed, concise requests will get the information sought and will be most likely approved by the courts.

South Carolina Bar

Confidentiality with Confidence: Protecting Your Clients While Projecting Your Image

Deborah Bjes
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Confidentiality with Confidence: Protecting your Clients While Protecting Your Image

Deborah Bjes, Risk Manager

Swiss Re Corporate Solutions

So many confidentiality concerns in social media…

Confidentiality

- ✓the cyber breach
- ✓unintentionally creating confidentiality
- ✓TMI issues: sharing too much information
- ✓intentionally or knowingly violating confidentiality

Cyber Breach

The most common way to breach confidentiality

Law firms are considered soft targets

Why are law firms targeted?

- Maintain valuable information
- Systems easier to hack
- No law firm too small!

ABA 2014 survey found law firms

"are not employing basic security measures used frequently in other businesses and professions"

Why are *lawyers* targets?

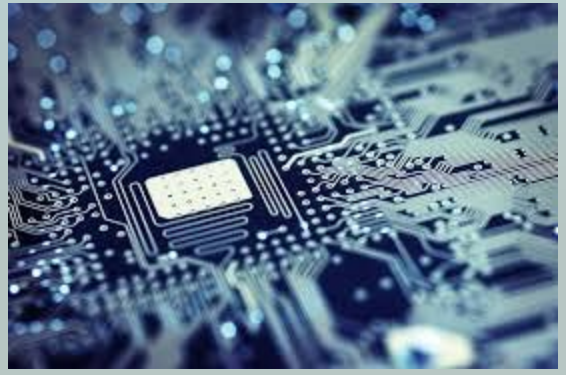
- Lawyers must work efficiently
- Lawyers look for new opportunities
- Lawyers want to assist
- Technologically challenged?

Verizon's 2015 Data Breach Investigations Report

Legal department is more likely to actually open a phishing e-mail than any other department

Changes in technology & culture = Changes in ethical duties

- Understand ethical implications
- Stay up-to-date with technology
- Exercise restraint on social media



Competence

ABA Model Rule 1.1, comment 8

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice **including the benefits and risks associated with relevant technology,** engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Understand technology

"Because of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct"

"Competent and zealous representation under Rules 1.1. and 1.3 *may require lawyer review of client and social media posting relevant to client matters"*

Ethics Opinion 370, Ethics Committee of the District of Columbia Bar

Ethical implications of cyber breach

Confidentiality of Information

ABA Model Rule 1.6

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

“Panama Papers”

- Documents leaked: 11.5 million
- Decades of documents: 4
- Equivalent thumb drives: 650

Is your law firm prepared?

- Be aware of weakest leak
- Too many documents on line?
- Data breach plan in place?
- Who should you call?

Current Scams

- Phishing: emails looks legitimate and directs user to malicious website where malware is loaded onto computer
- Spear Phishing: targeted email

Always verify!

Never provide person information!

Current Scams
Social engineering: the narrative email

Wire:

- telephone before sending wire

Suspicious check:

- wait 30 days
- wait for sender's bank to deliver money to firm account
- request a wire

***Be precise if asking bank whether check "has cleared"; confusing term!*

Email tracking - *ubiquitous invisible web bugs Is it ethical?*

Sender knows...

- when and how often an email is open (whether in foreground/background)
- how long the email was reviewed
- whether attachment was opened
- how long an attachment was opened
- where and on what devise email was opened
- where the email is forwarded
- the general location of the recipient

Ethical Rules Implicated or violated?

"The use of a tracking device that provides information about the use of documents – aside from their receipt and having been "read" by opposing counsel – is a violation of Rule 8.4 and also potentially impermissibly infringes on the lawyer's ability to preserve a client's confidences as required by Rule 1.6"

Alaska Ethics Opinion, 2016-1, October 26, 2016

Ethical Rules Implicated?

"...[C]onsistutes an impermissible intrusion on the attorney-client relationship in violation of the Code. The protection of the confidences and secrets of a client are among the most significant obligations imposed on a lawyer"

New York State Bar Association, Opinion 749, 12/14/2001

Unintentionally creating confidentiality -

"Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or lawyer's firm."

