

MATERIALS FOR LEGAL ETHICS IN THE AGE OF SOCIAL MEDIA

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The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence

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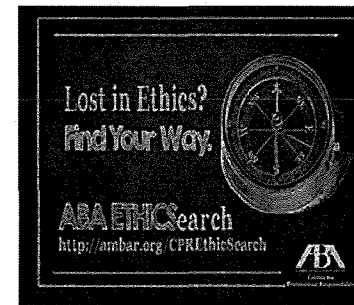
Just twenty years ago, lawyers were not expected to know how to protect confidential information from cybersecurity threats, use the Internet for marketing and investigations, employ cloud-based services to manage a practice and interact with clients, implement automated document assembly and expert systems to reduce costs, or engage in electronic discovery. Today, these skills are increasingly essential, and many lawyers want to know whether they are adapting quickly enough to satisfy their ethical duty of competence. This short article describes several relevant recent changes to the Model Rules of Professional Conduct and identifies new skills and knowledge that lawyers should have or develop.

The Duty of Competence in a Digital Age

The ABA Commission on Ethics 20/20 was created in 2009 to study how the Model Rules of Professional Conduct should be updated in light of globalization and changes in technology. The resulting amendments addressed (among other subjects) a lawyer's duty of confidentiality in a digital age, numerous issues related to the use of Internet-based client development tools, the ethics of outsourcing, the facilitation of jurisdictional mobility for both US and foreign lawyers, and the scope of the duty of confidentiality when changing firms.

One overarching theme of the Commission's work was that twenty-first century lawyers have a heightened duty to keep up with technology. An amendment to Model Rule 1.1 (Duty of Competence), Comment [8] captured the new reality (italicized language is new):

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including*



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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.

The Model Rules had not previously mentioned technology, and the Commission concluded that the Rules should reflect technology's growing importance to the delivery of legal and law-related services.

New Competencies for the Twenty-First Century Lawyer

The advice to keep abreast of relevant technology is vague, and the Commission intended for it to be so. The Commission understood that a competent lawyer's skillset needs to evolve along with technology itself. After all, given the pace of change in the last twenty years, the specific skills lawyers will need in the decades ahead are difficult to imagine.¹ In the meantime, a few new competencies appear to be critical.

Cybersecurity

Long gone are the days when lawyers could satisfy their duty of confidentiality by placing client documents in a locked file cabinet behind a locked office door. Lawyers now store a range of information in the "cloud" (both private and public) as well as on the "ground," using smartphones, laptops, tablets, and flash drives. This information is easily lost or stolen; it can be accessed without authority (e.g., through hacking); it can be inadvertently sent; it can be intercepted while in transit; and it can even be accessed without permission by foreign governments or the National Security Agency.²


In light of these dangers, lawyers need to understand how to competently safeguard confidential information. Newly adopted Model Rule 1.6(c) requires lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." New comments advise lawyers to examine a number of factors when determining whether their efforts are "reasonable," including (but not limited to) "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."

The particular safeguards lawyers need to use will necessarily change with time. For now, and at a minimum, competent lawyers need to understand the importance of strong passwords (lengthy passwords that contain a mix of letters, numbers, and special characters; the word "password," for example, is a lousy password), encryption (both for information stored in the "cloud" and on the "ground," such as on flash drives and laptops), and multifactor authentication (ensuring that data can be accessed only if the lawyer has the correct password as well as another form of identification, such as a code sent by text message to the lawyer's mobile phone). Lawyers also need to understand what metadata is and how to get rid of it, how to avoid phishing scams, the dangers of using public computers and Wi-Fi connections (including cloning and twinning of public Wi-Fi networks), the risks of using file sharing sites, and how to protect devices against malware.

Suggestions for articles and letters to the editor should be sent to Paul Haskins at paul.haskins@americanbar.org. Email submission is preferred. Submissions by regular mail should be addressed to *The Professional Lawyer*, American Bar Association, 321 North Clark Street, Chicago IL 60654-7598. *The Professional Lawyer* reserves the right to select, edit and excerpt letters for publication.

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Law firms with internal networks (also sometimes referred to as private clouds) should consult with competent data security experts to safeguard the information, and law firms that outsource these services (i.e., use a public cloud to store client data) need to ensure they select a service that uses appropriate security protocols. Recent changes to Rule 5.3, Comment [3] offer additional guidance on these issues, as do numerous ethics opinions related to cloud computing.³ A growing body of federal and state law also governs the area.

In sum, basic knowledge of cybersecurity has become an essential lawyer competency. Although lawyers cannot guard against every conceivable cybersecurity threat, they must take reasonable precautions. Failing to do so threatens the confidentiality of clients' information and puts lawyers at a heightened risk of discipline or malpractice claims.

Electronic Discovery

A sound grasp of e-discovery has become a necessity, especially for litigators, and lawyers face discipline and sanctions if they do not understand the basics of electronically stored information (ESI) or fail to collaborate with those who do. For example, a Massachusetts lawyer was recently disciplined for failing to take appropriate steps to prevent a client's spoliation of ESI.⁴ In addition to violating Rule 1.4 (for failing to communicate to his client the nature of the discovery obligations) and Rule 3.4 (for unlawfully obstructing access to evidence), the lawyer was found to have violated Rule 1.1 because he represented a client on "a matter that he was not competent to handle without adequate research or associating with or conferring with experienced counsel, and without any attempt to confirm the nature and content of the proposed deletions [of electronically stored information by the client]."⁵

In New York, e-discovery competence is now mandated in section 202.12(b) of the Uniform Rules for the Supreme and County Courts:

Where a case is reasonably likely to include electronic discovery, counsel shall, prior to the preliminary conference, confer with regard to any anticipated electronic discovery issues. Further, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery: counsel may bring a client representative or outside expert to assist in such e-discovery discussions.⁶

In California, a recently released draft of an ethics opinion covers similar ground and once again emphasizes the importance of e-discovery competence:

Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly

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experienced attorney not competent to handle certain litigation matters involving ESI.⁷

Competence is not the only ethical duty at stake. The California draft opinion (like the Massachusetts disciplinary case) observes that the improper handling of e-discovery "can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence."⁸ The opinion concludes that, if lawyers want to handle matters involving e-discovery and do not have the requisite competence to do so, they can either "(1) acquire sufficient learning and skill before performance is required; [or] (2) associate with or consult technical consultants or competent counsel. . . ."⁹

Related issues arise when lawyers advise their clients about social media content that might be discoverable. Recent opinions suggest that lawyers must competently advise clients about this content, such as whether they can change their privacy settings or remove posts, while avoiding any advice that might result in the spoliation of evidence.¹⁰ The bottom line is that e-discovery is a new and increasingly essential competency, and unless litigators understand it or associate with those who do, they risk court sanctions and discipline.

Internet-Based Investigations

Lawyers no longer need to rely exclusively on private investigators to uncover a wealth of factual information about a legal matter. Lawyers can learn a great deal from simple Internet searches.

Lawyers ignore this competency at their peril. Consider an Iowa lawyer whose client received an email from Nigeria, informing him that he stood to inherit nearly \$19 million from a distant Nigerian relative by paying \$177,660 in taxes owed to the Nigerian government. The client's gullible lawyer raised the "tax" money from other clients in exchange for a promise to give them a cut of the inheritance. Unsurprisingly, the "inheritance" was a well-known scam, and the lawyer's clients lost their money. The lawyer was disciplined for subjecting his clients to the fraud and was expressly criticized for failing to conduct a "cursory internet search" that would have uncovered the truth.¹¹

Internet research is also essential in more routine settings. For example, the Missouri Supreme Court recently held that lawyers should use "reasonable efforts," including Internet-based tools, to uncover the litigation history of jurors prior to trial in order to preserve possible objections to the empanelment of those jurors.¹² In Maryland, a court favorably cited a passage from a law review article that asserted that "[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."¹³ Other cases have emphasized the importance of using simple Internet searches to find missing witnesses and parties. Simply put, lawyers cannot just stick their heads in the sand when it comes to Internet investigations.

At the same time, lawyers need to be aware of the ethics issues involved with these kinds of investigations, especially when researching opposing parties, witnesses, and jurors. If the information is publicly available, these investigations raise few concerns. But when lawyers want to view information that requires a request for access, such as by "friending" the target of the investigation, a number of potential ethics issues arise under

Model Rules 4.1, 4.2, and 4.3. A rapidly growing body of ethics opinions addresses these issues, including a recent ABA Formal Opinion.¹⁴

Internet-Based Marketing

A growing number of lawyers use Internet-based marketing, such as social media (e.g., blogs, Facebook, Twitter, and LinkedIn), pay-per-lead services (paying a third party for each new client lead generated), and pay-per-click tools (e.g., paying Google for clicks taking Internet users to the law firm's website). Given the increasing prevalence of these tools, lawyers need to understand how to use them properly.

A recent Indiana disciplinary matter illustrates one potential risk. A lawyer with over 40 years of experience and no disciplinary record received a private reprimand for using a pay-per-lead service whose advertisements failed to comply with the Indiana Rules of Professional Conduct. The Indiana Supreme Court concluded that the lawyer should have known about the improper marketing methods and stopped using the company's services.¹⁵ The takeaway message is that lawyers need to understand how these new marketing arrangements operate and cannot ignore how client leads are generated on their behalf.

Even when lawyers take control of their own online marketing, they need to tread carefully. Potential issues include the inadvertent creation of an attorney-client relationship under Rule 1.18, the unauthorized practice of law under Rule 5.5 (when the marketing attracts clients in states where the lawyer is not licensed), and allegations of improper solicitation under Rule 7.3. (Newly adopted comments in Rules 1.18 and 7.3 can help lawyers navigate some of these issues.)

Leveraging New and Established Legal Technology/Innovation

Technological competence is not just a disciplinary or malpractice concern. It is becoming essential in a marketplace where clients handle more of their own legal work and use non-traditional legal service providers (i.e., providers other than law firms). To compete, lawyers need to learn how to leverage "New Law" – technology and other innovations that facilitate the delivery of legal services in entirely new ways. Lawyers are also being pressed to make better use of well-established technologies, such as word processing.

Examples of "New Law" include automated document assembly, expert systems (e.g., automated processes that generate legal conclusions after users answer a series of branching questions), knowledge management (e.g., tools that enable lawyers to find information efficiently within a lawyer's own firm, such as by locating a pre-existing document addressing a legal issue or identifying a lawyer who is already expert in the subject), legal analytics (e.g., using "big data" to help forecast the outcome of cases and determine their settlement value), virtual legal services, and cloud-based law practice management. These kinds of tools can be identified and implemented effectively through the sound application of legal project management and process improvement techniques (which reflect another set of important new competencies). Lawyers are not ethically required to use these tools and skills, at least not yet. But if lawyers want to remain competitive in a rapidly changing marketplace, these competencies are quickly becoming essential.

Clients also have less patience with lawyers who fail to use well-established legal technology appropriately.¹⁶ For instance, a corporate counsel at Kia Motors America (Casey Flaherty) has conducted "technology audits" of outside law firms to ensure they make efficient and effective use of available tools, such as word processing and spreadsheets. He has found they do not. On average, tasks that lawyers should have been able to perform in an hour took them five. (Casey Flaherty has partnered with my law school to automate the audit so that it can be used widely throughout the legal industry. I am working closely with Casey on the project.) Lawyers who fail to develop (or maintain) competence when using these established technologies risk alienating both existing and potential clients.

Conclusion

The seemingly minor change to a Comment to Rule 1.1 captures an important shift in thinking about competent twenty-first century lawyering. Technology is playing an ever more important role, and lawyers who fail to keep abreast of new developments face a heightened risk of discipline or malpractice as well as formidable new challenges in an increasingly crowded and competitive legal marketplace.

Endnotes

1. See generally Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (2013).
2. James Risen & Laura Poitras, *Spying by N.S.A. Ally Entangled U.S. Law Firm*, N.Y. Times (Feb. 15, 2014), <http://www.nytimes.com/2014/02/16/us/eavesdropping-ensnared-american-law-firm.html>.
3. See, e.g., *Cloud Ethics Opinions Around the U.S.*, A.B.A., http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (last visited Oct. 6, 2014).
4. Kenneth Paul Reisman, Public Reprimand, No. 2013-21, 2013 WL 5967131 (Mass. B. Disp. Bd. Oct. 9, 2013).
5. *Id.* at *2.
6. N.Y. Unif. R. Trial Ct. §202.12(b), available at <http://www.nycourts.gov/rules/trialcourts/202.shtml#12> (last visited Oct. 7, 2014).
7. State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 11-0004 (2014).
8. *Id.*
9. *Id.*
10. NYCLA Comm. on Prof'l Ethics, Formal Op. 745 (2013); Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2014-5 (2014).
11. Iowa Supreme Court Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301-04 (Iowa 2013).
12. Johnson v. McCullough, 306 S.W.3d 551, 558-59 (Mo. 2010).
13. Griffin v. Maryland, 995 A.2d 791, 801 (Md. Ct. Spec. App. 2010) (quoting Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 Regent U. L. Rev. 1, 13 (2009-2010)), *rev'd on other grounds*, Griffin v. State, 419 Md. 343 (Md. 2011).

14. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

15. *In re Anonymous*, 6 N.E.3d 903, 907 (Ind. 2014).

16. Casey Flaherty, *Could You Pass This In-House Counsel's Tech Test? If the Answer Is No, You May Be Losing Business*, A.B.A. J. (Jun. 17, 2013, 1:30 PM),

http://www.abajournal.com/legalrebels/article/could_you_pass_this_in-house_counsels_tech_test.

LAWYERS AND SOCIAL MEDIA: THE LEGAL ETHICS OF TWEETING, FACEBOOKING AND BLOGGING

By Michael E. Lackey Jr.* and Joseph P. Minta**

I. INTRODUCTION***

Lawyers should not—and often cannot—avoid social media. Americans spend more than 20% of their online time on social media websites, which is more than any other single type of website.¹ Many young lawyers grew up using the Internet and spent most of their college and law school years using social media sites. Some older attorneys have found that professionally-focused social media sites are valuable networking tools, and few big companies or law firms would ignore the marketing potential of websites like Facebook, Twitter, LinkedIn or YouTube. Finally, for litigators, these sites provide valuable information about witnesses and opposing parties.²

Yet social media sites are also rife with professional hazards for unwary attorneys. Rapidly evolving legal doctrines, fast-paced technological developments, a set of laws and professional rules written for the offline world, and the Internet's infancy provide only an incomplete map for lawyers trying to navigate the social media landscape.

Recent developments in social media technology are exposing the tensions inherent in older ethical rules and provoking difficult questions for lawyers seeking to take advantage of this new technolo-

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*** This article expresses the views of the authors, but not of the firm.

¹ *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSEN WIRE (Aug. 2, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/. This number jumps to more than twenty-five percent when video-viewing sites like YouTube are added to the total. *Id.*

² Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous*, 97 A.B.A. J. 48, 51 (2011).

gy. For example, how can a “tweet” comply with legal advertising disclaimer rules when the required disclaimer exceeds the 140-character limit for the mini-post?³ How can attorneys avoid the unauthorized practice of law in far-flung states when blog posts and Facebook messages are sent nationally or even globally?⁴ And how can an attorney avoid an inadvertent conflict of interest when he receives an anonymous online comment that actually comes from an adverse party?⁵

Additional questions arise when social media infiltrate the courthouse and the courtroom. For instance, can (and, perhaps more importantly, should) a judge “friend” or “follow” an attorney online? Can that judge friend a third party to resolve a discovery dispute? Can an attorney friend an opposing party to obtain potentially incriminating information, or can an attorney obtain that information directly from the social media provider?

This article discusses these common social media scenarios and aims to provide guidance on the proper way for lawyers to participate in the social media space. Part II provides a brief primer on social media and the most popular social media sites. Part III examines some of the potential ethical conflicts arising from social media and highlights many of the recent cases discussing lawyers’ use of these increasingly popular sites. Specifically, this section focuses on some of the most likely sources of ethical violations, including potential violations of the duty of confidentiality, of legal advertising rules, and of prohibitions of the unauthorized practice of law. In doing so, this section makes some recommendations for lawyers trying to find their way through the largely uncharted ethical areas in the intersection between law and cyberspace. Part IV focuses on the ethical implications of social media by members of the judiciary, examining sensitive areas for attorneys, judicial employees, and judges. Finally, Part V discusses some of the basics that lawyers need to know so they can use social media to better serve a client’s needs. In

³ See generally MODEL CODE OF PROF’L CONDUCT R. 7.3(c) (2007) (requiring that written and electronic communications to clients bear the words “Advertising Material”).

⁴ See generally MODEL CODE OF PROF’L CONDUCT R. 5.5(a) (2007) (“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.”).

⁵ See MODEL CODE OF PROF’L CONDUCT R. 1.7 (2007); MODEL CODE OF PROF’L CONDUCT R. 1.8 (2007); MODEL CODE OF PROF’L CONDUCT R. 1.10 (2007); MODEL CODE OF PROF’L CONDUCT R. 1.11 (2007). Each rule contains restrictions that would certainly raise ethical issues resulting from such contact.

particular, this section recommends that lawyers understand how to ethically obtain social media information in discovery or investigations and suggests that in-house counsel carefully craft policies governing appropriate social media use in hiring, firing, and other employment decisions.

II. BACKGROUND ON SOCIAL MEDIA

Although social media sites share certain key characteristics,⁶ the purposes and architecture of these sites are nearly limitless. Social media has been defined as:

web-based services that allow individuals to (1) construct public or semi-public profiles within a bounded system, (2) articulate a list of other users with whom they share a common connection, and (3) view and traverse their list of connections and those made by others within the system.⁷

Sites can conform to this definition while nonetheless taking a variety of forms. For instance, blogs (a blend of the term “web log”) are “personal Internet journals” that are updated on a regular basis by the author or “blogger,” who often does not have any specialized training.⁸ These sites were some of the earliest social media sites, first sprouting up in the earliest days of the Internet.⁹ Blogs can contain information related to a specific topic and often are written in a personal tone.¹⁰ Thanks in part to websites like Blogspot, Word Press, and Tumblr that make blog creation relatively simple, there are now more than 165 million blogs.¹¹

Today, the most well-known social media sites include social networking sites like Facebook and Myspace.¹² These sites allow individuals and organizations to connect virtually with others to com-

⁶ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 210 (2007).

⁷ *Id.* at 211.

⁸ See *What Are Blogs?*, WISEGEEK, <http://www.wisegeek.com/what-are-blogs.htm> (last visited July 20, 2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *BlogPulse Stats*, BLOGPULSE, <http://www.blogpulse.com/> (last visited July 20, 2011).

¹² Myspace, previously known as “MySpace,” rebranded its website and introduced a new suite of products on October 27, 2010. See *Meet the New Myspace*, MYSPACE (Oct. 27, 2010), <http://www.myspace.com/pressroom/2010/10/meet-the-new-myspace/>.

municate privately, share photographs and other digital media, and make public or semi-public announcements.¹³ LinkedIn provides similar services to professionals, allowing these individuals to network in cyberspace by posting resumes, sending messages, and connecting with current and former colleagues.¹⁴ Currently, Facebook has more than 750 million active users, with 50% of those users logging in on any given day.¹⁵

Twitter, one of the fastest growing social media sites, is a free social networking and micro-blogging service that enables users to send and read each others' updates, known as "tweets."¹⁶ Because Twitter relies heavily on cell phone text message technology, these "tweets" are limited to 140 characters.¹⁷ These tweets are displayed on the author's profile page and are delivered to other users who have subscribed to the author's messages by following the author's account.¹⁸ Twitter reportedly has more than 100 million users.¹⁹

Video and photo-sharing sites like YouTube, Veoh, Flickr, Yahoo! Video, and MSN Soapbox are also examples of social media. YouTube users alone posted 13 million hours of video in 2010, with forty-eight hours of video uploaded to the site every minute.²⁰

Originally, users joined sites like these to share information and individual user-generated content with smaller networks of friends and relatives.²¹ Today, however, social media sites are becoming popular tools for open marketing, viral or stealth marketing, and information sharing.²² For example, many politicians, entertain-

¹³ See *What Is Facebook?*, WISEGEEK, <http://www.wisegeek.com/what-is-facebook.htm> (last visited Oct. 11, 2011); *What Is Myspace?*, WISEGEEK, <http://www.wisegeek.com/what-is-myspace.htm> (last visited Oct. 11, 2011).

¹⁴ *About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Oct. 11, 2011).

¹⁵ *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited July 20, 2011).

¹⁶ *About Twitter*, TWITTER, <http://twitter.com/about> (last visited July 20, 2011).

¹⁷ *What Is Twitter?*, TWITTER, <http://business.twitter.com/basics/what-is-twitter> (last visited July 6, 2011).

¹⁸ *Id.*

¹⁹ *Id.* According to Twitter, its users post 230 million "tweets" per day. *Id.*

²⁰ *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Oct. 11, 2011).

²¹ Boyd & Ellison, *supra* note 6, at 214. The first recognizable site was launched in 1997, called SixDegrees.com. However, it closed and its founders later stated that the site was too ahead of its time. *Id.*

²² See *How to Use Social Networking Sites for Marketing and PR*, N.Y. TIMES, Dec. 24, 2008, http://www.nytimes.com/allbusiness/AB11702023_primary.html. PR managers are advising companies to use social networking sites as an outlet for marketing and PR. *Id.*

ers, universities, nonprofit organizations, sports leagues, media companies, and other businesses all have their own “channels” on YouTube.²³ Moreover, on Facebook, consumers can “friend” companies like Starbucks, Coca-Cola, and McDonalds.²⁴ In all, 79% of Fortune 100 companies use at least one form of social media, and 20% of companies are using all of the four main technologies (Facebook, Twitter, YouTube, and blogs).²⁵ As a result, a variety of industries, including the legal industry, have been forced to figure out how social media fit into their marketing models.

III. COMMON ETHICAL PROBLEMS POSED BY SOCIAL MEDIA

Like most professionals, lawyers have been unable to avoid social media. As of 2009, more than 70% of lawyers are members of a social media site—up nearly 25% from the past year—with 30% growth reported among lawyers ages forty-six and older.²⁶ According to the ABA’s 2010 Legal Technology Survey Report, 56% of attorneys in private practice are on social media sites, up from 43% the year before.²⁷

Law firms are also experimenting with how social media fit into their marketing models. Some firms, for example, operate Twitter accounts, touting litigation news and law firm accomplishments 140 characters at a time.²⁸ Consequently, the viral nature of social

²³ See *Channels—YouTube*, YOUTUBE, <http://www.youtube.com/members> (last visited July 20, 2011). Individuals and organizations with their own YouTube channels include President Obama, Harvard University, Universal Music Group, Showtime, Justin Bieber, Apple, Inc., and the Travel Channel. *Id.*

²⁴ See James Ledbetter, *Introducing the Big Money Facebook 50*, THEBIGMONEY (Nov. 30, 2009, 12:00 AM), <http://www.thebigmoney.com/articles/-big-money-facebook-50/2009/11/30/introducing-big-money-facebook-50?page=0,0> (discussing the companies making the best use of Facebook). *Id.* Several consumer products also have their own Facebook pages. For example, at one point Kellogg’s Pop-Tarts were winning over more than 7,000 new Facebook “fans” per day. See Stuart Elliott, *Marketers Trade Tales About Getting to Know Facebook and Twitter*, N.Y. TIMES, Oct. 15, 2010, at B2.

²⁵ See Catherine Smith, *Fortune 100 Companies’ Social Media Savvy (STATS)*, HUFFINGTON POST (last updated Aug. 10, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/06/10/fortune-100-companies-soc_n_607366.html (noting that the Fortune 100 Companies are the most active on Twitter).

²⁶ Tresa Baldas, *They Blog, They Tweet, They Friend; And, Oh Yes, They Discover Electronically: Tech Advances Redesigned Lawyers’ Lives*, 32 NAT’L L.J. 11, 11 (2009).

²⁷ Press Release, ABA, ABA Legal Tech. Survey Results Released (Sept. 28, 2010) (on file with the Touro Law Review).

²⁸ See, e.g., Tamer El-Ghobashy, *Tweeting for Lawyers 101*, WALL ST. J. LAW BLOG (July 15, 2011, 10:14 AM), <http://blogs.wsj.com/law/2011/07/15/tweeting-for-lawyers-101/>.

media can cause management headaches when, for example, partners at one major law firm learned that a lighthearted self-congratulatory song intended for firm ears only found its way onto a legal blog and then onto YouTube.²⁹

In addition to public relations frustration, lawyers and law firms also need to consider whether their forays into the social media world place them on the wrong side of any ethical or legal rules. Lawyers around the country have learned that in the social media universe, serious professional fallout can be just one click away.³⁰ However, interpreting the various ethical proscriptions can be difficult because existing ethics rules generally are geared toward the offline world, and most laws and rules were promulgated in the early years of the Internet before most social media sites were invented.³¹

In response to new technologies, the American Bar Association formed its “Commission on Ethics 20/20” in 2009, recognizing that “[t]echnological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure.”³² This commission released its initial proposal on June 29, 2011.³³ The initial recommendations focus on when electronic communications give rise to an attorney-client relationship, which types of client development tools lawyers may use, and when online communications constitute “solicitations.”³⁴ These suggestions will undergo additional comment and revision before they are presented

²⁹ Michael J. de la Merced, *Unauthorized Enjoyment of Song Irks Law Firm*, N.Y. TIMES, Aug. 27, 2007, <http://www.nytimes.com/2007/08/27/business/media/27lawsuit.html> (discussing Nixon Peabody’s attempts to stop the viral spread of a song touting a recent legal award).

³⁰ See generally Seidenberg, *supra* note 2.

³¹ The ABA Model Rules of Professional Conduct were last revised in 2002. *Model Rules of Professional Conduct: Preface*, AM.BAR, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble.html (last visited July 20, 2011). Congress enacted the Stored Communications Act (SCA) in 1986, which restricts the ability of certain third-party service providers to release user information. 18 U.S.C. § 2701 (a)(1)-(2) (2006). The majority of today’s most popular social media sites, however, did not exist until 2003 or later. See Boyd & Ellison, *supra* note 6, at 212 fig.1 (showing that LinkedIn and MySpace were invented in 2003, Facebook was launched in 2004, YouTube in 2005, and Twitter in 2006).

³² Press Release, ABA, ABA President Carolyn B. Lamm Creates Ethics Comm’n to Address Tech. and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009) (on file with the Touro Law Review).

³³ Press Release, ABA, ABA Comm’n on Ethics 20/20 Recommends No New Restrictions on Lawyer Adver., (June 29, 2011) (on file with the Touro Law Review).

³⁴ *Id.*

to the association's policymaking House of Delegates in 2012.³⁵ It is too soon to know just how much clarity these revised rules will provide, and in the meantime, lawyers need to understand how their on-line actions correspond to existing ethics rules.

This Part examines common ethical hazards for lawyers using social media in practice. In particular, this Part considers the duty of confidentiality, legal advertising rules, and the unauthorized or inadvertent practice of law. This Part also analyzes some of the recommendations from the ABA's Commission on Ethics 20/20 and provides a few best practices for attorneys on each of these subjects.

A. The Duty of Confidentiality

Model Rule 1.6(a) protects lawyer-client confidentiality and prohibits lawyers from revealing 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" under one of a handful of listed exceptions.³⁶ The ease of sharing and publicizing information through social media, however, raises a danger that lawyers might fall afoul of this duty.

The disclosure of confidential information can occur in myriad ways. Blog posts, Facebook status messages, and tweets all allow for instant publication of information, including information about procedural developments, interparty negotiations, courtroom developments, and business-related travel.³⁷ Many social media sites such as Facebook and LinkedIn also offer the ability to import contact information from existing e-mail accounts, but doing so may publicize details about clients, witnesses, consultants, and vendors.³⁸ Photo-sharing sites can host photos that accidentally display confidential information such as evidence, trial materials, or personnel locations, while geo-mapping sites like Foursquare that publish users' location information could permit lawyers to reveal information such as a current investigatory trip or meeting.³⁹ Even a post that hides the

³⁵ *Id.*

³⁶ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007).

³⁷ Jeffrey T. Kraus, *Online Social Networking—Ethics and Liability Issues*, 2010 LOSS PREVENTION J. 8, 9.

³⁸ *Id.*; Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 118-19 (2009).

³⁹ Antone Johnson, *Ethics Tips for Lawyers Using Social Media*, BOTTOM LINE LAW

identity of a client and recounts only public details of a trial still might reveal confidential information.⁴⁰

Indeed, there can be an inherent “ ‘tension between the duty of confidentiality and the Facebook norm of enormously reduced, if not nonexistent, personal boundaries.’ ”⁴¹ And although many lay people tweet, post, or blog their every thought with little self-censorship and few repercussions, inappropriate use of social media in the legal world can result in the release of confidential information, a waiver of the attorney client-privilege, or disciplinary action.⁴²

Social media even cost one Illinois public defender her job after it was revealed that she was blogging about her cases.⁴³ In the blog posts, the assistant public defender referred to “clients by either their first name, a derivative of their first name, or by their jail identification number.”⁴⁴ In the posts she disclosed her clients’ crimes and drug use as well as the details of private client conversations.⁴⁵ Because the posts included confidential client information, she was fired, charged with violating legal ethics, and ultimately received a sixty-day suspension from the state supreme court.⁴⁶

A client’s use of social media can similarly create problems with respect to attorney-client confidentiality. A federal judge in California, for example, upheld an order compelling discovery of a

GROUP, <http://bottomlinelawgroup.com/bllg/wp-content/uploads/2010/11/Ethics-Tips-for-Lawyers-Using-Social-Media.pdf> (last visited Oct. 13, 2011).

⁴⁰ Nev. Comm. on Ethics & Prof’l Responsibility, Formal Op. 411 (2009) (discussing Rule 1.6(a) which requires that all information relating to a client be confidential, including the mere identity of a client).

⁴¹ Leslie A. Gordon, *Why Can’t We Be Friends?*, ABA J. (Jan. 1, 2010, 9:00 PM), http://www.abajournal.com/magazine/article/why_cant_we_be_friends/ (quoting legal ethicist, John Steele).

⁴² See Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809, 1810-11, 1823-24 (1995) (“A prosecutor, . . . is not authorized to disclose representational information for purposes unrelated to his professional duties, such as for literary or media purposes, and he must obtain consent, as required by confidentiality rules, to do so.”); Adam C. Losey, Note, *Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege*, 60 FLA. L. REV. 1179, 1182 (2008) (“[E]mployees who e-mail an attorney from the workplace, or from a workplace e-mail account, often lose the evidentiary protections of attorney-client privilege.”).

⁴³ See Seidenberg, *supra* note 2, at 43.

⁴⁴ Complaint at ¶ 2, In the Matter of Kristine Ann Peshek, No. 09 CH 89 (Ill. Attorney Registration & Disciplinary Comm’n Aug. 25, 2009).

⁴⁵ *Id.* ¶¶ 4-8.

⁴⁶ Debra Cassens Weiss, *Blogging Assistant PD Gets 60-Day Suspension for Post on Little-Disguised Clients*, ABA J. (May 26, 2010, 8:57 AM), http://www.abajournal.com/news/article/blogging_assistant_pd_gets_60-day_suspension_for_posts_on_little-disguised/.

client's e-mails, instant message conversations, and blog posts after concluding that discussions of conversations with counsel waived attorney-client privilege.⁴⁷ In the lawsuit, which itself involved social media, a woman sued Universal Music after the company asked YouTube to remove a video she posted of her son dancing to the Prince song, "Let's Go Crazy."⁴⁸ Universal Music sought discovery of the plaintiff's communications with her lawyer after computer records revealed that the woman used a social media service to discuss her counsel's motivations for representing her pro bono, her decision to abandon her state law claims, and the factual allegations behind her case.⁴⁹ As the judge explained, "When a client reveals to a third party that something is 'what my lawyers thinks,' she cannot avoid discovery on the basis that the communication was confidential."⁵⁰

The current proposal from the ABA's Commission on Ethics 20/20 does not include any changes to the existing confidentiality rules.⁵¹ The comments on the current rule note only that lawyers "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure"⁵² and must choose a method of communication that has a reasonable expectation of confidentiality when transmitting information.⁵³ Because, in this instance, emerging technologies merely provide a new medium for conveying information, this guidance can continue to be applied with relative ease to the online world. For example, as with other technologies, lawyers should understand how social media sites function and the information that is shared by each site used.⁵⁴ And,

⁴⁷ See *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783 JF, 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010).

⁴⁸ *Id.*

⁴⁹ *Id.* at *1-4. In one chat, for example, she told her friend that she had told one of her attorneys that it was fine to drop her state law claim because "pursuing the federal portion of the case achieves the ends [she has] in mind." *Id.* at *3. In another conversation, she hinted at the content of an unfiled brief her lawyer had drafted. *Id.* at *4 n.2.

⁵⁰ *Lenz*, 2010 WL 4789099, at *5.

⁵¹ Compare MODEL RULES OF PROF'L CONDUCT R. 1.6 (existing confidentiality rules), with Memorandum from the ABA Comm'n on Ethics 20/20 on Initial Draft Proposals on Lawyers' Use of Tech. and Client Dev. (June 29, 2011) (on file with the Touro Law Review) (proposing amendments to Rule 1.18 entitled Duties to Prospective Clients, and 7.3 entitled Direct Contact with Prospective Clients, but no proposals made to amend Rule 1.6) [hereinafter *Technology and Client Development*].

⁵² MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16.

⁵³ *Id.* R. 1.6 cmt. 17.

⁵⁴ See J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 301 (2004)

as discussed in greater detail below, privacy settings on social media sites can play an important role in limiting the disclosure of information; lawyers should employ these filters and settings to the extent possible.⁵⁵ Finally, carefully dividing personal and professional networks can help avoid issues relating to contact-sharing.

B. Legal Advertising

Social media use can often blur the lines between private communication and public advertisement. If that line is crossed, lawyers could run afoul of their jurisdictions' ethical rules governing attorney advertising and solicitation.

With respect to explicit social media advertising, the guidance for lawyers is rather straightforward. In general, lawyers and law firms should ensure that any postings, messages, and video campaigns are permitted and are approved by the required authorities under their jurisdictions' relevant rules.⁵⁶ This may include the need to keep copies of the social media posting for later review by state authorities.⁵⁷

Some specific types of social media communication pose additional risks that attorneys need to consider, as many attorneys may not realize their actions online may fall under the rules governing advertising. For example, Connecticut's ethical rules suggest that even a simple LinkedIn invitation to another user that links to a lawyer's personal page describing his practice may be an advertisement subject to regulation.⁵⁸ With some social media sites, however, it can be impossible for an attorney's communications to comply with legal advertising rules that have yet to adapt to this new technology. For

(observing that lawyers "may be required to keep abreast of technological advances in security, as well as the technological advances being developed by hackers who are seeking to steal secrets from third parties").

⁵⁵ See *infra* Section V: A.

⁵⁶ See Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR (July 28, 2011), <http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html> (noting that "[t]he same ethical and professional rules apply to communications made on social networking sites as apply to any other communications by lawyers, and it is important for lawyers to understand how to apply these rules to new situations").

⁵⁷ See, e.g., Ariz. Comm. on Ethics & Prof'l Responsibility, Informal Op. 97-04 (1997) (noting that for certain solicitations "a copy of the communication must be maintained for three years").

⁵⁸ See Martin Whittaker, *Internet Advertising Isn't Exempt from Rules, Speakers Make Clear in Separate Programs*, 24 LAW. MAN. PROF. CONDUCT 444, 444-45 (2008).

example, the 140-character limit on tweets sometimes can make it impossible to include the required disclaimer requirements.⁵⁹

In some instances, attorneys can even be required to police the content others post online. Rating and review sites that allow consumers to search for a particular type of business or company and read reviews that other consumers post can implicate local ethics rules.⁶⁰ Although lawyers have little or no control about what clients post to their “profiles” on many of these sites, some state bar associations have nonetheless concluded that these sites can implicate state advertising rules. For instance, the Ethics Advisory Committee for the South Carolina Bar Association concluded that any lawyer who adopts, endorses, or otherwise “claims” information on a rating or review site is responsible for making sure the information complies with the relevant rules of professional conduct.⁶¹ The committee explained that lawyers generally are not responsible for information not placed or disseminated by the lawyer or on the lawyer’s behalf, but “by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing.”⁶²

Once a posting qualifies as an advertisement, the traditional rules apply. Model Rule 4.1, for instance, prohibits “puffery,” or “mak[ing] a false statement of material fact or law to a third person.”⁶³ Professional rules in Illinois and New York prohibit attorneys from using words like “specialist,” “certified,” or “expert” in advertising, unless they possess certain qualifications.⁶⁴ The Arizona State Bar concluded that such rules mean that a lawyer cannot state in an online chat that he “specializes” in a particular area of law unless he is certified in that area of law with the state bar.⁶⁵ Finally, Texas requires attorney video advertising to be filed with the state’s Advertis-

⁵⁹ See, e.g., WASH. RULES OF PROF’L CONDUCT R. 7.2(c) (2006) (requiring that all advertisements contain “the name and office address of at least one lawyer or law firm responsible for its content”).

⁶⁰ See S.C. Ethics Advisory Comm., Advisory Op. 09-10 (2009) (presuming that lawyers adopt or authorize certain advertisements).

⁶¹ *Id.*

⁶² *Id.*

⁶³ MODEL RULES OF PROF’L CONDUCT R. 4.1 (2007).

⁶⁴ See, e.g., ILL. RULES OF PROF’L CONDUCT R. 7.4(c) (2010); N.Y. RULES OF PROF’L CONDUCT R. 7.4(a) (2011).

⁶⁵ Ariz. Comm. on Ethics & Prof’l Responsibility, Informal Op. 97-04.

ing Review Committee,⁶⁶ and the Texas State Bar reminds attorneys that this filing requirement extends to firm videos posted on video-sharing sites like YouTube, Myspace, or Facebook if those videos solicit legal services and no exemption applies.⁶⁷

To avoid these risks, lawyers should refrain from editing, updating, expanding, or otherwise “claiming” profiles created by third parties, unless they are comfortable being responsible for the content.⁶⁸ Regardless, attorneys should monitor social profiles for factual accuracy, whether those profiles are third-party created or self-maintained.⁶⁹ This includes omitting any representation of expertise if it has not been approved by the proper authorities.⁷⁰ Finally, lawyers should phrase descriptions of past work and experience in ways that emphasize the fact-specificity of each outcome and include appropriate disclaimers.⁷¹

Because of some of the confusion surrounding online legal advertising, the ABA’s Commission on Ethics 20/20 studied the existing advertising rules extensively.⁷² The commission’s initial proposal, however, recommended few changes.⁷³ The commission advised leaving the text of the current Model Rule 7.2 unchanged,⁷⁴ but in its report the commission acknowledged that the Internet blurs the lines between advertising and lawyer referral.⁷⁵ For example, one firm recently distributed free t-shirts bearing the firm’s name, then offered a chance to win a prize to everyone who posted a photo on Facebook of them wearing the shirt.⁷⁶ The commission explained that because the firm was arguably giving people something “of val-

⁶⁶ TEX. MODEL CODE OF PROF’L CONDUCT DR 7.07 (2005).

⁶⁷ Kraus, *supra* note 37, at 10.

⁶⁸ S.C. Ethics Advisory Comm., Advisory Op. 09-10.

⁶⁹ *Id.*; see also MODEL RULES OF PROF’L CONDUCT R. 7.1 (2007) (prohibiting “a false or misleading communication about the lawyer or the lawyer’s services”). Careful monitoring can also help uncover potentially defamatory reviews from disgruntled clients. See Cynthia Foster, *Lawyer Sues Over Ex-Client’s Bad Review*, THE RECORDER (Nov. 3, 2011), available at <http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1202523864054>.

⁷⁰ See MODEL RULES OF PROF’L CONDUCT R. 7.4(a) (2007) (stating that “[a] lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law”).

⁷¹ See, e.g., Ariz. Comm. on Ethics & Prof’l Responsibility, Informal Op. 97-04 (prohibiting advertisements that “create an unjustified expectation”).

⁷² See Memorandum from the ABA Comm’n on Ethics 20/20 on Client Confidentiality and Lawyers’ Use of Tech., (Sept. 20, 2010) (on file with the Touro Law Review).

⁷³ Press Release, *supra* note 33.

⁷⁴ Technology and Client Development, *supra* note 51.

⁷⁵ *Id.*

⁷⁶ *Id.*

ue” by offering them an opportunity to win a prize for “recommending” the law firm’s services, such a promotion might violate existing ethics rules.⁷⁷

The main change the ABA Commission recommended can be found in its comments on Rule 7.2, which clarify what it means to “recommend” a lawyer’s services, defining a lawyer recommendation as “[a] communication. . . [that] endorses or vouches for a lawyer’s credentials, abilities or qualities.”⁷⁸ The comment also clarifies when “a lawyer may pay others for generating [Internet-based] client leads.”⁷⁹ Under this new definition, the t-shirt promotion, for example, would not be a recommendation because “wearing the t-shirts could not reasonably be understood as a ‘recommendation’ (i.e., it is not reasonably understood as an endorsement of the law firm’s credentials, abilities, or qualities).”⁸⁰

Beyond this clarification, however, the proposal does little more than add “the Internet, and other forms of electronic communication” to the list of “most powerful media for getting information to the public.”⁸¹ A co-chairwoman of the ABA Commission explained that “[t]hough the Model Rules were written before these technologies had been invented, their prohibition of false and misleading communications apply just as well to online advertising and other forms of electronic communications that are used to attract new clients today.”⁸² The proposal, however, does little to resolve other existing ambiguities.

C. The Unauthorized or Inadvertent Practice of Law

Although it is possible to use social media merely for passive advertising, these platforms facilitate, and even encourage, dynamic, interactive use. However, this dynamism, combined with the broad reach of social media, creates the risk of the inadvertent, and sometimes unauthorized, practice of law.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Technology and Client Development, *supra* note 51.

⁸⁰ *Id.* (“[A] lawyer may pay others for generating client leads, such as Internet-based client leads, . . . as long as the person does not recommend the lawyer and any payment is consistent with Rule 1.5(e) . . . and Rule 5.4 . . .”).

⁸¹ *Id.*

⁸² Press Release, *supra* note 33 (quoting Commission Co-Chair Jamie Gorelick, a partner at Wilmer Cutler Pickering Hale and Dorr LLP in Washington, D.C.).

First, social media communications are rarely one sided. Social media sites make it just as easy for people in other jurisdictions to leave blog comments, send Facebook messages, or tweet back to lawyers, and because anonymity or pseudonymity are common online, it is not always possible for the lawyer to know where the communication originated. This further complicates a lawyer's attempts to follow licensing rules.

As one commentator notes, "The speed of social networking . . . may facilitate referrals, advice, and the formation of apparent attorney-client relationships, all with a few clicks of a mouse[, and i]n social networking, casual interactions sometimes cannot be distinguished from more formal relationships."⁸³ As a result, lawyers need to monitor interactions with non-lawyers carefully to avoid creating the appearance of an attorney-client relationship, or even a *prospective* attorney-client relationship. This is particularly important because ethics rules provide that "[e]ven 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 in limited circumstances.⁸⁴ Under Model Rule 1.18, if a lawyer receives information from a prospective client that would be harmful to an existing client, he is disqualified from representing clients with materially adverse interests.⁸⁵ Such disqualification can have far-reaching consequences because Rule 1.18 also prevents attorneys at the same firm from representing the client unless both the existing client and the prospective client consent or if the lawyer who received the information "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," the disqualified lawyer is "timely screened" from representation, and the prospective client receives prompt written notice.⁸⁶

Second, social media sites permit users to send information regionally, nationally, or even globally. But the practice of law is still bound by jurisdictional limits with lawyers regulated and licensed on a state-by-state basis, with disciplinary charges awaiting those who practice in jurisdictions where they are not licensed.⁸⁷

⁸³ Bennett, *supra* note 38, at 122.

⁸⁴ MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2007).

⁸⁵ *Id.* R. 1.18(c).

⁸⁶ *Id.* R. 1.18(d)(2).

⁸⁷ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5(a) ("A lawyer shall not practice law

With the growth of social media, the same technology that allows lawyers to easily send information across global networks also makes it easy for lawyers to engage in law practice within jurisdictions where they are not licensed.⁸⁸

Finally, the frequent use of anonymity and pseudonymity online also can give rise to inadvertent conflicts of interests as lawyers unintentionally develop relationships with parties who have interests that are adverse to those of existing clients.⁸⁹ A lawyer also may state a position on an issue that is adverse to the interests of a client, inadvertently creating an issue conflict.⁹⁰

The ABA's Commission on Ethics 20/20 has proposed various revisions to Rule 1.18 to clarify when online communications give rise to a prospective client relationship.⁹¹ One proposed revision includes a more detailed definition of a "prospective client," defining the term as someone who has "a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship."⁹² Similar language now appears in Comment 2, and "[t]he Commission concluded that this language . . . more accurately characterizes the applicable standard and is more capable of application to electronic communications."⁹³

in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."); see also Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 156 (1999) ("Lawyers answering questions about the law in jurisdictions in which they are not licensed to practice may violate restrictions against the unauthorized practice of law.").

⁸⁸ See Melissa H. Weresh, *A Bold New Frontier—To Blog Where No Lawyer Has Blogged Before*, IOWA LAW., Jan. 2009, at 13 (discussing the difficulty non-location-specific internet posts pose for lawyers).

⁸⁹ See Lanctot, *supra* note 87, at 156 ("The possibility that a lawyer might inadvertently create a conflict of interest by answering legal questions from someone with an interest adverse to a current or former client is particularly troubling in the sometimes-anonymous world of cyberspace.").

⁹⁰ See *id.*

⁹¹ See Technology and Client Development, *supra* note 51.

⁹² *Id.*

⁹³ *Id.* Proposed additions to Comment 3 elaborate on the new definition by listing a number of factors to use in assessing whether someone has become a prospective client. See *id.* These factors include:

whether the lawyer previously represented or declined to represent the person; whether the person, prior to communicating with the lawyer, encountered any warnings or cautionary statements that were intended to limit, condition, waive or disclaim the lawyer's obligations; whether those warnings or cautionary statements were clear, reasonably understandable, and conspicuously placed; and whether the lawyer acted or communicated in a manner that was contrary to the warnings or cautionary

The proposal also broadens the types of interactions that give rise to a prospective client relationship. For example, the commission suggests changing “discusses” to “communicates” in the first paragraph “to make clear that a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place.”⁹⁴ Similarly, the commission recommends replacing the phrase “had discussions with a prospective client” to “learned information from a prospective client.”⁹⁵

Additionally, the commission recommends adding a sentence in one of the comments to make it clear that a person is not owed any duties under Rule 1.18 if the person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent.⁹⁶

The current proposal does not address the problem of unauthorized practice of law through social media, but there are steps lawyers can take to avoid these risks. For example, lawyers should not give fact-specific legal advice and should instead stick to discussing general legal topics and information. As the Arizona Bar explains, attorneys should treat online discussion groups and chat rooms the same way they treat offline legal seminars for lay people.⁹⁷ In other words, an attorney should avoid answering specific legal questions “unless the question presented is of a general nature and the advice given is not fact-specific.”⁹⁸ For similar reasons, lawyers should exercise caution when using social media to discuss sensitive client matters.⁹⁹

Any blog or social media posting should also contain a clear and conspicuous disclaimer to prevent misunderstandings. These notices “should disclaim the existence of an attorney-client relationship, except on express agreement from the lawyer, and caution prospective clients not to send a lawyer confidential information, without

nary statements.

Id.

⁹⁴ Technology and Client Development, *supra* note 51.

⁹⁵ *Id.*

⁹⁶ *Id.* This concept is commonly referred to as “taint shopping.” *See, e.g.*, Assoc. of the Bar of the City of New York, Formal Op. 2006-02 (2006); Va. Legal Ethics Comm., Legal Ethics Op. 1794 (2004). Some states already incorporate the concept into their versions of Rule 1.18. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT R.1.18(e)(2).

⁹⁷ Ariz. Comm. on Ethics & Prof'l Responsibility, Informal Op. 97-04.

⁹⁸ *Id.*

⁹⁹ *See id.* (noting that “[l]awyers also may want to caution clients about transmitting highly sensitive information via e-mail if the e-mail is not encrypted or otherwise secure from unwanted interception”).

confirmation of an agreement to undertake representation.”¹⁰⁰ Moreover, the disclaimer should indicate the state (or states) in which the attorney is admitted to practice.¹⁰¹ Lawyers can also use “click-wrap” disclaimers, also known as “click-through” disclaimers, which require readers to acknowledge their understanding that the communication does not form an attorney-client relationship by clicking “accept” prior to accessing the website.¹⁰²

IV. SOCIAL MEDIA AND THE JUDICIARY

Because of special ethics rules and practices governing lawyers and the judiciary, lawyers must take particular care when social media use involves judges, clerks, or other judicial employees.¹⁰³ Similarly, because of their special role in the judicial system, judges and judicial employees must be especially careful in their social media use to maintain an appearance of impartiality and to prevent security risks. This Part discusses some of the pitfalls of social media posts about the judiciary and judicial proceedings as well as some of the specific considerations facing judges and judicial employees who use social media.

A. Attorney Comments About Tribunals and the Judiciary

Lawyers have quickly learned that social media sites provide

¹⁰⁰ Bennett, *supra* note 38, at 121 (citing David Hricik, *To Whom It May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients*, 2005 PROF. LAW. 1, 3-4).

¹⁰¹ *Id.* at 127. As an extra precaution, an attorney also should ask posters and commenters about their state of residence before answering any questions or sending any messages. *Id.*

¹⁰² As one example of a “click-wrap” disclaimer:

By clicking “accept” you agree that our review of the information contained in e-mail and any attachments that you submit in a good faith effort to retain us will not preclude any lawyer in our firm from representing a party in any matter where that information is relevant, even if that information is highly confidential and could be used against you, unless that lawyer has actual knowledge of the content of the e-mail. We will otherwise maintain the confidentiality of your information.

Id. at 122 n.61.

¹⁰³ Seidenberg, *supra* note 2.

a useful tool for uncovering opposing parties' misconduct.¹⁰⁴ For example, photos, videos, and online posts can catch a party in a lie or can unwittingly reveal inside information. What attorneys sometimes forget, however, is that these tools can just as easily reveal their own misconduct, and attorneys who "overshare" online can end up facing disciplinary action.