Ethics Opinion 370, Ethics Committee of the District of Columbia Bar

Divorce firm website invites submissions to firm

- Contains “what are my rights” link
- Wife writes *detailed* question
- Agrees to TERMs and submits
- Law firm already represents husband!

The State Bar of California Standing Committee on Professional Responsibility and Conduct 2005-168

What were some relevant TERMS?

"...I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship..."

The State Bar of California Standing Committee on Professional Responsibility and Conduct 2005-168.

Confusing terms?

"... Law Firm's disclosures to Wife were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm".

The State Bar of California Standing Committee on Professional Responsibility and Conduct 2005-168

Attorney client relationship v. confidentiality

"...[O]ur assumption that Law Firm did not form an attorney-client relationship with Wife is not conclusive concerning Law Firm's confidential obligations to Wife."

The State Bar of California Standing Committee on Professional Responsibility and Conduct 2005-168

Can law firm represent husband?

"Law Firm may be disqualified from representing Husband should the court conclude that the information Wife submitted was material to the resolution of the dissolution action".

The State Bar of California Standing Committee on Professional Responsibility and Conduct 2005-168

Overly broad questions for a website?

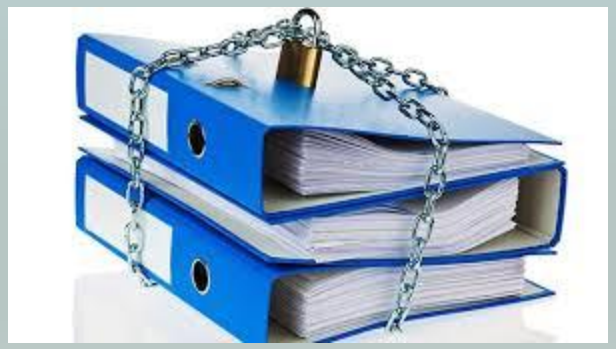
- *"tell us about your legal issues"*
- *"tell us about your case"*
- *"what is your legal issue"*

Consider more limited questions; allow for conflicts check

- names of parties
- children
- spouse/ former spouse
- date of accident
- general area of law

South Carolina Ethics Rule 1.18
DUTIES TO PROSPECTIVE CLIENT

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.



Avoid the surprise that you have just created a conflict!

Understand the functionality of social media sites

- May alert individuals that you reviewed their profile
- Lawyer may blend personal and business contacts
- Sites may access an entire address book
- May suggest potential *inappropriate* connections
- Writing post on A's profile; shows up in B's newsfeed
- May be inviting inappropriate information:
  - judge, client
  - opposing counsel, opposing counsel client

The “TMI” breach (Too much information)

Disclosure – inadvertent or negligent

So many social media options! Personal and business

- Firm websites
- Blogs/"Blawgs"
- Facebook
- LinkedIn
- Twitter
- Change.org

Confidentiality concerns

South Carolina Ethics 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).

Confidentiality goes beyond privilege!

"...The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source ..."

South Carolina Ethics Rule 1.6 Confidentiality, Comment [3]

So you want to discuss your case or client on social media?

- Nature of social media encourages (too much) candor
- There can be no posting of confidential/ secret information
- Avoid forgetting that you are a member of the Bar
- Avoid oversharing

✓Obtain *written* consent before sharing *any information!*

✓Be careful with hypotheticals!

✓Share a draft of the post with the client

✓Be truthful! No misrepresentations

Blog leads to unethical disclosure

- Attorney published public blog
- Contained confidential information about clients
- Contained derogatory comments about judges
- Sufficient information to identify clients and judges using public sources
- Defense is “acute stress disorder”

In the Matter of DISCIPLINARY PROCEEDINGS AGAINST Kristine A. PESHEK, Attorney at Law, No. 2011AP909–D, 798 N.W.2d 879 (2011)

Blog consequences

- Illinois Supreme Court - suspends law license 60 days
- Wisconsin Supreme Court - suspends law license 60 days
- Fired from public defender position

In the Matter of DISCIPLINARY PROCEEDINGS AGAINST Kristine A. PESHEK, Attorney at Law, No. 2011AP909–D, 798 N.W.2d 879 (2011),

Using social media to advance your case?