Model Rule 3.3 prohibits attorneys from making false statements to a tribunal.¹⁰⁵ This prohibition is not new, but when lawyers share personal information on publicly accessible platforms, these lies become easier to detect. One Texas judge, for example, checked a lawyer's Facebook page after the lawyer requested a continuance because of the death of her father. The young lawyer's Facebook posts revealed that "there wasn't a lot of grief expressed online."¹⁰⁶ Instead, the lawyer's posts described a week of partying and drinking with friends.¹⁰⁷ When the lawyer asked for a second continuance, the judge declined and disclosed the results of her research to a senior partner at the lawyer's firm.¹⁰⁸

Attorneys also should never disparage judges online. Florida lawyer, Sean Conway, received a public reprimand from the Florida Supreme Court after calling a Fort Lauderdale judge an "Evil, Unfair Witch" on a popular South Florida legal blog.¹⁰⁹ And a lawyer in California received a forty-five-day suspension after posting blog entries disparaging a judge and defendant while serving as a juror.¹¹⁰ In general, the best way to avoid sanctions arising out of social media

¹⁰⁴ See *infra* Section V: A-B.

¹⁰⁵ MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

¹⁰⁶ John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=1&hp (quoting Judge Susan Criss); see also Molly McDonough, *Facebooking Judge Catches Lawyer in a Lie, Sees Ethical Breaches*, A.B.A. J. (July 31, 2009, 3:16 PM) http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicag_o/ (discussing instances of a judge exposing lies and other borderline unethical behavior from attorneys' Facebook statuses).

¹⁰⁷ Schwartz, *supra* note 106.

¹⁰⁸ *Id.*

¹⁰⁹ The Fla. Bar v. Conway, 996 So. 2d 213 (Fla. 2008); Schwartz, *supra* note 106. A South Florida county bar association recently examined the blog itself to examine whether it adheres to local standards of professional conduct. See Tonya Alanez, *Courthouse Gossip Blog Faces Scrutiny from County Bar*, S. FLA. SUN-SENTINEL, Apr. 1, 2010, at 3B. The blog, however, is still active. See *JaaBlog Welcome*, JAABLOG.COM, <http://jaablog.jaablaw.com/> (last visited July 20, 2011).

¹¹⁰ See Martha Neil, *Calif. Lawyer Suspended over Trial Blogging While Serving as Juror*, A.B.A. J. (Aug. 4, 2009, 2:58 PM) http://www.abajournal.com/news/article/calif_lawyer_suspended_over_trial_blog_while_serving_as_juror/.

posts is simple and straightforward: never communicate a false statement or post disparaging comments. Furthermore, effective use of social media sites' privacy settings can help mitigate the damage of such statements, if they do occur.

B. Social Media and Judicial Employees

Social media use raises special ethical, confidentiality, and security concerns for law clerks and other judicial employees.¹¹¹ Some potential ethical problems include:

- Tweets or Facebook posts may inadvertently reveal confidential information from court filings or discussions that take place in a judge's chambers;
- Videos, photos, or online comments revealing improper or even illegal conduct can reflect poorly on the court;
- Social network connections with parties or attorneys appearing before the court can suggest special access or favoritism;
- Commenting on pending matters or on matters that may soon appear before the court could present an image of impropriety.¹¹²

Beyond ethical concerns, posting photos of the interior of the courthouse or posting information about a judge's location at a certain day or time could put the safety of judicial employees at risk.¹¹³

To avoid these problems, many judges and courts provide social media policies and guidelines to their employees. These policies, however, vary by court and even by judge. While some policies might include sweeping social media bans, others simply contain basic rules or general guidelines for employees.

Because of the unique safety risks facing judges and judicial employees, the most detailed portions of many of these policies contain prohibitions designed to reduce security risks. For example, the social media policies of several courts bar judicial employees from posting pictures of court events, judicial offices, and even the court-

¹¹¹ See generally JUDICIAL CONFERENCE OF THE UNITED STATES, RESOURCE PACKET FOR DEVELOPING GUIDELINES ON USE OF SOCIAL MEDIA BY JUDICIAL EMPLOYEES (2010) [hereinafter JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES].

¹¹² For additional examples, see *id.* at 15-16.

¹¹³ *Id.* at 18.

house itself.¹¹⁴

Unlike the more uniform safety rules, ethical prohibitions and guidelines tend to vary more among the courts. For example, the District of Rhode Island simply provides its law clerks and interns with a list of broad guidelines, like “Think before you post,” “Speak for yourself, not your institution,” and “Keep secrets secret,” but its policy includes few blanket prohibitions.¹¹⁵ Several policies also include general advice to obey libel and copyright laws.¹¹⁶

In contrast, the Southern District of Indiana and the Central District of California provide a more detailed list of prohibitions; both bar employees from using a court e-mail address for social networking, from disclosing confidential information, from posting photos or profile information that affiliates a judicial employee with a candidate or political party, and from “friending,” “following,” or “recommending” a lawyer or law firm that appears before the court.¹¹⁷

The Central District of California also prohibits employees from using United States District Court seals and logos, and from “identifying yourself as a court employee at all in social media.”¹¹⁸ In contrast, the Southern District of Indiana’s policy states that employees may identify themselves by a “court-related job title” such as law clerk or administrative assistant, on the condition that employees do not identify their specific court or judge.¹¹⁹ The Southern District

¹¹⁴ *Id.* at 30 (quoting UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, SOCIAL MEDIA POLICY/GUIDELINES, at 1 (2010) [hereinafter DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY]); *id.* at 34 (quoting UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CLERKS OFFICE EMPLOYEE SOCIAL MEDIA AND SOCIAL NETWORKING POLICY, at 3 [hereinafter CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY]); *see also* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, SOCIAL MEDIA AND SOCIAL NETWORKING POLICY FOR CHAMBERS’ OFFICE STAFF, at 1 [hereinafter SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY].

¹¹⁵ JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 27-29 (quoting DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY, *supra* note 114). To be sure, the court’s policy also notes that law clerks and interns also are bound by the First Circuit’s Social Media Policy. *Id.* at 27 (quoting DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY, *supra* note 114, at n.1).

¹¹⁶ *Id.* at 34 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY, *supra* note 114); SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 114.

¹¹⁷ JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 33-36 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY, *supra* note 114); SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 111.

¹¹⁸ JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 32-33, 36 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY, *supra* note 114).

¹¹⁹ SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 114, at 1.

of Indiana's policy also instructs judicial employees that "[a]ny commentary you post that could reveal an association with the court must contain an explicit disclaimer that states: 'These are my personal views and not those of my employer.'"¹²⁰

Finally, some of the same rules that apply to most employees also apply to judicial employees, and social media policies caution judicial employees not to post photos of themselves engaging in improper or illegal conduct.¹²¹

C. Social Media and Judges

Attorneys and judicial employees are not the only members of the legal profession using social media. More than forty percent of judges reported that they use social media sites.¹²² Judges, however, must exercise additional caution when it comes to social media use. In particular, judges need to decide whether to "friend" or "follow" attorneys who appear before them and how to communicate with attorneys over social media. Some judges also must mediate social media discovery disputes that arise in the cases before them, which often require creative solutions.

1. Judges and Attorneys as Social Media "Friends"

States disagree over whether a judge may friend an attorney who appears before him.¹²³ The Ohio Supreme Court's Board of

¹²⁰ *Id.* To be sure, at fifty-six characters in length, this disclaimer would effectively preclude judicial employees from Tweeting about the court.

¹²¹ JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 28-29 (quoting DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY, *supra* note 114); *Id.* at 34 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY); SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 114, at 1.

¹²² CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS, NEW MEDIA AND THE COURTS 65 (2010).

¹²³ Compare Fla. Jud. Ethics Advisory Comm., Formal Op. No. 2009-20 (2009) ("The Committee believes that listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."), with Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. No. 2010-7 (2010) ("A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge."), and Ky. Judicial Ethics Comm., Formal Op. JE-119 (2010) ("While the nomenclature of a social networking site may designate certain participants as 'friends,' the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge."), and N.Y. Jud. Ethics Comm., Informal Op. 08-176 (2009) ("The Committee cannot discern anything inherently inappro-

Commissioners on Grievances and Discipline, for example, wrote that “[a] social network ‘friend’ may or may not be a friend in the traditional sense of the word” because “[a]nyone who sets up a profile page on a social networking site can request to become a ‘friend’ (or similar designation) of any of the millions of users on the site.”¹²⁴ “There are hundreds of millions of ‘friends’ on social networking sites.”¹²⁵ As a result, a judge may friend a lawyer who appears before him in court, provided he follows ethical guidelines, avoids posting comments about a pending matter, and disqualifies himself when necessary.¹²⁶

New York’s committee on judicial conduct further explains that there is nothing “inherently inappropriate” about a judge joining a social network because in some ways it “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.”¹²⁷ The committee noted, however, that the public nature of the online link could create the appearance of a stronger bond, a factor judges should consider when deciding whether a particular relationship requires disclosure or recusal.¹²⁸

In Florida, the state’s judicial ethics advisory committee concluded that judges could not be social media friends with attorneys who appear before them.¹²⁹ The committee acknowledged that it was not saying “that simply because a lawyer is listed as a ‘friend’ on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, [it] means that this lawyer is, in fact, in a special position to influence the judge.”¹³⁰ The committee explained that the real issue was not whether the lawyer is *actually* in a position to influence the judge, but whether the online friendship conveys the *impression* that the lawyer has such influence.¹³¹

appropriate about a judge joining and making use of a social network.”).

¹²⁴ Ohio Bd. of Comm’rs on Grievances and Discipline, Formal Op. No. 2010-7, at 2.

¹²⁵ *Id.*

¹²⁶ *See id.* at 6-7.

¹²⁷ N.Y. Jud. Ethics Comm., Informal Op. 08-176, at 4.

¹²⁸ *Id.*

¹²⁹ Fla. Jud. Ethics Advisory Comm., Formal Op. No. 2009-20, at 9.

¹³⁰ *Id.* at 3-4.

¹³¹ *Id.* at 4. Following this opinion, some Florida lawyers found themselves with far fewer “friends” as judges “defriended” practicing attorneys on their friend lists. Tonya Alanez, *Ethics Group Frowns on Judicial ‘Friends,’* S. FLA. SUN SENTINEL, Jan. 17, 2010, at 3B. At

Even in jurisdictions that permit a judge to friend an attorney, “a judge’s actions and interactions must at all times promote confidence in the judiciary [and a] judge must avoid impropriety or the appearance of impropriety”¹³² As a result, *ex parte* communications should be avoided in the online world, just as they must be avoided if stated in person or over the phone. A North Carolina judge, for example, was reprimanded for discussing a case with an attorney on Facebook. In that case, a judge presiding over a child custody case became Facebook friends with the father’s attorney.¹³³ In response to a posting from the attorney, the judge posted that he had “two good parents to choose from.”¹³⁴ The judge also posted that he “feels that he will be back in court,” a reference to the fact that the case had not settled.¹³⁵ The father’s counsel responded to these posts by writing “I have a wise judge.”¹³⁶ The judge later disclosed the exchanges to the mother’s attorney, but was ultimately reprimanded for the communications.¹³⁷

In addition to avoiding *ex parte* communications, state ethics committees also have explained that a judge “must not investigate matters before the judge, must not make improper public statements on pending or impending cases, and must disqualify from cases when the judge has personal bias or prejudice concerning a party or a party’s lawyer or when the judge has personal knowledge of facts in dispute.”¹³⁸

2. Using Social Media to Address Discovery Disputes

The difficulties inherent in social media sometimes have required judges to respond creatively to discovery disputes. Social media sites have become invaluable discovery resources,¹³⁹ but the personal nature of many social media profiles and posts implicates

least one county court judge, however, sent an e-mail to the ten attorneys affected asking them not to take his actions personally. *Id.*

¹³² Ohio Bd. of Comm’rs on Grievances and Discipline, Formal Op. No. 2010-7.

¹³³ John C. Martin, *Public Reprimand of Terry*, North Carolina Judicial Standards Commission, Inquiry No. 08-234, at 2-3, 5 (Apr. 1, 2009).

¹³⁴ *Id.* at 2.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 2, 5.

¹³⁸ See, e.g., Ohio Bd. of Comm’rs on Grievances and Discipline, Formal Op. No. 2010-7.

¹³⁹ See *infra* Parts V: A-B.

considerable privacy concerns. As a result, judges have needed to figure out how to mediate these disputes.

In Tennessee, for example, a magistrate judge adopted an unorthodox approach to a protracted discovery dispute involving photos taken by the plaintiff and other witnesses.¹⁴⁰ The judge offered to create a Facebook account to expedite discovery of the photos, captions, and comments.¹⁴¹ The judge then explained that if the witnesses accepted his friend requests he would conduct an *in camera* inspection of photos and related comments, disseminate any relevant information to the parties, and then close the Facebook account.¹⁴²

Other judges have ordered parties to turn over hard copies of their social profile information for a more traditional *in camera* review. For example, one defendant requested production of Facebook content related to a plaintiff's alleged teasing and taunting, or any content related to the communications involving the student's claims in *Bass v. Miss Porter's School*.¹⁴³ The student had since lost access to her account but requested the information from Facebook.¹⁴⁴ When Facebook agreed to provide "reasonably available data," the judge ordered the student to provide responsive documents to the school and give the entire set of documents to the court for *in camera* review.¹⁴⁵ The defendant provided about a hundred pages of documents to the school and "more than 750 pages of wall postings, messages, and pictures" to the court.¹⁴⁶ After reviewing the documents, the court ultimately concluded that there was "no meaningful distinction" between the two sets of documents and ordered the plaintiff to provide the entire set of documents to the school.¹⁴⁷

Other judges have eschewed such detailed reviews entirely and simply have ordered parties to turn over social media posts and

¹⁴⁰ See *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-00764, 2010 WL 2265668, at *1 (M.D. Tenn. June 3, 2010).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ No. 3:08cv1807, 2009 WL 3724968, at *1 (D. Conn. Oct. 27, 2009).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* In fact, Facebook now has a feature that makes it easier for courts to conduct more traditional *in camera* reviews of social media information by allowing users to download copies of their entire profile. See *Download Your Information*, FACEBOOK, <http://www.facebook.com/help/?page=18830> (last visited July 20, 2011). Users then can provide this information to judges for an offline review.

account information directly to opposing parties.¹⁴⁸ It is unclear, however, whether such decisions comport with federal online privacy laws.¹⁴⁹

V. THE DUTY OF COMPETENCE

Model Rule 1.1 explains that “[a] lawyer shall provide competent representation to a client.”¹⁵⁰ One of the comments on this rule further clarifies that to fulfill this duty and “maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice.”¹⁵¹ As a result, today’s lawyers need to understand how social media sites work and how they can be used to serve a client’s needs.¹⁵² To that end, this Part briefly discusses some of the basic information that attorneys need to know to obtain social media information in discovery and investigations. It also highlights a few of the key points in-house counsel should consider when crafting social media policies that comply with regulatory requirements and employment laws.

A. Using Social Media in Court

Social media can provide an abundance of information about opposing parties, especially given the tendency of most social media users to “over-share” online. As a result, attorneys in a variety of practice areas recognize that social media sites can be invaluable sources of information. Family law attorneys, for example, have learned that social media sites can provide all types of information once available only through extensive investigation or by hiring a private detective. Now, with just a few clicks of a mouse, Facebook photos can reveal infidelity, a YouTube video can show a spouse partying instead of watching the kids, and irate social media posts can

¹⁴⁸ See *infra* Part V: B (discussing the discoverability of social media).

¹⁴⁹ See *infra* Part V: B (discussing the application of the Stored Communications Act with the Internet today).

¹⁵⁰ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2007).

¹⁵¹ *Id.* R. 1.1 cmt. 6.

¹⁵² One could actually argue that, at least in some contexts, attorneys who do not use social media as part of their representation of clients are actually failing to live up to their ethical obligations. See Margaret DiBianca, *Complex Ethical Issues of Social Media*, THE BENCHER, Nov./Dec. 2010, available at <http://www.innsofcourt.org/Content/Default.aspx?Id=5497> (discussing whether “ethical duties may require lawyers to be adept in social media”).

establish that one spouse in a custody dispute has a terrible temper.¹⁵³

Similarly, attorneys for personal injury defendants have a diminished need to hire investigators to follow plaintiffs with video cameras because YouTube videos or Facebook photos can reveal if a plaintiff is exaggerating, or even falsifying alleged injuries, particularly where social media users have lax privacy settings in place for their accounts. In one case, for example, photos of a personal injury plaintiff smiling happily outside her home contradicted claims that her injuries from falling from an allegedly defective chair left her “largely confined to her house and bed.”¹⁵⁴

Even one of the most famous names in social media, Facebook founder Mark Zuckerberg, learned the hard way that once litigation is underway, social media posts can easily reveal comments one would prefer to keep private. During a legal battle surrounding allegations that Zuckerberg stole the idea for his social media site, Facebook’s legal team pulled unflattering instant messages from Zuckerberg’s computer.¹⁵⁵ A Silicon Valley technology site later obtained and published some of the posts.¹⁵⁶ Although readers of the messages contend that they do not support the theft claim, they “portray Zuckerberg as backstabbing, conniving, and insensitive.”¹⁵⁷

To take advantage of this social media bounty, however, lawyers need to know how to legally (and ethically) obtain this information, and the law in this area is not always clear.

B. The Discoverability of Social Media

In general, social media is discoverable to the same extent as any other information. In fact, Federal Rule of Civil Procedure 26 specifically provides for the production of “electronically stored information.”¹⁵⁸ Pursuant to Rule 26, relevant information in any format “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible

¹⁵³ See Seidenberg, *supra* note 2; see also Stephanie Chen, *Divorce Attorneys Catching Cheaters on Facebook*, CNN.COM (June 1, 2010), http://articles.cnn.com/2010-06-01/tech/facebook.divorce.lawyers_1_privacy-settings-social-media-facebook?_s=PM:TECH.

¹⁵⁴ Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 654 (Sup. Ct. 2010).

¹⁵⁵ See Jose Antonio Vargas, *The Face of Facebook*, THE NEW YORKER (Sept. 20, 2010), http://www.newyorker.com/reporting/2010/09/20/100920fa_fact_vargas.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ FED. R. CIV. P. 26(b)(2)(B).

evidence.”¹⁵⁹

Nonetheless, because the information on a social media site is stored on the provider’s server rather than on the user’s hard drive, the provider, not the user, typically possesses the right to share the information.¹⁶⁰ Generally, it is difficult to obtain this information directly from a provider because of the Stored Communications Act (“SCA”).¹⁶¹ Congress enacted the SCA as Title II of the Electronic Communications Privacy Act¹⁶² to address privacy concerns arising out of new technologies such as the Internet.¹⁶³ The SCA “regulat[es] the relationship between government investigators and [network] service producers in possession of users’ private information,” and limits the government’s ability to compel disclosure of this information from third parties.¹⁶⁴ More specifically, the SCA prevents certain third-party providers from disclosing their users’ electronic communications to the government or a third party without a search warrant in most circumstances.¹⁶⁵

In 1986, however, when Congress enacted the SCA, the Internet was drastically different from the technology many know and use today.¹⁶⁶ As a result, applying this law to social media technologies can be like trying to force a square peg into a round hole, and courts

¹⁵⁹ FED. R. CIV. P. 26(b)(1).

¹⁶⁰ Ariana Eunjung Cha, *What Sites Such as Facebook and Google Know and Whom They Tell*, WASH. POST (May 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052804853.html>.

¹⁶¹ 18 U.S.C. § 2701 (2006).

¹⁶² Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. § 2510 (2006)).

¹⁶³ See generally Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004) (explaining the history and flaws of the SCA).

¹⁶⁴ See *id.* at 1212-14.

¹⁶⁵ See 18 U.S.C. §§ 2702-03 (2006 & Supp. III 2009). For a more detailed discussion of which types of third-party providers must comply with the SCA, see Kerr, *supra* note 163, at 1213-14.

¹⁶⁶ The World Wide Web, for example, did not exist, and cloud computing services and social network sites would not be developed for nearly a decade. Tim Berners-Lee invented the World Wide Web in 1989. See *Tim Berners-Lee*, WORLD WIDE WEB CONSORTIUM, <http://www.w3.org/People/Berners-Lee/> (last visited Jan. 9, 2012); see also Boyd & Ellison, *supra* note 6. Instead, at the time Congress enacted the SCA, Internet users could effectively do three things: (1) download and send e-mail; (2) post messages to online bulletin boards; and (3) upload and store information that they could then access on other computers. See S. REP. NO. 99-541, at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3562-63 (describing “some of the new telecommunications and computer technologies referred to in the [ECPA]”).

in different jurisdictions have reached different conclusions in their struggles to do so. In *Crispin v. Christian Audigier, Inc.*,¹⁶⁷ the Central District of California became the first court to extend SCA protection to some social media posts and messages.¹⁶⁸ In that case, the defendant sought basic subscriber information and certain communications from several social media sites.¹⁶⁹ The court drew distinctions among the different types of communications on social media sites and concluded that the SCA protects private messages between individual users because these messages are similar to the e-mail services that existed when Congress adopted the SCA.¹⁷⁰ The court also held that the SCA protects a user's Facebook wall posts and MySpace comments, but the court added that in order to be protected from disclosure, these posts and comments must not be "completely public."¹⁷¹ As a result, under this rule, SCA protection turns on a user's privacy settings.¹⁷²

Other courts have been more willing to release social media information. In *Ledbetter v. Wal-Mart Stores, Inc.*,¹⁷³ for example, a district court in Colorado issued a brief order finding that requests for the private messages, blog entries, photos, user logs, and other social media information of a personal injury defendant were "reasonably calculated to lead to the discovery of admissible evidence."¹⁷⁴ In a similar holding, a state judge in New York granted the defendants access to a personal injury plaintiff's current and historical social media pages.¹⁷⁵ The court held that the plaintiff had no expectation

¹⁶⁷ 717 F. Supp. 2d 965 (C.D. Cal. 2010).

¹⁶⁸ *Id.* at 991.

¹⁶⁹ *Id.* at 968-69.

¹⁷⁰ *Id.* at 981-82. The court further held that the SCA protects unread private messages because storage of these messages was "incidental" to the original transmission. *Id.* at 987.

¹⁷¹ *Crispin*, 717 F. Supp. 2d at 981 (citing *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 875 (9th Cir. 2002)).

¹⁷² Most social media sites allow users to restrict who can view their profiles and information. Facebook users can limit access to their profiles, even tailoring their settings to list which people can view individual pieces of information on their pages. See *Data Use Policy*, FACEBOOK, <http://www.facebook.com/about/privacy/> (last visited Jan. 9, 2012). Similarly, YouTube users can mark their videos as private so they "can only be viewed by others authorized by the user who posted . . . them." *Viacom Int'l v. YouTube, Inc.*, 253 F.R.D. 256, 264 (S.D.N.Y. 2008). Finally, although Twitter's default setting is to make information public, users also can add additional privacy filters. *Twitter Privacy Policy*, TWITTER, <https://twitter.com/privacy> (last visited Jan. 9, 2012).

¹⁷³ No. 06-cv-01958-WYD-MJW, 2009 WL 1067018 (D. Colo. Apr. 21, 2009).

¹⁷⁴ *Id.* at *2.

¹⁷⁵ *Romano*, 907 N.Y.S.2d at 651; see also *Patterson v. Turner Constr. Co.*, 2011 N.Y.

of privacy in her Facebook and MySpace pages because “neither Facebook nor MySpace guarantee complete privacy,” and therefore “when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings.”¹⁷⁶ Both of these decisions, however, omit discussion of the SCA, so it is unclear how—or even if—they would apply in future cases or in other jurisdictions.¹⁷⁷

Attorneys can overcome the SCA’s hurdles by seeking information directly from the social media user. Attorneys, however, need to be careful about how they access these social media profiles. In particular, ethical rules prohibit lawyers from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹⁷⁸ Other rules restrict communications with unrepresented persons¹⁷⁹ as well as persons represented by another attorney.¹⁸⁰ Based on these rules, state bar associations conclude that attorneys can access a user’s social media information in some cases, but not others. Generally, state bar associations have found that accessing a publicly available website or social media page does *not* violate ethics rules prohibiting dishonesty or rules governing communications with adverse parties.¹⁸¹ This is because, as these bodies explain, accessing a public

Slip Op. 07572 (N.Y. App. Div. Oct. 27, 2011) (“The postings on plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access . . .”).

¹⁷⁶ *Id.* at 656-57. One state court went even further, requiring a plaintiff to provide his Facebook and MySpace user names and passwords to the defendant. See *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (Pa. Ct. of Common Pleas Sept. 9, 2010), available at <http://www.padisciplinaryboard.org/documents/McMillen-v-Hummingbird-Speedway.pdf>. The court in this case, however, has been heavily criticized for, among other things, glossing over any relevance analysis in its decision. See, e.g., Venkat, *Court Orders Disclosure of Facebook and MySpace Passwords in Personal Injury Case—McMillen v. Hummingbird Speedway*, TECH. & MKTG. LAW BLOG (Oct. 24, 2010, 10:24 AM), http://blog.ericgoldman.org/archives/2010/10/court_orders_di_1.htm.

¹⁷⁷ There is at least one proposal to amend the Stored Communications Act. See *Electronic Communications Privacy Act Amendments Act of 2011*, S.1011, 112th Cong. (2011). However, these proposed amendments are generally focused on other aspects of the Act.

¹⁷⁸ MODEL RULES OF PROF’L CONDUCT R. 8.4 (2007).

¹⁷⁹ MODEL RULES OF PROF’L CONDUCT R. 4.3 (2007) (stating that a lawyer will not state or imply to an unrepresented person that he is disinterested in the matter and requiring a lawyer to take reasonable steps to correct any misunderstandings that arise).

¹⁸⁰ MODEL RULES OF PROF’L CONDUCT R. 4.2 (2007) (barring a lawyer from communicating with a person represented by counsel about the subject of the representation absent the consent of the other lawyer or a court order).

¹⁸¹ See, e.g., N.Y. State Bar Assoc. Op. 843 (2010) (concluding that accessing a page open to all members of a public network does not implicate a local ethics rule barring deception);

site “is no different from reading a magazine article or purchasing a book written by that adversary.”¹⁸²

However, local bar associations differ on whether ethical rules permit attorneys or their agents to “friend” a potential witness in an effort to gain access to the witness’s information. The Bar Association of the City of New York concluded that “an attorney or her agent may use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.”¹⁸³ The committee explained that such a conclusion is consistent with judicial policies favoring informal discovery.¹⁸⁴ Conversely, the Philadelphia Bar Association concluded that it would be deceptive for a lawyer to ask a third party to request access to a potential witness’s social networking site without first revealing the connection to the lawyer or the true purposes for seeking access.¹⁸⁵

To avoid running into ethical problems attorneys should proceed cautiously when attempting to obtain social media information. Attorneys should not make misrepresentations via social media, especially when those misrepresentations are designed to obtain information that would not otherwise be available.¹⁸⁶ Attorneys also should avoid contact with victims, witnesses, and other individuals involved in an opposing counsel’s case without disclosing their professional interests and affiliations.¹⁸⁷

C. In-House Policies Governing Social Media Use

Social media also pose additional challenges for in-house counsel, and these attorneys need to carefully craft policies governing appropriate social media use. Although the details will depend in part on the needs of the organization, the drafters should consider ad-

Or. State Bar Legal Ethics Comm. Op. 2005-164 (2005) (finding that accessing an opposing party’s public website does not violate ethics rules limiting communications with adverse parties).

¹⁸² Or. State Bar Legal Ethics Comm., Op. 2005-164, at 453.

¹⁸³ N.Y. City Bar Ass’n Comm. on Prof’l and Ethics, Formal Op. 2010-2 (2010).

¹⁸⁴ *Id.*

¹⁸⁵ Phila. Bar Ass’n Prof’l Guidance Comm., Formal Op. No. 2009-02 (2009). The committee stated, however, that it would be permissible for the attorney to “ask[] the witness forthrightly for access.” *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

dressing:

1. *Litigation/Document Holds*

Generally, a party has a duty to preserve information relevant to an issue when it is reasonably foreseeable that the issue is or will be the subject of litigation.¹⁸⁸ Typically, when faced with reasonably anticipated litigation, companies identify individuals and entities connected to litigation as well as the data they may have regarding the relevant issues.¹⁸⁹ The entity then “suspend[s the] routine document retention/destruction policy and put[s] in place a ‘litigation hold’ to ensure the preservation of relevant documents.”¹⁹⁰

Normally, enforcing these litigation or document holds is relatively straightforward because the information is held on a local server, hard drive, or network drive, but social media sites complicate these holds because the information is frequently stored on a third party’s computer, limiting the company’s ability to control the information and ensure that it remains preserved.¹⁹¹ In these cases, the party’s relationship with the service provider or the provider’s terms of service will influence the data preservation process, and parties should be aware of these policies before litigation arises.¹⁹²

2. *Regulatory Requirements*

Corporate social media use also implicates various regulatory limits already placed on offline communications. For example, social media communications could violate federal securities laws and associated securities trading rules, including federal disclosure require-

¹⁸⁸ See *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

¹⁸⁹ *Zubulake*, 220 F.R.D. at 218.

¹⁹⁰ *Id.*

¹⁹¹ This problem is essentially one of “cloud computing.” In cloud computing, users store their data on a virtual platform known as “the cloud,” “where users interact with Internet applications and store data on distant servers rather than on their own hard drives.” *Oregon v. Bellar*, 217 P.3d 1094, 1111 n.10 (Or. Ct. App. 2009) (Sercombe, J., dissenting).

¹⁹² See generally David D. Cross & Emily Kuwahara, *E-Discovery and Cloud Computing: Control of ESI in the Cloud*, EDDE JOURNAL (Spring 2010) <http://www2.americanbar.org/sections/scitech/ST203001/Pages/default.aspx> (last visited Jan. 9, 2012) (discussing the effect of cloud computing on electronic discovery).

ments and antifraud provisions.¹⁹³ Furthermore, allowing employees in the medical industry to use social media without proper training could lead to violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)¹⁹⁴ and other patient privacy laws.¹⁹⁵ As a result, in-house counsel need to consider regulatory rules when crafting corporate social media policies and should examine any relevant agency guidance when interpreting how existing regulatory rules apply in the social media context.

3. *Employment Decisions*

Finally, employers need to consider how to utilize social media when making hiring and firing decisions, as well as how to regulate the social media use of existing employees. Employers are increasingly using social media sites to search for information on prospective employees.¹⁹⁶ These searches can cause additional legal headaches because in addition to providing information on an applicant's ability to perform a particular job, social media sites also can reveal characteristics that are protected under state and federal employment laws, such as the prospective employee's age, ethnicity, gender, religion, marital status, sexual orientation, and other characteristics. Employment decisions cannot be based on this information, but the information often cannot be "unseen" once someone with hiring authority has viewed it.

Further, once an employee is hired, social media sites can disclose what an employee does outside the office, and employers do not always have the freedom to make adverse employment decisions based on those discoveries. Certain states have "lifestyle" statutes that prohibit employers from making employment decisions based on all or some off-duty behavior.¹⁹⁷ As a result, employers must ensure

¹⁹³ See generally Regulatory Notice 10-06: *Social Media Websites*, FINRA, 2 (Jan. 2010), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>; Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45862 (proposed Aug. 7, 2008) (to be codified at 17 C.F.R. pt. 241, 271).

¹⁹⁴ See 42 U.S.C. § 1320d-2(d) (2006 & Supp. IV 2010).

¹⁹⁵ See generally David Gevertz & Gina Greenwood, *Creating an Effective Social Media Policy for Healthcare Employees*, 6 HEALTH LAW. 28, 28-30 (2010) (discussing the risks of social networking in an age of medical privacy laws).

¹⁹⁶ *Id.* at 28.

¹⁹⁷ For example, Colorado, North Dakota, California, and New York have statutes prohibiting discrimination on the basis of lawful conduct outside of work. See COLO. REV. STAT. § 24-34-402.5 (2007); N.D. CENT. CODE § 14-02.4-01 (1993); CAL. LAB. CODE 96(k) (2000);

that they are not making employment decisions based on this information. Generally, however, employers have considerably more latitude to regulate and monitor employee social media use on employer-owned electronic equipment.¹⁹⁸ To minimize the risk that social media searches will lead to an employment discrimination claim, in-house counsel often implement “screening” features in hiring decisions. These features monitor when prospective employees visit certain social media sites, and pass along non-protected information to those who will make the ultimate hiring decisions. With respect to current employees, written policies explaining the appropriate use of social media and contemporaneous documentation of non-discriminatory reasons for adverse employment decisions are generally advisable.

Finally, the National Labor Relations Board has recently begun taking a close look at employers’ social media policies to examine whether the policies inappropriately restrict employees’ rights under Section 7 of the National Labor Relations Act.¹⁹⁹ Where a policy prohibits employees from discussing wages and working conditions, the NLRB has found the policy overly broad.²⁰⁰ Nonetheless, narrowly tailored policies designed to protect business interests (such as maintaining a consistent public message) will usually be considered permissible.²⁰¹

N.Y. LAB. LAW § 201-d(2)(a) (McKinney 1992). California, New York, and the District of Columbia prohibit discrimination based on an employee’s political affiliation. See CAL. LAB. CODE § 1101 (2011); N.Y. LAB. LAW § 201-d (McKinney 1992); D.C. CODE § 2-1402.31(a) (2006). Also, at least sixteen jurisdictions plus the District of Columbia have statutes barring discrimination based on the off-duty use of tobacco. See *Off-Duty Conduct*, NCSL, <http://www.ncsl.org/IssuesResearch/EmploymentWorkingFamilies/EmployeeOff-DutyConduct/tabid/13369/Default.aspx.Portals/1/documents/legismgt/%5CDefault.aspx> (last updated May 30, 2008).

¹⁹⁸ The Supreme Court has not directly addressed employer monitoring of employee social media use, but in *City of Ontario v. Quon*, where the Court upheld an employer’s ability to monitor messages sent on employer-owned pagers, the Court suggested that it plans to proceed on a case-by-case basis in this area of the law. 130 S. Ct. 2619, 2628-29 (2010).

¹⁹⁹ 29 U.S.C. § 157 (2006).

²⁰⁰ *Am. Med. Response of Conn., Inc. and Nat’l Emergency Med. Servs. Ass’n*, No. 34-CA-12576, 2011 WL 1788948, at *30 (N.L.R.B. May 10, 2011).

²⁰¹ See generally Memorandum from Lafe Solomon, Acting Gen. Counsel, N.L.R.B., Report of the Acting General Counsel Concerning Social Media Cases, OM 11-74 (Aug. 18, 2011), available at <http://www.nlr.gov/news/acting-general-counsel-releases-report-social-media-cases>.

VI. CONCLUSION

Some attorneys have found that social media can provide potential benefits in marketing, networking, and as a litigation resource. However, attorneys who are not careful about the use of social media risk breaching client confidences, incurring disciplinary action, or even losing their jobs. Ethical risks include breaching the duty of confidentiality, violating legal advertising rules, and engaging in the unauthorized or inadvertent practice of law. Additionally, attorneys face sanctions for revealing misconduct or disparaging judges on social media sites. The use of social media by judges and judicial employees presents additional ethical and security risks. Judicial employees must ensure that they are not revealing confidential information, posting comments or photos that would reflect poorly on the court, or disclosing information that would put the safety of a judge or judicial employee at risk. Meanwhile, judges need to consider their social media ties to attorneys who appear before them and must decide if, when, and how to use social media to resolve discovery disputes.

Litigators and corporate employers alike hope to take advantage of the bounty of information on most social media sites, but also must make sure that their use of that information complies with legal and ethical standards. Unfortunately, existing ethics rules and legal standards provide few clear guidelines, and fast-changing legal doctrines and technologies add to the complications. Proposed revisions to the ABA's Model Rules of Professional Conduct might provide additional clarity, but are unlikely to resolve the existing questions surrounding the ethical use of social media. As this technology continues its rapid evolution, lawyers should exercise caution in their use of social media. While online actions frequently have offline ethical analogues, social media often exposes tensions inherent in the application of rules written for the pre-Internet practice of law. Nonetheless, by understanding the current rules and following certain best practices, attorneys can take advantage of the potential benefits of social media, while avoiding many of its hazards.

Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites

*John G. Browning**

“The Internet has opened new channels of communication and self-expression Countless individuals use message boards, date matching sites, interactive social networks, blog hosting services, and video sharing websites to make themselves and their ideas visible to the world. While such intermediaries enable the user-driven digital age, they also create new legal problems.”

-Fair Housing Council of San Fernando Valley v. Roommates.com, LLC 489 F.3d 921, 924 (9th Cir. 2007).

I. INTRODUCTION

Imagine encountering the following scenario during the litigation following an industrial accident: just as an expert witness is explaining how all required safety protocols and procedures were diligently followed, opposing counsel confronts him with postings from YouTube videos shot by some of the defendant company’s own employees showing how they cut corners. Or perhaps the defendant driver in a devastating accident denies that he was in a hurry and not paying attention, only to be confronted with his own tweets about being behind schedule. For plaintiff’s counsel, consider the sinking feeling when your client, a grieving widow who has just finished testifying about the void left by the loss of her husband, is impeached with salacious photos and postings from her boyfriend’s MySpace page—all of which are dated months before the accident in which her husband was killed. And of course, there is nothing quite like the look on the face of a “severely and permanently injured” plaintiff who has spun his tale of woe for the jury about barely being able to walk and who now has to explain the photos from his Facebook page depicting his completion of a recent 10k run or a mountain climb in the Pacific Northwest.

Scenarios like these are occurring with increasing frequency in civil litigation—thanks not only to the explosive growth in and sheer pervasiveness of social media, but also to the legal profession’s eagerness to exploit the treasure trove of information to be mined from social networking sites. Roughly half of Internet users in the United States have a profile on a social

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networking site.¹ According to a recent Nielsen survey, individuals devote 22.7% of their online time to social networking.² Not only does this reflect an increase of 43% over the previous year, it also shows that social networking usage is growing more rapidly than any other online activity.³ Facebook, founded in 2004 by Mark Zuckerberg as a way for Harvard University students to stay in touch, now boasts 600 million users.⁴ Roughly half of all Facebook users visit the site at least once a day.⁵ In March 2010, Facebook surpassed Google as the most-visited website in the world.⁶ In December 2010 alone, Americans spent 49.3 billion minutes on Facebook.⁷

The social networking/micro-blogging site Twitter—which allows its users to “tweet” updates of up to 140 characters directly from their cell phones and other wireless devices—was founded in 2006.⁸ Lured by such immediacy and simplicity, Twitter’s ranks quickly swelled to 190 million users.⁹ The site went from handling 20,000 tweets a day in 2007 to a staggering 65 million a day by 2010.¹⁰ Even a site that bills itself as more professional and business-oriented, LinkedIn, has over 90 million members.¹¹

1. *The Infinite Dial 2010: Digital Platforms and the Future of Radio*, EDISON RES. & ARBITRON, (Apr. 8, 2010), http://www.edisonresearch.com/home/archives/2010/04/the_infinite_dial_2010_digital_platforms_and_the_future_of_r.php.
2. *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSEN WIRE, Aug. 2, 2010, http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-socialmedia-and-games-dominate-activity/.
3. *Id.*
4. Nicholas Carson, *Facebook Has More Than 600 Million Users, Goldman Tells Clients*, BUSINESS INSIDER, (Jan. 5, 2011), <http://www.businessinsider.com/facebook-has-more-than-600-million-users-goldman-tells-clients-2011-1>.
5. Julianne Pepitone, *Facebook CEO has “made every mistake you can make,”* CNNMONEY.COM, (Nov. 16, 2010), http://money.cnn.com/2010/11/16/technology/zuckerberg_facebook_web2/index.htm.
6. Julianne Pepitone, *Facebook Traffic Tops Google For the Week*, CNNMONEY.COM, (Mar. 16, 2010), http://money.cnn.com/2010/03/16/technology/facebook_most_visited/.
7. *Facebook’s Fast U.S. Growth Begins to Slow*, DALLAS MORNING NEWS, Jan. 23, 2011, at 3D.
8. Dominic Rushe, *How Twitter Has Become the People’s Voice on the Eve of Its Fifth Birthday*, THE GUARDIAN, (Feb. 13, 2011), <http://www.guardian.co.uk/technology/2011/feb/13/twitter-peoples-voice-fifth-birthday>.
9. *Id.*
10. *Id.*
11. Brenton Cordeiro, *LinkedIn Plans to Raise up to \$175 Million in IPO*, REUTERS, (Jan. 28, 2011), <http://www.reuters.com/article/2011/01/28/us-linkedin-ipo-idUSTRE70Q8UA20110128>.

Given this abundance of photos, video, statements, and other content flooding social networking sites, it is hardly surprising to find lawyers from virtually all areas of practice digging for such digital dirt. A February 2010 study conducted by the American Academy of Matrimonial Lawyers revealed that 81% of the attorneys responding reported finding and using evidence from social networking sites in their cases.¹² The most popular source of such information was Facebook, with 66% of all respondents indicating that they had found evidence on that site.¹³ Prosecutors and criminal-defense attorneys alike have located useful—and sometimes case-making—information from social networking sites, as have family-law practitioners, personal-injury and products-liability specialists, employment lawyers, intellectual-property attorneys, defamation and media lawyers, insurance-coverage practitioners, and even securities litigators. The ranks of lawyers monitoring sites like Facebook and MySpace for useful tidbits of information encompass both the public and private sectors, and include not only outside counsel but in-house lawyers as well. In fact, a 2009 LexisNexis survey of corporate counsel revealed that use of social networks by those working in corporate legal departments had increased approximately 25% in 2009.¹⁴

Social media's inexorable spread across state, national, and even international boundaries, along with the Internet's transformative effect on how people conduct business, is changing traditional notions of jurisdiction. As one court observed, the Internet "makes it possible to conduct business throughout the world entirely from a desk top."¹⁵ Courts across the country have wrestled with whether or not threatening YouTube videos, allegedly defamatory statements on LiveJournal, and even MySpace messages have been sufficient to warrant subjecting individuals in one state to a court's jurisdiction in another.¹⁶

As new media provides ever-increasing access to information that was once thought unavailable—and does so with the speed of a search engine—lawyers and courts have had to confront new problems in presenting cases.

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12. *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers, Facebook is Primary Source for Compromising Information*, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, (Feb. 10, 2010), <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey->.
 13. *Id.*
 14. *Survey Reveals Substantial Growth in Online Social Networking by Lawyers Over the Past Year*, LEXISNEXIS PRODUCT CORNER, (Oct. 15, 2009), http://www.lexisnexis.com/community/ideas/blogs/product_corner/archive/2009/10/15/survey-reveals-socialnetworking-growth-.aspx.
 15. *Jones v. Beech Aircraft Corp.*, 995 S.W.2d 767, 772 (Tex. App.—San Antonio 1999, pet. dism'd w.o.j. [mand. denied]).
 16. *See, e.g., Penachio v. Benedict*, 2010 WL 4505996, at *1 (S.D.N.Y. Nov. 9, 2010); *Miller v. Kelly*, 2010 WL 4684029, at *1 (D. Colo. Nov. 12, 2010); *State v. Pierce*, 792 N.W.2d 83 (Minn. Ct. App. 2010).

Individuals who have long since grown accustomed to gathering news and information on everything from restaurant reviews to medical advice online are now populating the jury box. As a result, jurors are venturing online in increasing numbers to look up legal terms, view crime scenes on Google Earth, comment on the proceedings via Facebook, or even communicate with parties and witnesses through social media. Such online misconduct by “Googling jurors” has resulted in an alarming number of mistrials and overturned verdicts in recent years, prompting a number of states (including, most recently, Texas) to revise their jury instructions to address social media limitations.¹⁷ By the same token, lawyers are exploiting people’s tendency to reveal their online selves by scouring social media sites as part of the jury selection process—from voir dire to “voir Google,” if you will.¹⁸

Litigators have seen evidence from social networking sites prove crucial in all kinds of cases—not just the incriminating Facebook statements of a criminal defendant, or the damaging Twitterpics or YouTube video in a bitter child-custody battle. Glowing testimonials on LinkedIn can make or break an employment case. Customer reviews and comments posted on social media sites have formed the evidence of likelihood of confusion that is so pivotal in trademark-infringement litigation.¹⁹ Postings, and even something as seemingly trivial as a friend request, have surfaced in product-liability, insurance-coverage matters, and even securities litigation. In some instances, judges are not even waiting for parties to bring such evidence to them, but instead are taking judicial notice of it themselves. In one case, for example, a Social Security disability claimant sought additional benefits because of asthma.²⁰ After the Commission of Social Security denied the claim, an administrative-law judge upheld it and denied the claimant’s appeal, finding that his symptoms were not credible.²¹ The judge noted that, “in the course of its own research, it discovered one profile on what is believed to be Plaintiff’s Facebook page where she appears to be smoking If accurately depicted, Plaintiff’s credibility is justifiably suspect.”²²

17. Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS, (Dec. 8, 2010), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208> (shows that since 1999, there have been at least 90 reported decisions involving verdicts challenged as a result of Internet-related juror misconduct).

18. Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, THE WALL STREET JOURNAL, (Feb. 22, 2011), <http://online.wsj.com/article/SB10001424052748703561604576150841297191886.html>.

19. *Chipotle Mexican Grill, Inc. v. Chipotles Grill of Jonesboro, Inc.*, 2011 WL 2292357, at *4 (E.D. Ark. June 9, 2011).

20. *Purvis v. Comm’r of Soc. Sec.*, 2011 WL 741234, at *1 (D. N.J. Feb. 23, 2011).

21. *Id.*

22. *Id.* at *7 n.4.

With the expanding use of social media evidence by lawyers, of course, come new professional risks and pitfalls. Attorneys must remain mindful of the fact that existing ethical rules apply to communications in the digital age as well. Lawyers have found themselves in ethical hot water for making Facebook posts about a case, betraying client confidences, criticizing a judge in blog posts, and sending tweets in which they link to sealed documents.²³ Even victorious attorneys have found their social media posts about time spent on a case and other issues sought during a post-trial dispute over attorney's fees.²⁴ And, as is discussed at greater length elsewhere in this article, several bar association ethics opinions have been issued dealing with the ethical questions raised by an attorney's use of social media sites while investigating and litigating a case.²⁵

Clearly, the cultural tsunami that is social media is altering the legal landscape. Less than 10 years ago, there was no cause of action for defamation by Twitter, no crime of creating a false online persona, and it would not have been possible to serve a defendant with process via a social networking site—yet all three exist today.²⁶ This article will demonstrate that the body of case law developed thus far on the use of social networking is instructive on a whole host of discoverability and evidentiary issues, as litigants and courts alike grapple with what can be obtained from an opposing party's social networking profile, as well as how such content may be used in the courtroom. Litigators in all areas of civil litigation need to understand not only the types of useful evidence to be gleaned from social networking sites, but also how to go about locating and obtaining such evidence, as well as the authentication issues and privacy concerns that have been raised with respect to the admissibility of content from a social networking profile. For lawyers on either side of the docket, and across virtually any area of litigation, evi-

23. JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW* 149-63 (2010).

24. *Muniz v. United Parcel Serv., Inc.*, 2011 WL 311374, at *8 (N.D. Cal. Jan. 28, 2011).

25. *See, e.g.*, Philadelphia Bar Ass'n Prof'l Guidance Comm. Opinion 2009-02 (2009) (a lawyer may not use a third person who does not truthfully represent herself to "friend" a witness and obtain access to that witness's restricted social networking profile); New York City Bar Ass'n Comm. on Prof'l Ethics Formal Opinion 2010-02 (2010) (while a lawyer may access the publicly viewable pages of another party's social networking profile, he may not engage in trickery or misrepresentation in "friending" a witness to gain access to an otherwise private social networking page); San Diego County Bar Ass'n Legal Ethics Opinion 2011-02 (2011) (a lawyer may not "friend" the high-ranking employees of a party whom he knows to be represented by counsel).

26. *See* BROWNING, *supra* note 23.

dence from what Professor Daniel Solove has termed the “permanent chronicle of people’s lives”²⁷ can be a potent weapon indeed.

II. WHAT IS OUT THERE AND HOW TO GET IT

Courts have seemingly undergone a sea change in attitudes toward evidence originating from the Internet. Just twelve years ago, a federal court referred derisively to “voodoo information taken from the Internet,” a source the judge regarded “as one large catalyst for rumor, innuendo, and misinformation,” concluding that “any evidence procured off the Internet is adequate for almost nothing.”²⁸ In more recent years, however, courts across the country have come to expect that lawyers will utilize online resources for everything from performing due diligence on a party being served²⁹ to jury selection.³⁰ At least one federal circuit court has recognized that it is perfectly acceptable for a judge to confirm his or her judicial intuition by conducting an Internet search.³¹

Lawyers love “smoking gun” revelations, and social media evidence can certainly provide those. Even popular culture has gotten into the act. During a first-season episode of the CBS legal drama *The Good Wife*, lawyers from the fictional Stern Lockhart Gardner firm were zealously representing a client needing an emergency medical procedure on her unborn child, for which she had been denied health insurance coverage.³² On cross-examination, the defendant-insurer’s lawyer confronted the husband and father about any misrepresentations he may have made when taking out the policy.³³ After he denied misleading the insurance company and acknowledged that on the application he stated he was a non-smoker, the husband was then impeached with photos from his Facebook page showing him smoking with buddies while on a camping trip.³⁴ With the speed of a search engine, the client’s health care coverage was gone and the judge ruled in favor of the defendant.³⁵

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27. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 11 (2007).
 28. *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774–75 (S.D. Tex. 1999).
 29. *See Munster v. Groce*, 829 N.E.2d 52, 61 n.3 (Ind. Ct. App. 2005) (recognizing the Internet as an acceptable means of “locating a missing litigant”); *Dubois v. Butler ex rel Butler*, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005).
 30. *See Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at *9–10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (per curiam).
 31. *See United States v. Bari*, 599 F.3d 176, 181 (2d Cir. 2010) (per curiam).
 32. *The Good Wife: Heart* (CBS television broadcast Mar. 16, 2010).
 33. *See id.*
 34. *See id.*
 35. *See id.*

To begin the search for social media evidence, see if the litigant or witness-in-question has any social networking profiles. This can be done within the confines of formal discovery, in which interrogatories are propounded inquiring about the party's use of such sites, screen names, passwords, and other account-related information. If it is preferable to proceed more informally, or if the subject is a witness or other non-party, conduct a search on Google, Bing, or other search engines for any social networking profile, or utilize search engines of social networking sites directly. Another option is to go to a site like Spokeo.com,³⁶ which aggregates information about any individual from many sites. If the subject is on multiple social media sites, this search should bring up any social media presence the individual has.