Beware!

In Re: Joyce Nanine McCool, No. 2015-B-0284, Supreme Court of Louisiana

Lawyer starts signed *change.org* petitions in custody dispute

- Urges public to contact judges and provides their contact information
- Social media campaign continues - Twitter, Blog –provides link to sealed audio

In Re: Joyce Nanine McCool, No. 2015-B-0284, Supreme Court of Louisiana

Sanction: Disbarment

"She cannot confuse a First Amendment claim of the right to free speech with a serious and intentional violation of the Rules of Professional Conduct..."

In Re: Joyce Nanine McCool, No. 2015-B-0284, concurring opinion

Sharing? Petitioning? Creating a profile?

It is professional misconduct for a lawyer to:

* * * * * * * *

(d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) engage in conduct that is prejudicial to the administration of justice;

South Carolina Ethics Rule 8.4: MISCONDUCT

Responding ethically to the negative on-line review

Sites that allow feedback and (negative) reviews!

- Avvo
- LawyerRatingz
- Yelp
- Ripoffreport
- Mylife

Is it permissible for an attorney to respond?

South Carolina
RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

* * * * * * *

(6) 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;

Colorado lawyer breaches confidentiality when responding to a negative review

- Discloses confidential & harmful information
- Discloses harmful information
- Suspended for 18 months!

People v. James C. Underhill Jr., Colorado Attorney Disciplinary Proceeding 15PDJ040 (August 12, 2015) 2015 WL 4944102

Georgia lawyer- reprimanded

- Responds to internet criticism
- Discloses confidential information
- Violates rule 1.6
- Public reprimand & must take practice management services

In the matter of Margrett Skinner, No. S14Y0661, Supreme Court of Georgia

Are you revealing bias on social media?

"The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice …"

South Carolina Ethics Rule1.7: CONFLICT OF INTEREST: CURRENT CLIENTS, Personal Interest Conflicts, Comment [10]

Can social media views create a Positional conflict?

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

* * * * * * * *

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

South Carolina Ethics Rule 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

Intentionally or knowingly violating confidentiality

The allure of social media

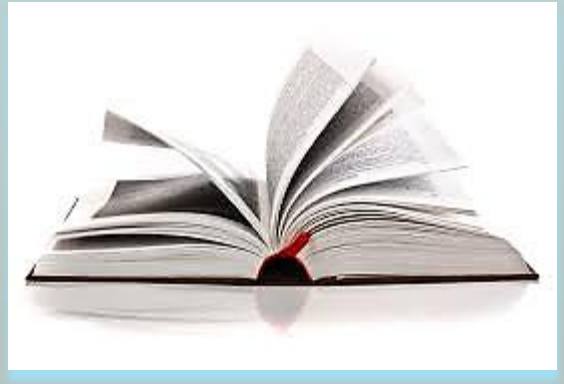
Some lawyers disregard continuing duty

The duty of confidentiality continues after the client-lawyer relationship has terminated. ...

South Carolina Ethics Rule 1.6: CONFIDENTIALITY OF INFORMATION Former Client, comment [21]

Avoid the tell-all book about your client!

- AZ lawyer/criminal defense counsel Laurence Kirk Nurmi- self publishes tell-all book –breaches confidentiality
- Nurmi accepts suspension
- Client objects
- Nurmi accepts disbarment



“Top Cook County official resigns after inappropriate Facebook Post”

- Posts were to Cook County State’s Attorneys personal Facebook page -some during working hours
- Posts were considered racially offensive
- Posts insulted First Lady Michelle Obama
- Posts insulted Hillary Clinton
- Resigns from his $153,000 position

Social media policy considerations

- No firm email for private or other business
- Nothing in public you would not say in private
- Maintain full client confidentiality at all times
- Post no pictures taken in office
- Stay factual; no legal advise
- Remember - nothing is truly deleted
- Be prudent when expressing views
- Review/monitor your social presence
- Review/monitor clients social presence
- No inappropriate contact/communication

Deborah Bjes

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Thank you!

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