If an individual's online profile is privacy-restricted, and the subject is a party, more formal discovery efforts will be necessary. Assuming, however, that the individual has elected to keep most, if not all, of his or her profile publicly viewable, an abundance of information may be available. Studies show that a majority of social media users either decide to allow these profiles to remain public, or have an insufficient understanding of their privacy options,³⁷ making informal discovery a viable option. While photos, videos, and statements posted on a social networking site are what most lawyers seek during discovery, the evidentiary value of other features associated with such profiles should not be overlooked. For example, mood indicators and emoticons are often employed by a user to share his or her current mood. In personal-injury cases, the "smiley face" used by a plaintiff claiming to be in serious pain or severely depressed can be used against them. In a New York case involving allegations of police brutality, the officer in question was confronted not only with his Facebook status update that referenced watching the movie *Training Day*³⁸ "to brush up on proper police procedure," but also with the fact that his mood indicator had been set to "devious," complete with an angry red emoticon being licked by flames.³⁹

Other often-overlooked features can also be used as valuable evidence in a case. The list of someone's Facebook "friends," for example, can lead to other potential witnesses or can itself serve as evidence to establish a witness's possible bias. Attorneys have also attempted, with varying degrees of success, to use status updates themselves as evidence. In *State v. Corwin*, the Missouri Court of Appeals upheld the exclusion of a sexual-assault victim's

36. SPOKEO.COM, <http://www.spokeo.com> (last visited Aug. 9, 2011).

37. See Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook*, PRIVACY ENHANCING TECHNOLOGIES WORKSHOP, CARNEGIE MELLON UNIVERSITY, at 13 (2006), available at <http://citeseer.ist.psu.edu/viewdoc/summary?doi=10.1.1.73.2056>. (reporting that nearly half of Facebook users surveyed gave incorrect answers when asked who could view their profiles on the site).

38. TRAINING DAY (Warner Bros. 2001).

39. See BROWNING, *supra* note 23, at 107-08.

Facebook status update.⁴⁰ In response to the victim's allegation of date rape, the defense tried to introduce status updates from other nights to purportedly demonstrate the victim's habit of binge drinking and inability to remember events.⁴¹ The court held, however, that updates not "even tangentially related to the events of the night in question" were irrelevant and were properly excluded.⁴² In November 2009, an armed-robbery suspect in New York was able to get all charges dismissed after his Facebook status update and other corroborating evidence—like server records and eyewitness testimony—established his alibi.⁴³ In one Canadian case, a plaintiff claimed that he was physically unable to return to his job, which involved office work at a computer.⁴⁴ However, the court upheld the defense's admission of the plaintiff's Facebook log-on/log-off server records to demonstrate his extensive late-night computer usage, thereby undermining the plaintiff's claims.⁴⁵

Even basic profile information, like one's contacts or employer listed on LinkedIn, can be extremely useful evidence. In a recent age-discrimination case, casino gaming giant Harrah's maintained that it was not actually the plaintiff's employer.⁴⁶ However, in addition to showing that he received a Harrah's employee handbook and paychecks signed by Harrah's personnel, the plaintiff demonstrated that the primary defense witness—his supervisor—denied working for Harrah's on the stand yet identified Harrah's as his employer on his LinkedIn profile.⁴⁷ The judge found that the supervisor was not a credible witness and ruled for the plaintiff.⁴⁸

Many lawyers assume that directly issuing a subpoena to a social networking site itself is the best way to formally obtain social media evidence. In reality, social networking sites are notoriously resistant to such efforts, perhaps due to the criticism and lawsuits leveled against them over alleged failures to protect user privacy. Sending subpoenas to social media sites raises privacy issues and Stored Communications Act⁴⁹ (SCA) implications that will be addressed later in this article. As a practical matter, a review of Facebook's view on its role in the discovery process reveals the potential futility of such actions.

40. *State v. Corwin*, 295 S.W. 3d 572, 579 (Mo. Ct. App. 2009).

41. *See id.*

42. *Id.*

43. BROWNING, *supra* note 23, at 214–16.

44. *See Bishop v. Minichiello*, 2009 BCSC 358 (Can.).

45. *Id.* at ¶¶ 56–67.

46. *See Blayde v. Harrah's Entm't, Inc.*, No. 2:08-cv-02798-BBD-cgc, 2010 WL 5387486, at *1 (W.D. Tenn. Dec. 17, 2010) (mem. op.).

47. *See id.* at *8.

48. *See id.*

49. 18 U.S.C. §§ 2701–2712.

Facebook urges parties to civil litigation to resolve their discovery issues without involving Facebook. Almost without exception, the information sought by parties to civil litigation is in the possession of, and readily accessible to, a party to the litigation. Requests for account information are therefore better obtained through party discovery.

Federal law and Facebook policies prohibit the disclosure of user information. Specifically, the Stored Communication Act, 18 U.S.C. § 2701 et seq., prohibits Facebook from disclosing the contents of a user's Facebook account to any non-governmental entity even pursuant to a valid subpoena or court order. The most Facebook can provide is the basic subscriber information for a particular account.

If a Facebook user deletes content from their account, Facebook will not be able to provide that content. Effectively, Facebook and the applicable Facebook user have access to the same account. To the extent a user claims it does not have access to content (e.g., the user terminated their account), Facebook will restore access to allow that user to collect and produce the information to the extent possible.⁵⁰

Facebook also charges a mandatory, non-refundable processing fee of \$500 per user account, an additional \$100 for a notarized declaration from the records custodian, and requires a valid California or Federal subpoena to be served on Facebook.⁵¹ Out-of-state civil litigants must have their subpoena domesticated by a California court.⁵² MySpace has similar policies, but also requires more information than a party might readily have, such as the "user's unique friend ID number or URL," the user's ZIP code, the password associated with the account, and the birth date provided to MySpace.⁵³ Another obstacle one might encounter is that an attorney's idea of social networking profile content is likely to be different from—and more extensive than—the basic subscriber information or account information that a site might be willing to release, albeit reluctantly.

The most effective methods of obtaining discovery of the contents of a party's social networking profile are propounding specific, well-tailored discovery requests to the party himself, or by having that party execute a consent form or authorization permitting the holder to obtain such content directly from a social networking site.⁵⁴ In terms of discovery requests, refrain from being excessively global (i.e., "all contents of any and all social

50. *Digital Forensics & eDiscovery Advisory—Facebook Subpoenas*, CONTINUUM WORLDWIDE (Oct. 13, 2010), http://continuumwww.com/Libraries/PDFs/DF_eD_101310.sflb.ashx.

51. *Id.*

52. *Id.*

53. Sam Glover, *Subpoena MySpace information*, LAWYERIST.COM (July 17, 2009), <http://lawyerist.com/subpoena-myspace-information>.

54. See Joel Patrick Schroeder & Leita Walker, *Social Media in Civil Litigation*, FAEGRE & BENSON LLP (Oct. 14, 2010), <http://faegre.com/12201>.

media profiles of John Doe”).⁵⁵ Instead, be specific in what is sought, and tie it to the claims or defenses in the case.⁵⁶ For example, instead of just a blanket request for all content, seek “all online profiles, postings, messages (including, but not limited to, tweets, replies, re-tweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), photographs, videos, and online communication” relating to particular claims, allegations of mental anguish or emotional distress, defenses, et cetera.

*Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*⁵⁷ is particularly illuminating on the subject of what social media discovery might be deemed relevant or reasonably calculated to lead to the discovery of admissible evidence. *Mackelprang* involved claims of sexual harassment and a hostile work environment, allegedly culminating in emotional distress so severe that it led to plaintiff’s two suicide attempts.⁵⁸ The court rejected the defense’s efforts to obtain discovery of plaintiff’s MySpace content and private messages regarding any of her sexual conduct or relationships.⁵⁹ It questioned the relevance of non-work-related sexual relationships, reasoning that “what a person views as acceptable or welcomed sexual activity or solicitation in his or her private life, [sic] may not be acceptable or welcomed from a fellow employee or a supervisor.”⁶⁰ However, the court did permit discovery of the plaintiff’s online accounts, any online statements referring to her lawsuits, any online activity around the time of her two alleged suicide attempts and attributed to the defendant’s treatment of her, and any information relevant to her emotional-distress claims.⁶¹ Incidentally, the defense claimed that the plaintiff “was voluntarily pursuing, encouraging or even engaging in extramarital relationships on or through MySpace.”⁶² The discovery allowed by the court revealed that Mackelprang had two MySpace pages: one created just before the lawsuit was filed, in which the plaintiff identifies herself as a happily married woman and loving mother of several children, and a second page created around the time of the alleged affairs in which she holds herself out as single and not wanting kids.⁶³

55. See Rachel K. Alexander, *E-Discovery Practice, Theory, & Precedent: Finding the Right Pond, Lure, & Lines Without Going On A Fishing Expedition*, 56 S.D. L. REV. 25, 65 (2011).

56. See Schroeder, *supra* note 54.

57. *Mackelprang v. Fidelity Nat’l Title Agency of Nev., Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *1 (D. Nev. Jan. 9, 2007).

58. See *id.* at *1, *8.

59. See *id.* at *6.

60. *Id.*

61. See *id.* at *8.

62. *Mackelprang*, 2007 WL 119149, at *3.

63. See *id.*

With respect to having the party sign a written consent, the SCA allows a holder of electronic communications like Facebook to provide the user's records with "the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service"⁶⁴ A properly drafted consent form should include the account holder or user's name, any user ID, group ID, or known screen name, along with the person's date of birth and address, including email address. The consent should also include—much like a well-drafted discovery request—a detailed description of what is being sought.

Finally, it should also bear the notarized signature of the person giving consent. If the party/account holder refuses to sign the consent, one should file a motion to compel and seek a court order forcing that party to execute the consent. The usual objections to granting a motion to compel are rooted in privacy concerns. And, as will be discussed in more detail, courts tend to cast a jaundiced eye on claims that something is "private" when it has already been communicated to one or more friends on a social networking site—even with privacy restrictions. Case authority indicates that a party may be compelled to produce information from private online profiles.⁶⁵ In the event that the information produced gives rise to a belief that information has been withheld, removed, or altered, consider requesting a forensic examination of the party's hard drive or wireless device. In Texas, for example, such access may be granted, particularly if the party's conduct suggests that the party may be withholding, concealing, or destroying discoverable electronic information.⁶⁶

Gathering information from social networking profiles of those who have restricted access to part or all of their page—in effect allowing only designated "friends" to view private material—presents ethical issues as well. May a lawyer, or someone working for that lawyer, try to become someone's "friend" in order to gain access to private content? Of course, if the person is a represented party (such as the plaintiff in a personal-injury suit) the answer is a resounding "no." Rule 4.2 of the Rules of Professional Conduct stipulates that a lawyer may not communicate, or cause another person to communicate, with a person represented by counsel without the prior

64. 18 U.S.C. § 2702(b)(3) (2006).

65. *See, e.g.*, *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 654 (N.Y. Sup. Ct. 2010) (holding that evidence on plaintiff's online profiles was likely material and necessary regardless of privacy settings); *Flagg v. City of Detroit*, No. 05-74253, 2008 WL 787061, at *1 (E.D. Mich. March 20, 2008) (where the city was compelled to produce the text messages of former Mayor Kwame Kilpatrick and the employee with whom he was having an affair on the grounds that even the records held by an Internet service provider were within the city's constructive control and custody). *See also* *O'Grady v. Superior Court of Santa Clara County*, 44 Cal. Rptr.3d 72, 88 (Cal. App. Ct. 2006).

66. *In re Weekley Homes*, 295 S.W.3d 309, 313–16 (Tex. 2009); *In re Honza*, 242 S.W.3d 578, 581–82 (Tex. App.—Waco 2008, no pet.).

consent of the party's attorney.⁶⁷ But even if the individual in question is not a represented party, an attorney must tread very carefully. Rule 4.1 of the Rules of Professional Conduct mandates that a lawyer, in the course of representing a client, may not knowingly "make a false statement of material fact or law to a third person."⁶⁸

In 2009 and 2010, two bar associations' ethics opinions dealt with this issue head on. In March 2009, the Philadelphia Bar Association's Professional Guidance Committee dealt with an inquiry from an attorney about the propriety of asking a third party to "friend" a witness in order to gain access to her Facebook and MySpace pages.⁶⁹ The lawyer already deposed the witness, learned of her social media presence, and concluded that her testimony would be beneficial.⁷⁰ While the lawyer did not ask the witness about the information on her profiles or request access to them, the lawyer learned through subsequent visits that she had restricted access to "friends" only.⁷¹ The lawyer wanted to know if he could ethically have a third party "friend" the witness to gain information to use against the witness without revealing the third party's affiliation with the lawyer.⁷²

The Philadelphia Bar Association's Professional Guidance Committee found that such conduct runs the risk of violating several ethics rules, including Pennsylvania's equivalent of Rule 4.1.⁷³ Using a non-lawyer assistant, such as a paralegal, does not relieve an attorney of responsibility for the conduct of such assistants under Rule 8.4 of the Rules of Professional Conduct.⁷⁴ The Committee reasoned that failing to disclose the third party's affiliation with the lawyer "omits a highly material fact," an omission that:

would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she [might] not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.⁷⁵

In September 2010, the New York City Bar Association's Committee on Professional Ethics also weighed in on the same issue confronted by its Phil-

67. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010).

68. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2010).

69. Phila. Bar Ass'n on Prof'l Guidance, Op. 2009-02 (2009), http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Phila. Bar Ass'n on Prof'l Guidance, Op. 2009-02 (2009).

75. *Id.*

adelphia counterpart.⁷⁶ And, like Philadelphia, the New York City Bar's ethics authorities pointed to Rule 4.1's prohibition against knowingly making a false statement of fact to a third person, as well as to Rule 8.4's ban on conduct involving dishonesty, deception, fraud, or misrepresentation.⁷⁷ The New York opinion took note of the increasing use of social media sites by lawyers, and specifically mentioned potential ruses like creating a fake Facebook profile or contacting a YouTube account holder to access a "channel" in order to view his digital postings.⁷⁸ The New York City Bar Committee pointed out that pursuing such deceptive avenues was easier in cyberspace than in person, and increased the risk of strangers gaining unfettered access to all kinds of personal information.⁷⁹ The committee took pains to point out, however, that there are no ethical restrictions against lawyers accessing publicly viewable pages of another party's social-networking profiles.⁸⁰

In May 2011, San Diego County Bar Association's Legal Ethics Committee tackled a somewhat different scenario—that of *ex parte* communication via social media to a represented party.⁸¹ The facts involved a lawyer representing a plaintiff in a wrongful-discharge action against a former employer.⁸² The lawyer wanted to know if it was permissible to send out "friend" requests to two employees at the defendant's company, hoping that these employees would make disparaging comments about the employer on Facebook (a forum in which the lawyer felt they'd be more forthright than in a deposition).⁸³ The committee rejected the idea that friend requests are not about "the subject of the representation" (and therefore innocuous).⁸⁴ The committee similarly swept aside the argument that "friending" a represented party is no different than accessing an opposing party's public website.⁸⁵

76. See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2010-2 (2010), <http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* Similarly, the New York State Bar Association issued a formal ethics opinion stating that there is nothing unethical about a lawyer accessing the publicly viewable pages of an adverse party's social media profile for "the purpose of obtaining possible impeachment material for use in the litigation." N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010).

81. San Diego County Bar Ass'n on Legal Ethics, Op. 2011-2 (2011), <http://www.sdcba.org/index.cfm?pg=LEC2011-2>.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

While the Committee, like its counterparts in New York and Philadelphia, embraced the concept that a lawyer may ethically access and view public social media profiles of parties other than the lawyer's client, it concluded that the rules of ethics bar an attorney from making an *ex parte* friend request of a represented party. Reasoning that "represented parties shouldn't have 'friends' like that," the committee sought to strike "the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented."⁸⁶

III. AUTHENTICATION ISSUES

Once social-networking evidence has been obtained, of course, the next hurdle is getting it admitted. As with all evidence, the offering party must be prepared to demonstrate that the content from a social networking site is (1) relevant, (2) authentic, and (3) not subject to being excluded under the hearsay or best evidence rules.⁸⁷ Satisfying the first and third prongs of this test will vary considerably based on the particular facts of each case. With regard to the authenticity requirement, courts have been reluctant to come up with unique rules for authenticating electronic data.⁸⁸ In dispensing with an appellant's contention that emails and text messages are "inherently unreliable" and would have to be the subject of a "whole new body of law," one court noted that electronic communications could be properly authenticated within the existing legal framework, since "the same uncertainties exist with traditional written documents. A signature can be forged, a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen."⁸⁹

Upon a determination that the information is relevant and can be heard by the jury, Federal Rule of Evidence 901 requires that the attorney presenting the evidence make a *prima facie* showing of genuineness.⁹⁰ It is then up to the finder of fact to decide authenticity.⁹¹ For example, in one commercial litigation and defamation case involving competing providers of satellite-tel-

86. *Id.*

87. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 (D. Md. 2007) (explaining that electronic information must be relevant, authentic, and not excluded under the hearsay rules).

88. *See generally* Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 7 (2009) (explaining why "the existing rules of evidence are adequate to the task of addressing questions about the admissibility of such electronic evidence").

89. *In re* F.P., 878 A.2d 91, 95 (Pa. Super. Ct. 2005).

90. Fed. R. Evid. 901.

91. *Telewizja Polska USA, Inc. v. Echostar Satellite*, No. 02 C3293, 2004 WL 2367740, at *6 (N.D. Ill. Oct. 15, 2004).



FORMAL OPINION 2014-300

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

I. Introduction and Summary

“Social media” or “social networking” websites permit users to join online communities where they can share information, ideas, messages, and other content using words, photographs, videos and other methods of communication. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, LinkedIn, and Twitter, are designed to permit users to share information about their personal and professional activities and interests. As of January 2014, an estimated 74 percent of adults age 18 and over use these sites.¹

Attorneys and clients use these websites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys use the sites and in the advice attorneys provide to clients who use them. The Rules of Professional Conduct apply to all of these uses.

The issues raised by the use of social networking websites are highly fact-specific, although certain general principles apply. This Opinion reiterates the guidance provided in several previous ethics opinions in this developing area and provides a broad overview of the ethical concerns raised by social media, including the following:

1. Whether attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.
5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror's Internet presence.

¹ <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>

10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror's Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

This Opinion addresses social media profiles and websites used by lawyers for business purposes, but does not address the issues relating to attorney advertising and marketing on social networking websites. While a social media profile that is used exclusively for personal purposes (*i.e.*, to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, the Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.

II. Background

A social networking website provides a virtual community for people to share their daily activities with family, friends and the public, to share their interest in a particular topic, or to increase their circle of acquaintances. There are dating sites, friendship sites, sites with business purposes, and hybrids that offer numerous combinations of these characteristics. Facebook is currently the leading personal site, and LinkedIn is currently the leading business site. Other social networking sites include, but are not limited to, Twitter, Myspace, Google+, Instagram, AVVO, Vine, YouTube, Pinterest, BlogSpot, and Foursquare. On these sites, members create their own online "profiles," which may include biographical data, pictures and any other information they choose to post.

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to "friend" them) as well as to invite friends of friends or others.

Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the “public,” “friends,” and “others.” For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows “friends of friends” to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person’s posts and other items.

These are just a few of the main features of social networking websites. This Opinion does not address every feature of every social networking website, which change frequently. Instead, this Opinion gives a broad overview of the main ethical issues that lawyers may face when using social media and when advising clients who use social media.

III. Discussion

A. Pennsylvania Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney’s responsibilities towards clients, potential clients, and other parties. Although no Pennsylvania Rule of Professional Conduct specifically addresses social networking websites, this Committee’s conclusions are based upon the existing rules. The Rules implicated by these issues include:

- Rule 1.1 (“Competence”)
- Rule 1.6 (“Confidentiality of Information”)
- Rule 3.3 (“Candor Toward the Tribunal”)
- Rule 3.4 (“Fairness to Opposing Party and Counsel”)
- Rule 3.5 (“Impartiality and Decorum of the Tribunal”)
- Rule 3.6 (“Trial Publicity”)
- Rule 4.1 (“Truthfulness in Statements to Others”)
- Rule 4.2 (“Communication with Person Represented by Counsel”)
- Rule 4.3 (“Dealing with Unrepresented Person”)
- Rule 8.2 (“Statements Concerning Judges and Other Adjudicatory Officers”)
- Rule 8.4 (“Misconduct”)

The Rules define the requirements and limitations on an attorney’s conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

B. General Rules for Attorneys Using Social Media and Advising Clients About Social Media

Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. A few Rules of

Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

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

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients' obligation to preserve information that may be relevant to their legal disputes.

Comment [8] to Rule 1.1 further explains that, "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..." Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

Another Rule applicable in almost every context, and particularly relevant when social media is involved, is Rule 8.4 ("Misconduct"), which states in relevant part:

It is professional misconduct for a lawyer to:

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

This Rule prohibits "dishonesty, fraud, deceit or misrepresentation." Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated. This Opinion frequently refers to Rule 8.4, because its basic premise permeates much of the discussion surrounding a lawyer's ethical use of social media.

C. Advising Clients on the Content of their Social Media Accounts

As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client's social media profile, an attorney may and often should advise a client about the content on the client's profile.

Against this background, this Opinion now addresses the series of questions raised above.

1. Attorneys May, Subject to Certain Limitations, Advise Clients About The Content Of Their Social Networking Websites

Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client's social media account.

For example, in a Miami, Florida case, a man received an \$80,000.00 confidential settlement payment for his age discrimination claim against his former employer.² However, he forfeited that settlement after his daughter posted on her Facebook page “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff \$80,000.00.

The Virginia State Bar Disciplinary Board³ suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client’s Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney’s violations of Virginia’s rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed \$722,000 in sanctions (\$542,000 upon the lawyer and \$180,000 upon his client) to compensate opposing counsel for their legal fees.⁴

While these may appear to be extreme cases, they are indicative of the activity that occur involving social media. As a result, lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client’s social media account.

Three Rules of Professional Conduct are particularly important when addressing a lawyer’s duties relating to a client’s use of social media.

Rule 3.3 states:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; ...
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal’s adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal

² “Girl costs father \$80,000 with ‘SUCK IT’ Facebook Post, March 4, 2014: <http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/>

³ *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

⁴ *Lester v. Allied Concrete Co.*, Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)

- or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.4 states:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Rules do not prohibit an attorney from advising clients about their social networking websites. In fact, and to the contrary, a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute.

The Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-5, concluding that a lawyer may advise a client to change the privacy settings on the client's social media page but may not instruct a client to destroy any relevant content on the page. Additionally, a lawyer must respond to a discovery request with any relevant social media content posted by the client. The Committee found that changing a client's profile to "private" simply restricts access to the content of the page but does not completely prevent the opposing party from accessing the information. This Committee agrees with and adopts the guidance provided in the Philadelphia Bar Association Opinion.

The Philadelphia Committee also cited the Commercial and Federal Litigation Section of the New York State Bar Association and its "Social Media Guidelines," which concluded that a lawyer may advise a client about the content of the client's social media page, to wit:

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well 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.
- Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject

to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises⁵

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.⁶

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)'s prohibition against "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information, regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter.

Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making "a false statement of material fact or law." If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

2. Attorneys May Ethically Connect with Clients or Former Clients on Social Media

Social media provides many opportunities for attorneys to contact and connect with clients and other relevant persons. While the mode of communication has changed, the Rules that generally address an attorney's communications with others still apply.

There is no *per se* prohibition on an attorney connecting with a client or former client on social media. However, an attorney must continue to adhere to the Rules and maintain a professional relationship with clients. If an attorney connects with clients or former clients on social networking sites, the attorney should be aware that his posts may be viewed by clients and former clients.

Although this Committee does not recommend doing so, if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice. As outlined below, an attorney must not reveal confidential client information on social media. While the Rules do not prohibit connecting with clients on social media, social media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

⁵ *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted).

⁶ <http://www.ncbar.com/ethics/printopinion.asp?id=894>

3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited,⁷ it would also be prohibited while using social networking websites.

Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party's lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02,⁸ that an attorney may not use an intermediary to access a witness' social media profiles. The inquirer sought access to a witness' social media account for impeachment purposes. The inquirer wanted to ask a third person, *i.e.*, "someone whose name the witness will not recognize," to go to Facebook and Myspace and attempt to "friend" the witness to gain access to the information on the pages. The Committee found that this type of pretextual "friending" violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2,⁹ concluding that an attorney is prohibited from making an *ex parte* "friend" request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that "friending" a represented party violates Rule 4.2.

While it would be forbidden for a lawyer to "friend" a represented party, it would be permissible for the lawyer to access the public portions of the represented person's social networking site, just as it would be permissible to review any other public statements the person makes. The New York State

⁷ See, e.g., Formal Opinion 90-142 (updated by 2005-200), in which this Committee concluded that, unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct *ex parte* communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.

⁸ Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).

⁹ San Diego County Bar Assn., Legal Ethics Comm., Op. 2011-2 (2011).

Bar Association Committee on Professional Ethics issued Opinion 843,¹⁰ concluded that lawyers may access the public portions of other parties' social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

This Committee agrees that accessing the public portion of a represented party's social media site does not involve an improper contact with the represented party because the page is publicly accessible under Rule 4.2. However, a request to access the represented party's private page is a prohibited communication under Rule 4.2

4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information¹¹

Communication with an unrepresented party through a social networking website is governed by the same general rule that, if the contact is prohibited using other forms of communication, then it is also prohibited using social media.

Rule 4.3 states in relevant part:

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. . . .
- (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Connecting with an unrepresented person through a social networking website may be ethical if the attorney clearly identifies his or her identity and purpose. Particularly when using social networking websites, an attorney may not use a pretextual basis when attempting to contact the unrepresented person. Rule 4.3(a) instructs that "a lawyer shall not state or imply that the lawyer is disinterested." Additionally, Rule 8.4(c) (discussed above) prohibits a lawyer from using deception. For example, an attorney may not use another person's name or online identity to contact an unrepresented person; rather, the attorney must use his or her own name and state the purpose for contacting the individual.

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony¹². He was fired for "unethical behavior," which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

¹⁰ New York State Bar Assn., Comm. on Prof'l Ethics, Op. 843 (2010).

¹¹ Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

¹² "Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook," June 7, 2013. <http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/>

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee¹³ concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, “[t]he underlying principles of fairness and honesty are the same, regardless of context.”¹⁴ The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02,¹⁵ the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness’ social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05,¹⁶ concluding that a lawyer may not use deception to access the private portions of an unrepresented person’s social networking account. The Committee noted, “A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge.”

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189,¹⁷ concluding that a lawyer may request access to an unrepresented party’s social networking website if the lawyer is truthful and does not employ deception.

These Committees consistently conclude that a lawyer may not use deception to gain access to an unrepresented party’s page, but a lawyer may request access using his or her real name. There is, however, a split of authority among these Committees. The Philadelphia and New Hampshire Committees would further require the lawyer to state the purpose for the request, a conclusion with which this Committee agrees. These Committees found that omitting the purpose of the contact implies that the lawyer is disinterested, in violation of Rule 4.3(a).

This Committee agrees with the Philadelphia Opinion (2009-02) and concludes that a lawyer may not use deception to gain access to an unrepresented person’s social networking site. A lawyer may ethically request access to the site, however, by using the lawyer’s real name and by stating the lawyer’s purpose for the request. Omitting the purpose would imply that the lawyer is disinterested, contrary to Rule 4.3(a).

5. Attorneys May Use Information Discovered on a Social Networking Website in a Dispute

If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of

¹³ Kentucky Bar Assn., Ethics Comm., Formal Op. KBA E-434 (2012).

¹⁴ *Id.* at 2.

¹⁵ Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).

¹⁶ New Hampshire Bar Assn., Ethics Comm., Op. 2012-13/05 (2012).

¹⁷ Oregon State Bar, Legal Ethics Comm., Op. 2013-189 (2013).

this Opinion. As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client's postings on social media may potentially be used against the client's interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

For example, in 2011, a New York¹⁸ court ruled against a wife's claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife's postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

Courts have, with increasing frequency, permitted information from social media sites to be used in litigation, and have granted motions to compel discovery of information on private social networking websites when the public profile shows relevant evidence may be found.

For example, in *McMillen v. Hummingbird Speedway, Inc.*,¹⁹ the Court of Common Pleas of Jefferson County, Pennsylvania granted a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.*,²⁰ the Court similarly granted a defendant's request for access to a plaintiff's social media accounts because the Court believed, based on the public portions of plaintiff's account, that the information may be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In *Largent v. Reed*,²¹ a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff's social media accounts. The Court engaged in a lengthy discussion of Facebook's privacy policy and Facebook's ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in *McCann v. Harleysville Insurance Co.*,²² a New York court denied a defendant access to a plaintiff's social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a "fishing expedition" that was too broad to be granted. Similarly, in *Trail v. Lesko*,²³ Judge R. Stanton Wettick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a

¹⁸ *B.M. v D.M.*, 31 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).

¹⁹ *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).

²⁰ *Romano v Steelcase Inc.*, 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).

²¹ *Largent v. Reed*, No. 2009-1823 (Pa.Ct.Com.Pl. Franklin Cty. 2011).

²² *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524 (N.Y. App. Div. 4th Dep't 2010).

²³ *Trail v. Lesko*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Pa. County Ct. 2012).

plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant did not produce any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook account would have been needlessly intrusive.

6. Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy

Some social networking websites permit a member or other person, including clients and former clients, to recommend or endorse a fellow member's skills or accomplishments. For example, LinkedIn allows a user to "endorse" the skills another user has listed (or for skills created by the user). A user may also request that others endorse him or her for specified skills. LinkedIn also allows a user to remove or limit endorsements. Other sites allow clients to submit reviews of an attorney's performance during representation. Some legal-specific social networking sites focus exclusively on endorsements or recommendations, while other sites with broader purposes can incorporate recommendations and endorsements into their more relaxed format. Thus, the range of sites and the manner in which information is posted varies greatly.

Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney's social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. For example, if a lawyer limits his or her practice to criminal law, and is "endorsed" for his or her expertise on appellate litigation on the attorney's LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.

Similarly, the Rules do not prohibit an attorney from soliciting reviews from clients about the attorney's services on an attorney's social networking site, nor do they prohibit an attorney from posting comments by others.²⁴ Although requests such as these are permissible, the attorney should monitor the information so as to verify its accuracy.

Rule 7.2 states, in relevant part:

- (d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.
- (e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

Rule 7.2(d) prohibits any endorsement by a celebrity or public figure. A lawyer may not solicit an endorsement nor accept an unsolicited endorsement from a celebrity or public figure on social

²⁴ In *Dwyer v. Cappell*, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.

media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

Even if the endorsement is not made by a celebrity or a paid endorser, the post must still be accurate. Rule 8.4(c) is again relevant in this context. This Rule prohibits lawyers from dishonest conduct and making misrepresentations. If a client or former client writes a review of a lawyer that the lawyer knows is false or misleading, then the lawyer has an obligation to correct or remove the dishonest information within a reasonable amount of time. If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item.

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8,²⁵ concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted.²⁶ Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer's services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client's level of satisfaction with the lawyer-client relationship.

This Committee agrees with the North Carolina Committee's findings. Attorneys may request or permit clients to post positive reviews, subject to the limitations of Rule 7.2, but must monitor those reviews to ensure they are truthful and accurate.

7. Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information

Attorneys may not disclose confidential client information without the client's consent. This obligation of confidentiality applies regardless of the context. While the issue of disclosure of confidential client information extends beyond this Opinion, the Committee emphasizes that attorneys may not reveal such information absent client approval under Rule 1.6. Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege. Consequently, a lawyer's comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client's informed consent.

This Committee has opined, in Formal Opinion 2014-200,²⁷ that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as "information relating to representation," which is generally very broad. While there are

²⁵ North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

²⁶ Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.

²⁷ Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-200 (2014).

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.

As Rule 1.6 states:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
- (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
- (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
 - (4) 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 or disciplinary proceeding 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
- (d) 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.
- (e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Thus, any information that an attorney posts on social media may not violate attorney/client confidentiality.

An attorney's communications to a client are also confidential. In *Gillard v. AIG Insurance Company*,²⁸ the Pennsylvania Supreme Court ruled that the attorney-client privilege extends to communications from attorney to client. The Court held that "the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice."²⁹ The court noted that communications from attorney to client come with a certain expectation of privacy. These communications only originate because of a confidential communication from the client. Therefore, even revealing information that the attorney has said to a client may be considered a confidential communication, and may not be revealed on social media or elsewhere.

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO³⁰. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

²⁸ *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).

²⁹ *Id.* at 59.

³⁰ *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

The Illinois disciplinary action is consistent with this Committee's recent Opinion and with the Pennsylvania Rules. A lawyer is not permitted to reveal confidential information about a client even if the client posts a negative review about the lawyer. Rule 1.6(d) instructs a lawyer to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client." This means that a lawyer must be mindful of any information that the lawyer posts pertaining to a client. While a response may not contain confidential client information, an attorney is permitted to respond to reviews or endorsements on social media. These responses must be accurate and truthful representations of the lawyer's services.

Also relevant is Rule 3.6, which states:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This Rule prohibits lawyers from making extrajudicial statements through public communication during an ongoing adjudication. This encompasses a lawyer updating a social media page with information relevant to the proceeding. If a lawyer's social media account is generally accessible publicly then any posts about an ongoing proceeding would be a public communication. Therefore, lawyers should not be posting about ongoing matters on social media when such matters would reveal confidential client information.

For example, the Supreme Court of Illinois suspended an attorney for 60 days³¹ for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

Some social networking sites allow members to endorse other members' skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. As previously noted, Rule 8.4(c) prohibits an attorney from being dishonest or making

³¹ *In Re Peshek*, No. M.R. 23794 (Il. 2010); Compl., *In Re Peshek*, Comm. No. 09 CH 89 (Il. 2009).

misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror's Internet Presence

The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror's social media presence but may not attempt to access the private portions of a juror's page.

Rule 3.5 states:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate;
 - or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

During jury selection and trial, an attorney may access the public portion of a juror's social networking website but may not attempt or request to access the private portions of the website. Requesting access to the private portions of a juror's social networking website would constitute an *ex parte* communication, which is expressly prohibited by Rule 3.5(b).

Rule 3.5(a) prohibits a lawyer from attempting to influence a juror or potential juror. Additionally, Rule 3.5(b) prohibits *ex parte* communications with those persons. Accessing the public portions of a juror's social media profile is ethical under the Rules as discussed in other portions of this Opinion. However, any attempts to gain additional access to private portions of a juror's social networking site would constitute an *ex parte* communication. Therefore, a lawyer, or a lawyer's agent, may not request access to the private portions of a juror's social networking site.

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466 concluded that a lawyer may view the public portion of the social networking profile of a juror or potential juror but may not communicate directly with the juror or jury panel member. The Committee determined that a lawyer, or his agent, is not permitted to request access to the private portion of a juror's or potential juror's social networking website because that type of *ex parte* communication would violate Model Rule 3.5(b). There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.

This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5's prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.³²

Various Rules address this concern. For example, Rule 8.2 states:

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

In addition, Comment [4] to Canon 2.9 of the Code of Judicial Conduct, effective July 1, 2014, states that "A judge shall avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media." Thus, the Supreme Court has implicitly agreed that judges may participate in social media, but must do so with care.

Based upon this statement, this Committee believes that attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no *ex parte* or other prohibited communication. This conclusion is consistent with Rule 3.5(a), which forbids a lawyer to "seek to influence a judge" in an unlawful way.

IV. Conclusion

Social media is a constantly changing area of technology that lawyers keep abreast of in order to remain competent. As a general rule, any conduct that would not be permissible using other forms of communication would also not be permissible using social media. Any use of a social networking website to further a lawyer's business purpose will be subject to the Rules of Professional Conduct.

Accordingly, this Committee concludes that any information an attorney or law firm places on a social networking website must not reveal confidential client information absent the client's consent. Competent attorneys should also be aware that their clients use social media and that what clients reveal on social media can be used in the course of a dispute. Finally, attorneys are permitted to use social media to research jurors and may connect with judges so long as they do not attempt to

³² American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462 concluded that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

Social media presents a myriad of ethical issues for attorneys, and attorneys should continually update their knowledge of how social media impacts their practice in order to demonstrate competence and to be able to represent their clients effectively.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.



NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

ETHICS OPINION 843

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion # 843 (09/10/2010)

Topic: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

Digest: A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.*, only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have

the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.*, that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.^[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

(76-09)

^[1]One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* - and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-

contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

Related Files

[Lawyers access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.\(PDF File\)](#)

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The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2010-2:

OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1, 5.3(b)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.^[1] In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall.^[2] Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices.^[3] The prevalence of these and other social networking websites, and the potential benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. *See, e.g., Niesig v. Team I*, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); *Muriel, Siebert & Co. v. Intuit Inc.*, 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.^[4] While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. *See, e.g., id.*, 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party's former employee]." (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools,

hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a “friend request” falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a “friend request” or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder’s “channel” and view all of her digital postings. By making the “friend request” or a request for access to a YouTube “channel,” the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the “virtual” inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to “open the door” to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the “Rules”), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that “[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” N.Y. Prof’l Conduct R. 8.4(c) (2010). And Rule 4.1 states that “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.” *Id.* 4.1. We believe these Rules are violated whenever an attorney “friends” an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), “[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” *Id.* 8.4(a). Consequently, absent some exception to the Rules, a lawyer’s investigator or other agent also may not use deception to obtain information from the user of a social networking website. *See id.* Rule 5.3(b)(1) (“A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . .”).

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. *See* N.Y. County 737 (2007) (requiring, for use of dissemblance, that “the evidence sought is not reasonably and readily obtainable through other lawful means”); *see also* ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort.^[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in “trickery,” lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful “friending” of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual’s social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.^[6]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

[1] Social networks are internet-based communities that individuals use to communicate with each other and view

and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to “friends” – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

[2] See, e.g., Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, <http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2>.

[3] See, e.g., Bass ex rel. Bass v. Miss Porter’s School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

[4] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party’s lawyer is obtained or the conduct is authorized by law. N.Y. Prof’l Conduct R. 4.2. The term “party” is generally interpreted broadly to include “represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties.” N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).

[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) etseq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 etseq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a “friend request”. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 (“[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party’s former employee.”).

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SDCBA Legal Ethics Opinion 2011-2

(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)

I. FACTUAL SCENARIO

Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer's answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client's former employer's employees. Attorney sends out a "friending"^A request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.

II. QUESTION PRESENTED

Has Attorney violated his ethical obligations under the California Rules of Professional Conduct, the State Bar Act, or case law addressing the ethical obligations of attorneys?

III. DISCUSSION

A. Applicability of Rule 2-100

California Rule of Professional Conduct 2-100 says, in pertinent part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an . . . employee of a . . . corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." "Rule 2-100 is intended to control communication between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Rule 2-100 Discussion Note.)

Similarly, ABA Model Rule 4.2 says: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 7 to ABA Model Rule 4.2 adds: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

1. Are the High-ranking Employees Represented Parties?

The threshold question is whether the high-ranking employees of the represented corporate adversary are "parties" for purposes of this rule.

In *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 (2003), a trade secrets action, the Court of Appeal reversed an order disqualifying counsel for the defendant-former sales manager for ex parte contact with plaintiff-event management company's current sales manager and productions director. The contacted employees were not "managing agents" for purposes of the rule because neither "exercise[d] substantial discretionary authority over decisions that determine organizational policy." Supervisory status and the power to enforce corporate policy are not enough. (*Id.* at 1209.) There also was no evidence that either employee had authority from the company to speak concerning the dispute or that their actions could bind or be imputed to the company concerning the subject matter of the litigation. (*Id.* at 1211.)

The term "high-ranking employee" suggests that these employees "exercise substantial discretionary authority over decisions that determine organizational policy" and therefore should be treated as part of the represented corporate party for purposes of Rule 2-100. At minimum, the attorney should probe his client closely about the functions these employees actually perform for the company-adversary before treating those high-ranking employees as unrepresented persons.

2. Does a Friend request Constitute Unethical Ex Parte Contact with the High-Ranking Employees?

Assuming these employees are represented for purposes of Rule 2-100, the critical next question is whether a friend request is a direct or indirect communication by the attorney to the represented party "about the subject of the representation." When a Facebook user clicks on the "Add as Friend" button next to a person's name without adding a personal message, Facebook sends a message to the would-be friend that reads: "[Name] wants to be friends with you on Facebook." The requester may edit this form request to friend to include additional information, such as information about how the requester knows the recipient or why the request is being made. The recipient, in turn, may send a message to the requester asking for further information about him or her before deciding whether to accept the sender as a friend.

A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party to the attorney's friend request is a communication "about the subject of the representation." We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: "[Name] wants to have access to the information you are sharing on your Facebook page." If the communication to the represented party is motivated by the quest for information about the subject of the representation,

the communication with the represented party is about the subject matter of that representation.

This becomes clearer when the request to friend, with all it entails, is transferred from the virtual world to the real world. Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "Yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently."

A recent federal trial court ruling addressing Rule 2-100 supports this textual analysis. In *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, the question before the District Court was whether counsel for a corporation in an action brought by the government alleging corporate responsibility for a forest fire violated Rule 2-100 when counsel, while attending a Forest Service sponsored field trip to a fuel reduction project site that was open to the public, questioned Forest Service employees about fuel breaks, fire severity, and the contract provisions the Forest Service requires for fire prevention in timber sale projects without disclosing to the employees that he was seeking the information for use in the pending litigation and that he was representing a party opposing the government in the litigation. The Court concluded that counsel had violated the Rule and its reasoning is instructive. It was undisputed that defense counsel communicated directly with the Forest Service employees, knew they were represented by counsel, and did not have the consent of opposing counsel to question them. (2010 WL 4778051, *5.) Defense counsel claimed, however, that his questioning of the Forest Service employees fell within the exception found in Rule 2-100(C)(1), permitting "[c]ommunications with a public officer. . .," and within his First Amendment right to petition the government for redress of grievances because he indisputably had the right to attend the publicly open Forest Service excursion.

While acknowledging defense counsel's First Amendment right to attend the tour (*id.* at *5), the Court found no evidence that defense counsel's questioning of the litigation related questioning of the employees, who had no "authority to change a policy or grant some specific request for redress that [counsel] was presenting," was an exercise of his right to petition the government for redress of grievances. (*Id.* at *6.) "Rather, the facts show and the court finds that he was attempting to obtain information for use in the litigation that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." (*Ibid.*, emphasis added.) Defense counsel's interviews of the Forest Service employees on matters his corporate client considered part of the litigation without notice to, or the consent of, government counsel "strikes at . . . the very policy purpose for the no contact rule." (*Ibid.*) In other words, counsel's motive for making the contact with the represented party was at the heart of why the contact was prohibited by Rule 2-100, that is, he was "attempting to obtain information for use in the litigation," a motive shared by the attorney making a friend request to a represented party opponent.

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel's ex parte contacts violated that rule as well. "Unconsented questioning of an opposing party's employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 unless the sole purpose of the communication is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government's counsel is required." (*Id.* at *7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney's ex parte communication is at the heart of the offense. The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and "nothing in the rule precludes the attorney from advising the client that such a communication can be made." (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

3. Response to Objections

- a. Objection 1: The friend request is not about the subject of the representation because the request does not refer to the issues raised by the representation.

It may be argued that a friend request cannot be "about the subject of the representation" because it makes no reference to the issues in the representation. Indeed, the friend request makes no reference to anything at all other than the name of the sender. Such a request is a far cry from the vigorous ex parte questioning to which the government employees were subjected by opposing counsel in *U.S. v. Sierra Pacific Industries*.²

The answer to this objection is that as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation. The extensive ex parte questioning of the represented party in *Sierra Pacific Industries* is different in degree, not in kind, from an ex parte friend request to a represented opposing party. It is not uncommon in the course of litigation or transactional negotiations for open-ended, generic questions to impel the other side to disclose information that is richly relevant to the matter. The motive for an otherwise anodyne inquiry establishes its connection to the subject matter of the representation.

It is important to underscore at this point that a communication "about the subject of the representation" has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) In litigation, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ.

Proc. § 2017.010.) Discovery casts a wide net. "For discovery purposes, information should be regarded as 'relevant to the subject matter' if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney's duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party's response to a friend request at least "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (*Ibid.*) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.* (8th Cir. 2003) 347 F.3d 693, Franchisee A of South Dakota sued Franchisor of Minnesota for wrongfully terminating its franchise and for installing Franchisee B, also named as a defendant, in Franchisee A's place. A "critical portion" of this litigation was Franchisee A's expert's opinion that Franchisee A had sustained one million dollars in damages as a result of the termination. (*Id.* at 697.) Franchisor's attorney sent a private investigator into both Franchisee A's and Franchisee B's showroom to speak to, and surreptitiously tape record, their employees about their sales volumes and sales practices. Among others to whom the investigator spoke and tape-recorded was Franchisee B's president.

The Eighth Circuit affirmed the trial court's order issuing evidentiary sanctions against Franchisor for engaging in unethical ex parte contact with represented parties. The Court held that the investigator's inquiry about Franchisee B's sales volumes of Franchisor's machines was impermissible ex parte communication about the subject of the representation for purposes of Model Rule 4.2, adopted by South Dakota. "Because every [Franchisor machine] sold by [Franchisee B] was a machine not sold by [Franchisee A], the damages estimate [by Franchisee A's expert] could have been challenged in part by how much [Franchisor machine] business [Franchisee B] was actually doing." (*Id.* at 697-698.) It was enough to offend the rule that the inquiry was designed to elicit information about the subject of the representation; it was not necessary that the inquiry directly refer to that subject.

Similarly, in the hypothetical case that frames the issue in this opinion, defense counsel may be expected to ask plaintiff former employee general questions in a deposition about her recent activities to obtain evidence relevant to whether plaintiff failed to mitigate her damages. (BAJI 10.16.) That is the same information, among other things, counsel may hope to obtain by asking the represented party to friend him and give him access to her recent postings. An open-ended inquiry to a represented party in a deposition seeking information about the matter in the presence of opposing counsel is qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel. Yet one is sanctioned and the other, as *Midwest Motors* demonstrated, is sanctionable.

- b. Objection 2: Friending an represented opposing party is the same as accessing the public website of an opposing party

The second objection to this analysis is that there is no difference between an attorney who makes a friend request to an opposing party and an attorney suing a corporation who accesses the corporation's website or who hires an investigator to uncover information about a party adversary from online and other sources of information.

Not so. The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user, such as a corporation but not limited to one, may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a represented party's public Facebook page. Such access requires no communication to, or permission from, the represented party, even though the attorney's motive for reviewing the page is the same as his motive in making a friend request. Without ex parte communication with the represented party, an attorney's motivated action to uncover information about a represented party does not offend Rule 2-100. But to obtain access to *restricted* information on a Facebook page, the attorney must make a request to a represented party outside of the actual or virtual presence of defense counsel. And for purposes of Rule 2-100, that motivated communication with the represented party makes all the difference.³

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York's prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as "the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network." That, said the New York Bar, is "because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."

- c. Objection 3: The attorney-client privilege does not protect anything a party posts on a Facebook page, even a page accessible to only a limited circle of people.

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user's circle, those communications reach beyond "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the [Facebook user's] lawyer is consulted. . . ." (Evid. Code §952, defining "confidential communication between client and lawyer." Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in "getting their teeth" into the opposing party, a major music company.)

That observation may be true as far as it goes⁴, but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure. "[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

The rule barring ex parte communication with a represented party is designed to avoid disrupting the trust essential to the attorney-client relationship. "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." (*U.S. v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1459.) The same could be said where a client is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request.

- d. Objection 4: A recent Ninth Circuit ruling appears to hold that Rule 2-100 is not violated by engaging in deceptive tactics to obtain damaging information from a represented party.

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9th Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. "There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor." (*Id.* at *5.) The Court ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. "The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary, (Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation. suggest support for our conclusion that there was no ethical violation to begin with." (*Id.* at *6.)

There are several responses to this final objection. First, *Carona* was a ruling on the appropriateness of excluding evidence, not a disciplinary ruling as such. The same is true, however, of *U.S. v. Sierra Pacific Industries*, which addressed a party's entitlement to a protective order as a result of a Rule 2-100 violation. Second, the Court ruled that the exclusion of the evidence was unnecessary because of the availability of state bar discipline if the prosecutor had offended Rule 2-100. The Court of Appeals' discussion of Rule 2-100 therefore was dicta. Third, the primary reason the Court of Appeals found no violation of Rule 2-100 was because there was no direct contact between the prosecutor and the represented criminal defendant. The same cannot be said of an attorney who makes a direct ex parte friend request to a represented party.

4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney. The evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-100 (A): Opinions of ethics committees in California are not binding, but "should be consulted by members for guidance on proper professional guidance." See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee's opinion, "the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court." But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: "Some federal courts have imposed sanctions for violation of applicable rules of professional conduct." (citing *Midwest Motor Sports, supra.*))

B. Attorney Duty Not To Deceive

We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not.

ABA Model Rule 4.1(a) says: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person. . . ." ABA Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." In *Midwest Motor Sports, supra*, the Eighth Circuit found that the violations of the rule against ex parte contact with a represented party alone would have justified the evidentiary sanctions that the district court imposed. (*Midwest Motor Sports, supra*, 347 F.3d at 698.) The Court of Appeals also concluded, however, that Franchisor's attorney had violated 8.4(c) by sending a private investigator to interview Franchisees' employees "under false and misleading pretenses, which [the investigator] made no effort to correct. Not only did [the investigator] pose as a customer, he wore a hidden device that secretly recorded his conversations with" the Franchisees' employees. (*Id.*, at 698-699.)⁵

Unlike many jurisdictions, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. The provision coming closest to imposing a generalized duty not to deceive is Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." This provision is typically applied to allegations that an attorney misled a judge, suggesting that the second clause in the provision merely amplifies the first. (See e.g., *Griffith v. State Bar of Cal.* (1953) 40 Cal.2d 470.) But while no authority was found applying the provision to attorney deception of anyone other than a judicial officer, its language is not necessarily so limited. The provision is phrased in the conjunctive, arguably setting forth a general duty not to deceive *anyone* and a more specific duty not to mislead a judge by any false statement or fact or law. We could find no authority addressing the question one way or the other.

There is substantial case law authority for the proposition that the duty of an attorney under the State Bar Act not to deceive extends beyond the courtroom. The State Bar, for example, may impose discipline on an attorney for intentionally deceiving opposing counsel. "It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown." (*Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65. See also *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152; *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628.) "[U]nder CRPC 5-200 and 5-220, and BP 6068(d), as officers of the court, attorneys have a duty of candor and not to mislead the judge by any false statement of fact or law. These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel." (*In re Central European Industrial Development Co.* (Bkrcty. N.D. Cal. 2009) 2009 WL 779807, *6, citing *Hallinan v. State Bar of Cal.* (1948) 33 Cal.2d 246, 249.)

Regardless of whether the ethical duty under the State Bar Act and the Rules of Professional Conduct not to deceive extends to misrepresentation to those other than judges, the *common law* duty not to deceive indisputably applies to an attorney and a breach of that duty may subject an attorney to liability for fraud. "[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 74, the Court of Appeal ruled that insured's judgment creditors had the right to sue insurer's coverage counsel for misrepresenting the scope of coverage under the insurance policy. The *Shafer* Court cited as authority, *inter alia*, *Fire Ins. Exchange v. Bell by Bell* (Ind. 1994) 643 N.E.2d 310, holding that insured had a viable claim against counsel for insurer for falsely stating that the policy limits were \$100,000 when he knew they were \$300,000.

Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the Court of Appeal held that an attorney, negotiating at arm's length with an adversary in a merger transaction was not immune from liability to opposing party for fraud for not disclosing "toxic stock" provision. "A fraud claim against a lawyer is no different from a fraud claim against anyone else." (*Id.* at 291.) "Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient." (*Ibid.*, citation omitted.) While a "casual expression of belief" that the form of financing was "standard" was not actionable, active concealment of material facts, such as the existence of a "toxic stock" provision, is actionable fraud. (*Id.* at 291-294.)

If there is a duty not to deceive opposing counsel, who is far better equipped by training than lay witnesses to protect himself against the deception of his adversary, the duty surely precludes an attorney from deceiving a lay witness. But is it impermissible deception to seek to friend a witness without disclosing the purpose of the friend request, even if the witness is not a represented party and thus, as set forth above, subject to the prohibition on ex parte contact? We believe that it is.

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York's Committee on Professional and Judicial Ethics considered whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation." (*Id.*, emphasis added.) Consistent with New York's high court's policy favoring informal discovery in litigation, the Committee concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request." In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York's rules prohibiting acts of deception are violated "whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website." (*Id.*)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, "someone whose name the witness will not recognize," to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. "The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer's duty under Pennsylvania Rule of Professional Conduct 8.4 not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." The planned communication by the third party

omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the [attorney] and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

(*Id.* at p. 2.) The Philadelphia opinion was cited approvingly in an April 2011 California Lawyer article on the ethical and other implications of juror use of social media. (P. McLean, "Jurors Gone Wild," p. 22 at 26, California Lawyer, April 2011.)

We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion, notwithstanding the value in informal discovery on which the City of New York Bar Association focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request.

Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.

IV. CONCLUSION

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

1 Quotation marks are dropped in the balance of this opinion for this now widely used verb form of the term "friend" in the context of Facebook.

2 *Sierra Pacific Industries* also is factually distinguishable from the scenario addressed here because it involved ex parte communication with a represented *government* party opponent rather than a private employer. But that distinction made it harder to establish a Rule 2-100 violation, not easier. That is because a finding of a violation of the rule had to overcome the attorney's constitutional right to petition government representatives. Those rights are not implicated where an attorney makes ex parte contact with a private represented party in an analogous setting, such as a corporate – or residential – open house.

3 The Oregon Bar reached the same conclusion, but with limited analysis. Oregon State Bar Formal Opinion No. 2005-164 concluded that a lawyer's ex parte communications with represented adversary via adversary's website would be ethically prohibited. "[W]ritten communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to" Oregon's rule against ex parte contact with a represented *person*. If the lawyer knows that the person with whom he is communicating is a represented person, "the Internet communication would be prohibited." (*Id.* at pp. 453454.)

4 There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

5 The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id.* at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id.* at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id.* at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id.* at p. 5), the opinion has no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-02
(March 2009)

The inquirer deposed an 18 year old woman (the “witness”). The witness is not a party to the litigation, nor is she represented. Her testimony is helpful to the party adverse to the inquirer’s client.

During the course of the deposition, the witness revealed that she has “Facebook” and “Myspace” accounts. Having such accounts permits a user like the witness to create personal “pages” on which he or she posts information on any topic, sometimes including highly personal information. Access to the pages of the user is limited to persons who obtain the user’s permission, which permission is obtained after the user is approached on line by the person seeking access. The user can grant access to his or her page with almost no information about the person seeking access, or can ask for detailed information about the person seeking access before deciding whether to allow access.

The inquirer believes that the pages maintained by the witness may contain information relevant to the matter in which the witness was deposed, and that could be used to impeach the witness’s testimony should she testify at trial. The inquirer did not ask the witness to reveal the contents of her pages, either by permitting access to them on line or otherwise. He has, however, either himself or through agents, visited Facebook and Myspace and attempted to access both accounts. When that was done, it was found that access to the pages can be obtained only by the witness’s permission, as discussed in detail above.

The inquirer states that based on what he saw in trying to access the pages, he has determined that the witness tends to allow access to anyone who asks (although it is not clear how he could know that), and states that he does not know if the witness would allow access to him if he asked her directly to do so.

The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to “friend” her, to obtain access to the information on the pages. The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.

The inquirer asks the Committee's view as to whether the proposed course of conduct is permissible under the Rules of Professional Conduct, and whether he may use the information obtained from the pages if access is allowed.

Several Pennsylvania Rules of Professional Conduct (the "Rules") are implicated in this inquiry.

Rule 5.3. **Responsibilities Regarding Nonlawyer Assistants** provides in part that,

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

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

Since the proposed course of conduct involves a third person, the first issue that must be addressed is the degree to which the lawyer is responsible under the Rules for the conduct of that third person. The fact that the actual interaction with the witness would be undertaken by a third party who, the committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct.

The Committee cannot say that the lawyer is literally "ordering" the conduct that would be done by the third person. That might depend on whether the inquirer's relationship with the third person is such that he might require such conduct. But the inquirer plainly is procuring the conduct, and, if it were undertaken, would be ratifying it with full knowledge of its propriety or lack thereof, as evidenced by the fact that he wisely is seeking guidance from this Committee. Therefore, he is responsible for the conduct under the Rules even if he is not himself engaging in the actual conduct that may violate a rule. (Of course, if the third party is also a lawyer in the inquirer's firm, then that lawyer's conduct would itself be subject to the Rules, and the inquirer would also be responsible for the third party's conduct under Rule 5.1, dealing with Responsibilities of Partners, Managers and Supervisory Lawyers.)

Rule 8.4. **Misconduct** provides in part that,

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

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

Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible. Plainly, the reason for not doing so is that the inquirer is not sure that she will allow access and wants to adopt an approach that will deal with her possible refusal by deceiving her from the outset. In short, in the Committee's view, the possibility that the deception might not be necessary to obtain access does not excuse it.

The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the Committee's conclusion. Even if, by allowing virtually all would-be "friends" onto her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical.

The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

Rule 4.1. **Truthfulness in Statements to Others** provides in part that,

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; ...

The Committee believes that in addition to violating Rule 8.4c, the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.

Furthermore, since the violative conduct would be done through the acts of another third party, this would also be a violation of Rule 8.4a.¹

The Committee is aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May, 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.

¹ The Committee also considered the possibility that the proposed conduct would violate Rule 4.3, **Dealing with Unrepresented person**, which provides in part that

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested . . .

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer should make reasonable efforts to correct the misunderstanding.

Since the witness here is unrepresented this rule addresses the interactions between her and the inquirer. However, the Committee does not believe that this rule is implicated by this proposed course of conduct. Rule 4.3 was intended to deal with situations where the unrepresented person with whom a lawyer is dealing knows he or she is dealing with a lawyer, but is under a misapprehension as to the lawyer's role or lack of disinterestedness. In such settings, the rule obligates the lawyer to insure that unrepresented parties are not misled on those matters. One might argue that the proposed course here would violate this rule because it is designed to induce the unrepresented person to think that the third person with whom she was dealing is not a lawyer at all (or lawyer's representative), let alone the lawyer's role or his lack of disinterestedness. However, the Committee believes that the predominating issue here is the deception discussed above, and that that issue is properly addressed under Rule 8.4.

Elsewhere, some states have seemingly endorsed the absolute reach of Rule 8.4. In *People v. Pautler*, 47 P. 3d 1175 (Colo. 2002), for example, the Colorado Supreme Court held that no deception whatever is allowed, saying,

“Even noble motive does not warrant departure from the rules of Professional Conduct. . . We reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive. Purposeful deception by an attorney licensed in our state is intolerable, even when undertaken as a part of attempting to secure the surrender of a murder suspect. . . . Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so. “ The opinion can be found at <http://www.cobar.org/opinions/opinion.cfm?opinionid=627&courtid=2>

The Oregon Supreme Court in *In Re Gatti*, 8 P3d 966 (Ore 2000), ruled that no deception at all is permissible, by a private or a government lawyer, even rejecting proposed carve-outs for government or civil rights investigations, stating,

“The Bar contends that whether there is or ought to be a prosecutorial or some other exception to the disciplinary rules is not an issue in this case. Technically, the Bar is correct. However, the issue lies at the heart of this case, and to ignore it here would be to leave unresolved a matter that is vexing to the Bar, government lawyers, and lawyers in the private practice of law. A clear answer from this court regarding exceptions to the disciplinary rules is in order.

As members of the Bar ourselves -- some of whom have prior experience as government lawyers and some of whom have prior experience in private practice -- this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, . . . [f]aithful adherence to the wording of [the analog of Pennsylvania’s Rule 8.4], and this court’s case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial decree.” The opinion can be found at <http://www.publications.ojd.state.or.us/S45801.htm>

Following the *Gatti* ruling, Oregon’s Rule 8.4 was changed. It now provides:

“(a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law.


(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future. "

Iowa has retained the old Rule 8.4, but adopted a comment interpreting the Rule to permit the kind of exception allowed by Oregon.

The Committee also refers the reader to two law review articles collecting other authorities on the issue. See *Deception in Undercover Investigations: Conduct Based v. Status Based Ethical Analysis*, 32 Seattle Univ. L. Rev.123 (2008), and *Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (Summer 1995).

Finally, the inquirer also requested the Committee's opinion as to whether or not, if he obtained the information in the manner described, he could use it in the litigation. The Committee believes that issue is beyond the scope of its charge. If the inquirer disregards the views of the Committee and obtains the information, or if he obtains it in any other fashion, the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.



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Ethics Committee Advisory Opinion #2012-13/05
Social Media Contact with Witnesses in the Course of Litigation

By the NHBA Ethics Committee
This opinion was submitted for publication by the NHBA Board of Governors at its June 20, 2013 meeting.

- RULE REFERENCES:**
- 1.1(b) and (c) Competence
 - 1.3 Diligence
 - 3.4 Fairness to opposing party and counsel
 - 4.1(a) Truthfulness in statements to others
 - 4.2 Communications with others represented by counsel
 - 4.3 Dealing with the unrepresented person
 - 4.4 Respect for the rights of third persons
 - 5.3 Non-lawyer assistants
 - 8.4(a) Unethical conduct through an agent

- SUBJECTS:**
- Competence and Diligence
 - Truthfulness
 - Fairness to Opposing Parties, Counsel, and Third Parties
 - Contact with Witnesses
 - Agents of Lawyers; Acting Through Others

ANNOTATION

The Rules of Professional Conduct do not forbid use of social media to investigate a non-party witness. However, the lawyer must follow the same rules which would apply in other contexts, including the rules which impose duties of truthfulness, fairness, and respect for the rights of third parties. The lawyer must take care to understand both the value and the risk of using social media sites, as their ease of access on the internet is accompanied by a risk of unintended or misleading communications with the witness. The Committee notes a split of authority on the issue of whether a lawyer may send a social media request which discloses the lawyer's name - but not the lawyer's identity and role in pending litigation - to a witness who might not recognize the name and who might otherwise deny the request.¹ The Committee finds that such a request is improper because it omits material information. The likely purpose is to deceive the witness into accepting the request and providing information which the witness would not provide if the full identity and role of the lawyer were known.

QUESTION PRESENTED

What measures may a lawyer take to investigate a witness through the witness's social media accounts, such as Facebook or Twitter, regarding a matter which is, or is likely to be, in litigation?

FACTS

The lawyer discovers that a witness for the opposing party in the client's upcoming trial has Facebook and Twitter accounts. Based on the information provided, the lawyer believes that statements and information available from the witness's Facebook and Twitter accounts may be relevant to the case and helpful to the client's position. Some information is available from the witness's social media pages through a simple web search. Further information is available to anyone who has a Facebook account or who signs up to follow the witness on Twitter. Additional information is available by "friending" the witness on Facebook or by making a request to follow the witness's restricted Twitter account. In both of those latter instances, the information is only accessible after the witness has granted a request.

ANALYSIS

General Principles

The New Hampshire Rules of Professional Conduct do not explicitly address the use of social media such as Facebook and Twitter. Nonetheless, the rules offer clear guidance in most situations where a lawyer might use social media to learn information about a witness, to gather evidence, or to have contact with the witness. The guiding principles for such efforts by counsel are the same as for any other investigation of or contact with a witness.

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First and foremost, the lawyer has a duty under Rules 1.1 and 1.3 to represent the client competently and diligently. This duty specifically includes the duties to:

- “Gather sufficient facts” about the client’s case from “relevant sources,” Rule 1.1(c)(1);
- Take steps to ensure “proper preparation,” Rule 1.1(b)(4); and
- Acquire the skills and knowledge needed to represent the client competently. Rule 1.1(b)(1) and (b)(2).

In the case of criminal defense counsel, these obligations, including the obligation to investigate, may have a constitutional as well as an ethical dimension.² In light of these obligations, counsel has 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.

The duties of competence and diligence are limited, however, by the further duties of truthfulness and fairness when dealing with others. Under Rule 4.1, a lawyer may not “make a false statement of material fact” to the witness. Notably, the ABA Comment to this rule states that “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” Similarly, under Rule 8.4, it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Also, if the witness is represented by counsel, then under Rule 4.3, a lawyer “shall not communicate” with the witness “about the subject of the representation” unless the witness’s lawyer has consented or the communication is permitted by a court order or law. Finally, under Rule 4.4, the lawyer shall not take any action, including conducting an investigation, if it is “obvious that the action has the primary purpose to embarrass, delay, or burden a third person.”

The lawyer may not avoid these limitations by conducting the investigation through a third person. With respect to investigators and other non-lawyer assistants, the lawyer must “make reasonable efforts to ensure” that the non-lawyer’s conduct “is compatible with the professional obligations of the lawyer.” Rule 5.3(b). A lawyer may be responsible for a violation of the rules by a non-lawyer assistant where the lawyer has knowledge of the conduct, ratifies the conduct, or has supervisory authority over the person at a time when the conduct could be avoided or mitigated. Rule 5.3(c). Nor should a lawyer counsel a client to engage in fraudulent or criminal conduct. Rule 1.2(d). Finally, of course, a lawyer is barred from violating the rules through another or knowingly inducing the other to violate the rules. Rule 8.4(a).

Application of the General Principles to the Use of Social Media When Investigating a Witness

Is it a violation of the rules for the lawyer to personally view a witness’s unrestricted Facebook page or Twitter feed? In the view of the Committee, simply viewing a Facebook user’s page or “following” a Twitter user is not a “communication” with that person, as contemplated by Rules 4.2 and 4.3, if the pages and accounts are viewable or otherwise open to all members of the same social media site. Although the lawyer-user may be required to join the same social media group as the witness, unrestricted Facebook pages and Twitter feeds are public for all practical purposes. Almost any person may join either Facebook or Twitter for free, subject to the terms-of-use agreement. Furthermore, membership is more common than not, with Facebook reporting that it topped one billion accounts in 2012.⁴

Other state bars’ ethics committees are in agreement that merely viewing an unrestricted Facebook or Twitter account is permissible.⁵ If, however, a lawyer asks the witness’s permission to access the witness’s restricted social media information, the request must not only correctly identify the lawyer, but also inform the witness of the lawyer’s involvement in the disputed or litigated matter. At least two bar associations have adopted the position that sending a Facebook friend request in-name-only constitutes a misrepresentation by omission, given that the witness might not immediately associate the lawyer’s name with his or her purpose and that, were the witness to make that association, the witness would in all likelihood deny the request.⁶ (This point is discussed in more detail below.)

May the lawyer send a Facebook friend request to the witness or a request to follow a restricted Twitter account, using a false name? The answer here is no. The lawyer may not make a false statement of material fact to a third person. Rule 4.1. Material facts include the lawyer’s identity and purpose in contacting the witness. For the same reason, the lawyer may not log into someone else’s account and pretend to be that person when communicating with the witness.

May the lawyer’s client send a Facebook friend request or request to follow a restricted Twitter feed, and then reveal the information learned to the lawyer? The answer depends on the extent to which the lawyer directs the client who is sending the request. Rule 8.4(a) prohibits a lawyer from accomplishing through another that which would be otherwise barred. Also, while Rule 5.3 is directed at legal assistants rather than clients, to the extent that the client is acting as a non-lawyer assistant to his or her own lawyer, Rule 5.3 requires the lawyer to advise the client to avoid conduct on the lawyer’s behalf which would be a violation of the rules.

Subject to these limitations, however, if the client has a Facebook or Twitter account that reasonably reveals the client’s identity to the witness, and the witness accepts the friend request or request to follow a restricted Twitter feed, no rule prohibits the client from sharing with the lawyer information gained by that means. In the non-social media context, the American Bar Association has stated that such contact is permitted in similar limitations. See ABA Ethics Opinion 11-461.⁷

May the lawyer’s investigator or other non-lawyer agent send a friend request or request to follow a restricted Twitter feed as a means of gathering information about the witness? The non-lawyer assistant is subject to the same restrictions as the lawyer. The lawyer has a duty to make sure the assistant is informed about these restrictions and to take reasonable steps to ensure that the assistant acts in accordance with the restrictions.

Thus, if the non-lawyer assistant identifies him- or herself, the lawyer, the client, and the cause in litigation, then the non-lawyer assistant may properly send a social media request to an unrepresented witness.

The witness's own predisposition to accept requests has no bearing on the lawyer's ethical obligations. The Committee agrees with the Philadelphia Bar Association's reasoning: "The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical." Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02.

May the lawyer send a request to the witness to access restricted information, using the lawyer's name and disclosing the lawyer's role? The answer depends on whether the witness is represented. If the witness is represented by a lawyer with regard to the same matter in which the lawyer represents the client, the lawyer may not communicate with the witness except as provided in Rule 4.2. If the witness is not represented, the lawyer may send a request to access the witness's restricted social media profile so long as the request identifies the lawyer by name as a lawyer and also identifies the client and the matter in litigation. This information serves to correct any reasonable misimpression the witness might have regarding the role of the lawyer.

May the lawyer send a request to the witness to access restricted information, when the request uses only the lawyer's name or the name of an agent, and when there is a reasonable possibility that the witness may not recognize the name and may not realize the communication is from counsel involved in litigation? There is a split of authority on this issue, but the Committee concludes that such conduct violates the New Hampshire Rules of Professional Conduct. The lawyer may not omit identifying information from a request to access a witness's restricted social media information because doing so may mislead the witness. If a lawyer sends a social media request in-name-only with knowledge that the witness may not recognize the name, the lawyer has engaged in deceitful conduct in violation of Rule 8.4(c). The Committee further concludes omitting from the request information about the lawyer's involvement in the disputed or litigated matter creates an implication that the person making the request is disinterested. Such an implication is a false statement of material fact in violation of Rule 4.1. As noted above, the ABA Comment to this rule states that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Deceit is improper, whether it is accomplished by providing information or by deliberately withholding it. Thus, a lawyer violates the rules when, in an effort to conceal the lawyer's identity and/or role in the matter, the lawyer requests access to a witness's restricted social media profile in-name-only or through an undisclosed agent. The Committee recognizes the counter-argument that a request in-name-only is not overtly deceptive since it uses the lawyer's or agent's real name and since counsel is not making an explicitly false statement. Nonetheless, the Committee disagrees with this counter-argument. By omitting important information, the lawyer hopes to deceive the witness. In fact, the motivation of the request in-name-only is the lawyer's expectation that the witness will not realize who is making the request and will therefore be more likely to accept the request. The New Hampshire Supreme Court has stated that honesty is the most important guiding principle of the bar in this state and that deceitful conduct by lawyers will not be tolerated. See *generally*, RSA311:6; *Feld's Case*, 149 N.H. 19, 24 (2002); *Kalil's Case*, 146 N.H. 466, 468 (2001); *Nardi's Case*, 142 N.H. 602, 606 (1998). The Committee is guided by those principles here.

The Committee notes that there is a conflict of authority on this issue. For example, the Committee on Professional Ethics for the Bar Association of New York City has stated:

We conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. [Footnote omitted.]

NY City Bar, Ethic Op. 2010-2. Alternatively, the Philadelphia Bar Association concludes that such conduct would be deceptive. Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02. That opinion finds that a social media request in-name-only "omits a highly material fact" -that the request is aimed at obtaining information which may be used to impeach the witness in litigation.³ The Philadelphia opinion further recognizes, as does this Committee, that the witness would not likely accept the social media request if the witness knew its true origin and context. An opinion from the San Diego County Bar Association reaches the same conclusion. San Diego Cty. Bar Legal Ethics Op. 2011-2. The Committee finds that the San Diego and Philadelphia opinions are consistent with the New Hampshire Rules of Professional Conduct but that the New York City opinion is not. A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge.

Finally, this situation should be distinguished from the situation where a person, not acting as an agent or at the behest of the lawyer, has obtained information from the witness's social media account. In that instance, the lawyer may receive the information and use it in litigation as any other information. The difference in this latter context is that there was no deception by the lawyer. The witness chose to reveal information to someone who was not acting on behalf of the lawyer. The witness took the risk that the third party might repeat the information to others. Of course, lawyers must be scrupulous and honest, and refrain from expressly directing or impliedly sanctioning someone to act improperly on their behalf. Lawyers are barred from violating the rules "through the acts of another." Rule 8.4(a).

CONCLUSION

As technology changes, it may be necessary to reexamine these conclusions and analyze new situations.

However, the basic principles of honesty and fairness in dealing with others will remain the same. When lawyers are faced with new concerns regarding social media and communication with witnesses, they should return to these basic principles and recall the Supreme Court's admonition that honesty is the most important guiding principle of the bar in New Hampshire.

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ENDNOTES

¹ In the remainder of this opinion, the Committee refers to this as a communication "in-name-only."

² See, e.g., *Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 107 (E.D.N.Y.2003); *Williams v. Washington*, 59 F.3d 673, 680-81 (7th Cir. 1995); *People v. Donovan*, 184 A.D.2d 654, 655 (N.Y. App. Div. 1992); see also American Bar Association Criminal Justice Standards, Defense Function §4-4.1.

³ For the purposes of this opinion, an unrestricted page is a page which may be viewed without the owner's authorization but which may require membership with the same social media service.

⁴ "Facebook by the Numbers: 1.06 Billion Monthly Active Users," [available online](#).

⁵ San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion 2011-2; NY Bar Ethics Op. #843 (9/10/2010).

⁶ San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion 2011-2; Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02.

⁷ Pursuant to ABA Ethics Opinion 11-461, a lawyer may advise a client regarding the client's right to communicate directly with the other party in the legal matter and assist the client in formulating the substance of any proposed communication, so long as the lawyer's conduct falls short of overreaching. This opinion has engendered significant controversy because, according to some critics, it effectively allowed the lawyer to "script" conversations between the client and a represented opposing party and prepare documents for the client to deliver directly to the represented opponent. For a more complete discussion, see Podgers, On Second Thought: Changes Muller Re ABA Opinion on Client Communications Issue, ABA Journal (Jan. 1, 2012), [available online](#) (last accessed May 22, 2013). The Committee takes no position on this issue and cites the opinion solely to illustrate the point that the client may independently obtain and share information with the lawyer, subject to certain constraints.

⁸ In contrast to this opinion, the Philadelphia opinion does not find a violation of Rule 4.3.

(Oregon)

FORMAL OPINION NO. 2013-189

**Accessing Information about Third Parties
Through a Social Networking Website**

Facts:

Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

Questions:

1. May Lawyer review a person's publicly available information on a social networking website?

2. May Lawyer, or an agent on behalf of Lawyer, request access to a person's non-public information?

3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view non-public information?

Conclusions:

1. Yes.
2. Yes, qualified.
3. No, qualified.

Discussion:

1. Lawyer may access publicly available information on a social networking website.¹

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so;
or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Accessing the publicly available information on a person's social networking website is not a "communication" prohibited by Oregon RPC 4.2. OSB Formal Ethics Op No 2005-164 discusses the propriety of a lawyer accessing the public portions of an adversary's website and concludes that doing so is not "communicating" with the site owner within the meaning of Oregon RPC 4.2. The Opinion compared accessing a website to reading a magazine article or purchasing a book written by an adversary. The same analysis applies to publicly available information on a person's social networking web pages.²

¹ Although Facebook, MySpace, and Twitter are current popular social networking websites, this opinion is meant to apply to any similar social networking websites.

² This analysis is not limited to adversaries in litigation or transactional matters; it applies to a lawyer who is accessing the publicly available information of any person. However, caution must be exercised with regard to jurors. Although a lawyer may review a juror's publicly available information on social networking websites, communication with jurors before, during, and after a proceeding is generally prohibited. Accordingly, a lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so. *See* Oregon RPC 3.5(b) (prohibiting ex parte communications with a juror during the proceeding unless authorized to do so by law or court order); Oregon RPC 3.5(c) (prohibiting communication with a juror

2. Lawyer may request access to non-public information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by Lawyer.

To access non-public information on a social networking website, a lawyer may need to make a specific request to the holder of the account.³ Typically that is done by clicking a box on the public portion of a person’s social networking website, which triggers an automated notification to the holder of the account asking whether he or she would like to accept the request. Absent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible. OSB Formal Ethics Op No 2005-164.⁴

In doing so, however, Lawyer must be mindful of Oregon RPC 4.3, which regulates communications with unrepresented persons. Oregon RPC 4.3 provides, in pertinent part:

In dealing on behalf of a client or the lawyer’s own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The purpose of the rule is to avoid the possibility that a nonlawyer will believe lawyers “carry special authority” and that a nonlawyer will be “inappropriately deferential” to someone else’s

after discharge if (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress, or harassment); Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice). *See, generally*, §61:808, ABA/BNA Lawyers’ Manual on Professional Conduct and cases cited therein.

³ This is sometimes called “friending,” although it may go by different names on different services, including “following” and “subscribing.”

⁴ *See, e.g.*, New York City Bar Formal Opinion 2010-2, which concludes that a lawyer “can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful ‘friending’ of unrepresented parties”

lawyer. *Apple Corps Ltd. v. International Collectors Soc.*, 15 F Supp2d 456 (DNJ 1998) (finding no violation of New Jersey RPC 4.3 by lawyers and lawyers' investigators posing as customers to monitor compliance with a consent order).⁵ A simple request to access non-public information does not imply that Lawyer is "disinterested" in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person's social networking information, although for an unidentified purpose.

Similarly, Lawyer's request for access to non-public information does not in and of itself make a representation about the Lawyer's role. In the context of social networking websites, the holder of the account has full control over who views the information available on his or her pages. The holder of the account may allow access to his or her social network to the general public or may decide to place some, or all, of that information behind "privacy settings," which restrict who has access to that information. The account holder can accept or reject requests for access. Accordingly, the holder's failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding Lawyer's role in the matter.⁶ By contrast, if the holder of the account asks for additional information to identify Lawyer, or if Lawyer has some other reason to believe that the person misunderstands her role, Lawyer must provide the additional information or withdraw the request.

⁵ See also ABA Model Rule 4.3, Cmt. [1] ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client."). Cf. *In re Gatti*, 330 Or 517, 8 P3d 966 (2000), in which the court declined to find an "investigatory exception" and disciplined a lawyer who used false identities to investigate an alleged insurance scheme. ORPC 8.4(b), discussed *infra*, was adopted to address concerns about the *Gatti* decision.

⁶ Cf. *Murphy v. Perger* [2007] O.J. No. 5511, (S.C.J.) (Ontario, Canada) (requiring personal injury plaintiff to produce contents of Facebook pages, noting that "[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.")

If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent.⁷ See OSB Formal Ethics Op No 2005-80 (discussing the extent to which certain employees of organizations are deemed represented for purposes of Oregon RPC 4.2).

3. Lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless Oregon RPC 8.4(b) applies.

Oregon RPC 8.4(a)(3) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."⁸ See also Oregon RPC 4.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a third person in the course of representing a client). Accordingly, Lawyer may not engage in subterfuge designed to shield Lawyer's identity from the person when making the request.⁹

As an exception to Oregon RPC 8.4(a)(3), Oregon RPC 8.4(b) allows a lawyer "to advise clients and others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct." For purposes of the rule "covert activity" means:

[A]n effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or

⁷ *In re Newell*, 348 Or 396, 409, 234 P3d 967 (2010) (reprimanding lawyer who communicated on "subject of the representation").

⁸ See *In re Carpenter*, 337 Or 226, 95 P3d 203 (2004) (lawyer received public reprimand after assuming false identity on social media website).

⁹ See Oregon RPC 8.4(a), which prohibits a lawyer from violating the RPCs, from assisting or inducing another to do so, or from violating the RPCs "through the acts of another").

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supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

In the limited instances allowed by Oregon RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another's deception to access a person's nonpublic information on a social networking website.

Approved by Board of Governors, February 2013.

**THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE**

Opinion 2014-5
(July 2014)

I. Introduction

The inquirer requests an opinion concerning the following issues relating to a client's Facebook account¹:

- (1) Whether a lawyer may advise a client to change the privacy settings on a Facebook page so that only the client or the client's "friends" may access the content. This question assumes that all information relevant or discoverable in the client's matter is retained.
- (2) Whether a lawyer may instruct a client to remove a photo, link or other content that the lawyer believes is damaging to the client's case from the client's Facebook page.
- (3) Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by the client, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.
- (4) Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by someone other than the client on the client's Facebook page, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.

It is this Committee's opinion that, subject to the limitations described below²:

- (1) A lawyer may advise a client to change the privacy settings on the client's Facebook Page.
- (2) A lawyer may instruct a client to make information on the social media website "private," but may not not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.

¹ Although the inquiry focuses on Facebook (www.facebook.com), the response applies to all social media or other websites on which individuals or businesses post or otherwise disseminate information to friends, the public and others. The questions raised have been minimally reframed to address social media websites generally.

² The analyses for questions 1 and 2, and for questions 3 and 4, are merged into two discussions below.

- (3) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a Request for Production or other discovery request.
- (4) A lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.

II. Analysis

A. Introduction

"Social media" websites permit users to join online communities where they can share information, ideas, messages, and other content. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, Myspace and others, are designed to permit users to share information about personal and professional activities and interest. As of September 2013, an estimated 73 percent of adults age 18 and over use these sites.³

The issues raised by clients' use of social media websites, such as Facebook, raise ethical concerns. This opinion attempts to provide a broad overview of the issues, with the strong recommendation that you examine the Rules carefully and understand that, as social media evolves, so will the ethical issues related to it.

Moreover, the Committee reminds the inquirer that, at its most basic, this inquiry focuses on a party's and an attorney's duty to preserve evidence, and that this duty applies to information regardless of form, *i.e.*, discoverable information may not be concealed or destroyed regardless whether it is in paper, electronic or some other format. As noted by this Committee in Opinion 2000-5, "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like."

B. Relevant Pennsylvania Rules of Professional Conduct

Your inquiry implicates numerous Rules of Professional Conduct, including:

Rule 1.1. Competence

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

³ <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>

Rule 3.3. Candor Toward the Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

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

C. Discussion

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, and their obligation to preserve information that may be relevant to specific proceedings. Comment (8) to Rule 1.1 further explains that, "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..." Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and, (2) advise clients about the issues that may arise as a result of their use of these websites.

(1.) A lawyer may advise a client to change the privacy settings on the client's Facebook page, but may not instruct or knowingly allow a client to delete/destroy a relevant photo, link, text or other content;

A lawyer may advise a client about the privacy settings of the client's social media website, *i.e.*, a lawyer may counsel a client to restrict access to their social media information. Changing a client's profile to "private" simply restricts access to the content

of the page. While it may be more cumbersome for an opposing party to access the information, changing a client's settings does not violate the Rules of Professional Conduct.

Even though an opposing party may not be able to gain unrestricted access to a client's information after the privacy settings are changed, the opposing party may still obtain the information through discovery or subpoena. For example, in *McMillen v. Hummingbird Speedway, Inc.*⁴, the Court of Common Pleas of Jefferson County, Pennsylvania approved a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.*⁵, the Court similarly granted a defendant's request for access to a plaintiff's social media accounts because the Court believed, based on the public portions of plaintiff's account, that information therein might be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

Conversely, in *McCann v. Harleysville Insurance Co.*⁶, a New York court refused to permit a defendant access to a plaintiff's social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a "fishing expedition" that was too broad to be granted. Similarly, in *Trail v. Lesko*⁷, Judge Wettick of the Court of Common Pleas of Allegheny County denied a party access to a plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant had not produced any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook profile would merely cause embarrassment, which is prohibited by the rule.

Recently, the Commercial and Federal Litigation Section of the New York State Bar Association released its "Social Media Guidelines," which concluded that a lawyer may advise a client about the content of the client's social media page, to wit:

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well 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.

⁴ *McMillen v. Hummingbird Speedway, Inc.*, No. 113 – 2010 CD (Pa.Ct.Com.Pl. Jefferson County 2010)

⁵ *Romano v. Steelcase Inc.* (2010 NY Slip Op 20388)

⁶ *McCann v. Harleysville Ins. Co. of N.Y.* (2010 NY Slip Op 08181)

⁷ *Trail v. Lesko*, No. GD-10-017249 (Pa.Ct.Com.Pl. Allegheny County 2010)

- Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.⁸

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)'s prohibition against "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, but must take appropriate action to preserve the information in the event it should prove to be relevant and discoverable.

A lawyer must also be mindful of Rule 3.3(b), which requires the lawyer to take reasonable remedial measures, "including, if necessary, disclosure to the tribunal" if the lawyer learns that a client has destroyed evidence.

In 2013, the Virginia State Bar Disciplinary Board⁹ suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal (see Rule. 3.3), fairness to opposing counsel (see Rule. 3.4), and misconduct (see Rule. 8.4). In addition, the trial court imposed \$722,000 in sanctions (\$542,000 upon the lawyer and \$180,000 upon his client) to compensate opposing counsel for their legal fees.¹⁰

- (2) **A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a Request for Production, and must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.**

In order to comply with a Request for Production of Documents, or any other discovery request, a lawyer must produce any social media content, such as photos and links, posted by the client, including posts that may be unfavorable to the client. Rule 4.1(a) provides that a lawyer shall not knowingly "make a false statement of material fact or law to a third person" while representing a client. When a lawyer provides another party

⁸ *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted)

⁹ *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

¹⁰ *Lester v. Allied Concrete Co.*, Nos. CL08-150 and CL09-223 (Charlotte, Virginia Circuit Court, October 21, 2011)

with requested material, the lawyer is affirmatively representing that the information is full and complete to the best of his knowledge. If a lawyer purposefully omits information, or directs or countenances a client's destruction or omission of evidence, the lawyer has violated the Rules of Professional Conduct.

Consistent with this conclusion, under Rule 4.1, "a lawyer is required to be truthful when dealing with others on a client's behalf," which includes the obligation to produce relevant information in counsel's possession and to make good faith efforts to obtain any other relevant information from the client. Thus, if a lawyer knows or has a reasonable belief that a client possesses relevant information, the lawyer must make reasonable efforts to obtain it. The lawyer is not obligated, however, to obtain information that was neither in counsel's possession nor in the client's possession.

In addition, Rule 8.4(c) states that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Providing an opposing party with incomplete information, without so noting, violates the Rules of Professional Conduct and the lawyer's obligations under various Rules of Procedure. Under the facts presented, the lawyer must produce all of the requested photographs and other information from Facebook, regardless whether it was favorable to the client.

Finally, a lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware *if the lawyer knows or reasonably believes it has not been produced by the client*. If the items were never in the possession of either the client or counsel, and were instead under the control of a third party, then the Rules do not require the attorney to take affirmative steps to obtain the requested information. Once, and if, the information comes into counsel's possession, then the obligation to preserve and produce arises.

III. Conclusion

When dealing with a client's use of social media, the Rules apply to electronic information in the same way that they apply to other forms of information. However, because social media websites change frequently, certain unique situations arise. A lawyer may advise a client about how to manage the content of the client's social media account, including the account's privacy settings. However, a lawyer may not advise a client to delete or destroy any information that has potential evidentiary value. Finally, in order to comply with a Request for Production of Documents, a lawyer must provide all information that the client has posted if the lawyer is aware that the information exists.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

**New York State Bar Association
Committee on Professional Ethics**

Opinion 972 (6/26/13)

Topic: Listing in social media

Digest: Law firm may not list its services under heading of “Specialties” on a social media site, and lawyer may not do so unless certified as a specialist by an appropriate organization or governmental authority.

Rule: 7.4

FACTS

1. The inquiring lawyer’s firm has created a page on LinkedIn, a professional network social media site. A firm that lists itself on the site can, in the “About” segment of the listing, include a section labeled “Specialties.” The firm can put items under that label but cannot change the label itself. However, the firm can, in the “About” segment, include other sections entitled “Skills and Expertise,” “Overview,” “Industry,” and “Products & Services.”

QUESTION

2. When a lawyer or law firm provides certain kinds of legal services, and is listed on a social media site that includes a section labeled “Specialties,” may the lawyer or law firm use that section to describe the kinds of services provided?

OPINION

3. The New York Rules of Professional Conduct allow lawyers and law firms to make statements about their areas of practice, but the Rules also limit the wording of such statements:

A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm *shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law*, except as provided in Rule 7.4(c).

Rule 7.4(a) (emphasis added). The exception in Rule 7.4(c) allows a lawyer to state the fact of certification as a specialist, along with a mandated disclaimer, if the lawyer is certified as a specialist in a particular area by a private organization approved for that purpose by the American Bar Association, or by the authority having jurisdiction over specialization under the laws of another state or territory.^[1]

4. A lawyer or law firm listed on a social media site may, under Rule 7.4(a), identify one or more areas of law practice. But to list those areas under a heading of “Specialties” would constitute a claim that the lawyer or law firm “is a specialist or specializes in a particular field of law” and thus, absent certification as provided in Rule 7.4(c), would violate Rule 7.4(a). *See* N.Y. State 559 (1984) (under the Rule’s similar predecessor in Code of Professional Responsibility, it would be improper for lawyer to be listed in law school alumni directory cross-referenced by “legal specialty”). We do not in this opinion address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings such as “Products & Services” or “Skills and Expertise.”

5. If a lawyer has been certified as a specialist in a particular area of law or law practice by an organization or authority as provided in Rule 7.4(c), then the lawyer may so state if the lawyer complies with that Rule's disclaimer provisions, which have undergone recent change.^[2] However, Rule 7.4(c) does not provide that a law firm (as opposed to an individual lawyer) may claim recognition or certification as a specialist, and Rule 7.4(a) would therefore prohibit such a claim by a firm.

CONCLUSION

6. A law firm may not list its services under the heading "Specialties" on a social media site. A lawyer may not list services under that heading unless the lawyer is certified in conformity with the provisions of Rule 7.4(c).

(22-13)

[1] Also, Rule 7.4(b) allows a lawyer admitted to patent practice before the United States Patent and Trademark Office to use a designation such as "Patent Attorney." This opinion does not address the particular circumstances of such patent attorneys.

[2] In *Hayes v. Grievance Comm. of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012), the Court struck down two parts of the Rule's required disclaimers. One part was the language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law." Subsequently, by order dated June 25, 2012, the Appellate Divisions deleted that language from the required disclaimers. (The other part of the originally required disclaimers – that a certifying organization is not affiliated with a governmental authority, or alternatively that certification granted by another government is not recognized by any New York governmental authority – remains in place.) The *Hayes* court also held that Rule 7.4's requirement that disclaimers be "prominently made" was unconstitutionally void for vagueness as applied to the plaintiff. In a memorandum dated May 31, 2013, the Unified Court System requested comments from interested persons with respect to defining the term "prominently made." A lawyer asserting a specialty risks violation of Rule 7.4(c) if the social media site does not satisfy the requirement of "prominently" making the required disclaimer. See Rule 8.4(a) (violation of Rules "through the acts of another").

The committee pointed out that a lawyer who does make such a claim on a social media profile must comply with [Rule 7.4(c)] disclaimer provisions, which have undergone Tell Me About Yourself

The committee's guidance responds to an inquiry from a law firm that created a LinkedIn profile and was prompted to fill in an "About" segment on the page that "include[s]" "The firm can put items under that label but cannot change the label itself," the opinion states. "However, the firm can, in the 'About' segment, include other sections entitled The law firm asked whether it could use the "Specialties" section to describe the kinds of services it provides.

The panel concluded that the firm may not do so.

Problematic Heading

In reaching that determination, the committee focused on the heading that LinkedIn chose to provide users for use in describing their professional services.

"A lawyer or law firm listed on a social media site may, under Rule 7.4(a), identify one or more areas of law practice," the committee acknowledged. "But to list those areas Law firms are prohibited from making such a claim, the committee pointed out. The panel quoted Rule 7.4(a) in full and highlighted relevant language supporting its conclusion.

A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to the areas of law listed in Rule 7.4(c).

Unlike firms, individual lawyers may make specialization claims, the committee said, pointing to the exception identified in Rule 7.4(a). That exception, set forth in Rule 7.4(c)

- the certifying organization has "been approved for that purpose by the American Bar Association," and the lawyer "prominently" displays a disclaimer stating that the
- the lawyer "prominently" displays a disclaimer that certifications granted by organizations in other jurisdictions are "not recognized by any governmental authority with

Disclaimer Issue in Flux

The committee noted that the task of complying with the disclaimer requirements in Rule 7.4(c) has been complicated by the recent decision in Hayes v. Grievance Comm. of I rights to engage in commercial speech.

The court's first objection related to language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate great The Appellate Divisions responded to that ruling by deleting the offending language, the committee noted.

However, the second part of the Hayes court's ruling—which involved a "void for vagueness" challenge to the words "prominently made" in the rule's description regarding t The language did not have to be deleted from Rule 7.4(c) because the Hayes court found that the words "prominently made" were not facially unconstitutional, but were ins

In a memorandum dated May 31, 2013, the [state] Unified Court System requested comments from interested persons with respect to defining the term 'prominently made' Because that issue remains unresolved, however, a lawyer "asserting a specialty risks violation of Rule 7.4(c) if the social media site does not satisfy the requirement of 'pr

For More Information

Full text at http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions901975/EO_972.pdf.

The 'LinkedIn Loophole'

In a February 2013 notice to its members, the South Carolina bar highlighted a problematic feature on LinkedIn that allows members of the public to add endorsements. The endorser's comments then appear on "an as-yet unremovable section on each lawyer's page" entitled "Skills & Expertise," the notice said. This placement created a loophole. The bar group directed lawyers to a temporary fix: instructions on how to hide third-party endorsements on a LinkedIn profile.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 465

October 21, 2013

Lawyers' Use of Deal-of-the-Day Marketing Programs

Deal-of-the-day or group-coupon marketing programs offer an alternative way to sell goods and services. Lawyers hoping to market legal services using these programs must comply with various Rules of Professional Conduct, including, but not limited to, rules governing fee sharing, advertising, competence, diligence, and the proper handling of legal fees. It is also incumbent upon the lawyer to determine whether conflicts of interest exist. While the Committee believes that coupon deals can be structured to comply with the Model Rules, it has identified numerous difficult issues associated with prepaid deals and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.

Introduction

Group-coupon or deal-of-the-day marketing programs have emerged as a new model for advertising and selling goods and services. These marketing programs use websites, email, newspapers, and other tools as vehicles for helping local retailers and service providers to promote their goods and services. Businesses gain an influx of new customers, name and brand exposure through the marketing organization's activities, and the opportunity for increased sales from returning customers and word-of-mouth publicity.¹

One popular model works as follows: a marketing organization uses a website to advertise deals, allowing anyone interested in receiving notifications of such deals to subscribe to the website's frequent emails. Visitors to the website also may view the deals. The marketing organization works with local businesses to create deals for goods or services that are offered to the marketer's subscribers and visitors. After a threshold number of buyers purchase a deal, the marketing organization and the local business share the proceeds in an agreed-upon division. Each successful buyer receives a code, coupon, or voucher to obtain the specified good or service, which typically has an expiration date.²

Lawyers may seek to obtain new clients through these marketing organizations' activities. However, a lawyer must exercise great care to ensure that both the offer and any resulting representation comply with all obligations under the Model Rules, including avoiding false or misleading statements and conflicts of interest, providing competent and diligent representation, and appropriately handling all money received.³

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² Not all deal-of-the-day marketing programs operate alike and the business model is not static. Therefore, variations to the model described in this opinion may impact how a lawyer uses this type of marketing tool. This opinion does not address marketing programs where the recipient has not initiated contact with the marketing organization and requested notification of deals.

³ State ethics opinions addressing lawyer use of marketing organization websites have reached different conclusions. As one opinion concluded, the situation is "fraught with peril." Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1 (2012).

Structuring the Deal to Avoid Ethical Issues

The dictionary definition of a coupon is a “voucher entitling the holder to a discount for a particular product.”⁴ For example, a coupon clipped from the newspaper may entitle a person to buy a jar of spaghetti sauce for fifty cents less than the usual price, but the buyer has to hand over to the merchant both the coupon and the cost of the sauce, less fifty cents. In contrast, marketing organizations often collect the entire discounted price for a good or service and then provide a code that entitles the bearer to collect the good or service from the merchant without any additional payment.

For a lawyer, the two options described above might be illustrated as follows. Assume a lawyer charges \$200 per hour for legal services. The lawyer could sell a coupon for \$25 that would entitle the bearer to buy up to five hours of legal services at a fifty-percent discount; in other words, the \$25 would allow the bearer to pay only \$100 per hour for up to five hours of legal services, potentially saving up to \$500. This first option requires the coupon bearer to make additional payment to the lawyer commensurate with the number of hours actually used. Alternatively, the lawyer could sell a deal for \$500 that would entitle the buyer to receive up to five hours of legal service (with a value of up to \$1,000), but all of the money would be collected by the marketing organization, with no additional payment collected by the lawyer no matter how many of the five hours of legal services were actually used. For ease of reference, this opinion will refer to option one as a coupon deal and to option two as a prepaid⁵ deal.⁶

A lawyer must pay careful attention to how a deal-of-the-day offer is structured. As discussed more fully below, a coupon deal can meet the requirements of the Model Rules. Less clear is whether a prepaid deal can be structured to be consistent with the Model Rules. No doubt other structures may arise in the future, and they will have to be carefully assessed on their particular terms.

The Cost of Advertising Does Not Constitute Sharing of a Legal Fee

Model Rule 5.4 prohibits a lawyer, with certain exceptions, from sharing legal fees with nonlawyers. Several state ethics opinions examining lawyers’ use of deal-of-the-day marketing programs have concluded that these arrangements do not constitute fee sharing and do comport with the purpose behind Rule 5.4, the protection of lawyers’ independent professional judgment, by limiting the influence of nonlawyers on client-lawyer relationships.⁷ The Committee generally agrees with the analysis set forth in such state opinions, with one caveat.

⁴ NEW OXFORD AMERICAN DICTIONARY 397 (3d ed. 2010).

⁵ Although this opinion uses the term “prepaid deal” to describe one form of marketing, it should not be confused with a lawyer’s participation in for-profit prepaid legal service plans which this Committee found permissible, subject to certain requirements, in ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-355 (1987).

⁶ These two options are not meant to be exhaustive; rather, they are used to illustrate the types of issues a lawyer must consider in structuring a deal for a marketing program.

⁷ See, e.g., Maryland State Bar Ass’n Comm. on Ethics, Op. 2012-07 (2012) (where website collects fees upfront and retains percentage of purchase price, arrangement is cost of advertising and not legal fee-splitting arrangement); North Carolina State Bar, Formal Op. 10 (2011) (portion of fee retained by website is merely advertising cost because “it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee...”); South Carolina Bar Ethics Advisory Comm., Advisory Op. 11-05 (2011) (website’s share of fee paid by purchaser was an “advertising cost” and not sharing of legal fee with nonlawyer). *But see Advertising on Groupon*

It is the opinion of the Committee that marketing organizations that retain a percentage of payments are obtaining nothing more than payment for advertising and processing services rendered to the lawyers who are marketing their legal services. This is particularly true where the lawyer structures the transaction as a coupon deal because, as discussed below, no legal fees are collected by the marketer. The fact that the marketing organizations deduct payment upfront rather than bill the lawyer at a later time for providing the advertising services does not convert the nature of the relationship between the lawyer and the marketing organization from an advertising arrangement into a fee sharing arrangement that violates the Model Rules.

The one caveat is that the percentage retained by the marketing organization must be reasonable. Model Rule 7.2(b)(1) prohibits a lawyer from paying for referrals but allows a lawyer to pay the “reasonable” costs of advertising.⁸ If the portion of the price retained by the marketing organization is reasonable given the cost of alternate types of advertising, the fee likely would be deemed to be reasonable. Similarly, if additional services are being provided (e.g., where the marketing organization is being compensated for publishing the lawyer’s advertising message to a large group of subscribers that has been developed by the marketing organization, and/or the organization processes payments from the buyers), the fee, even if a significant portion of the purchase price, likely would be considered to be reasonable.

Advertising Must Not Be False or Misleading

Truthful advertising, including that for legal services, is constitutionally protected commercial speech.⁹ Rule 7.1, however, provides that lawyers must not make false or misleading statements about their own abilities or services.¹⁰ Lawyers who choose to use deal-of-the-day marketing programs must supervise the statements made to ensure their accuracy and ensure that the substantive content does not include misleading or incomplete offers that run afoul of the restrictions contained in the Model Rules.

Advertising a coupon deal likely presents fewer hurdles than advertising a prepaid deal. As with any advertising, lawyers must exercise care in offering prepaid deals for a specified service. The public, particularly first-time or unsophisticated purchasers of legal services, may not easily discern what legal services they require or what legal services are encompassed in an offer. Therefore, care should be taken to draft the advertisements and communications to clearly

and Similar Deal of the Day Websites, Alabama State Bar, Formal Op. 2012-01 (2012) (percentage taken by site is not tied in any manner to “reasonable cost” of advertisement, thus use of such sites to sell legal services is violation of Rule 5.4 because legal fees are shared with a nonlawyer); Indiana State Bar Ass’n Legal Ethics Comm., Advisory Op. 1, *supra* note 3 (online providers are being paid to channel buyers of legal work to specific lawyers in violation of advertising and fee sharing rules); Pennsylvania Bar Ass’n, Advisory Op. 2011-27 (2011) (use of deal-of-the-day website is impermissible fee splitting under Rule 5.4); State Bar of Arizona, Formal Op.13-01 (2013) (even if portion retained is reasonable, it constitutes illegal fee sharing because the consumer pays all the money directly to the website versus the lawyer paying fees for advertising out of already earned fees).

⁸ ABA MODEL RULES OF PROF’L CONDUCT R. 7.2(b)(1) provides in full: “A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may pay the reasonable costs of advertisements or communications permitted by this Rule.”

⁹ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

¹⁰ ABA MODEL RULES OF PROF’L CONDUCT R. 7.1 provides in full: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

define the scope of services offered, including whether court costs and/or other expenses are excluded. Whether a coupon deal or prepaid deal is offered, care should be taken to explain under what circumstances the purchase price of a deal may be refunded, to whom, and what amount.

Buyer is Neither a Prospective nor Current Client

Importantly, a lawyer must be careful to communicate the nature of the relationship created, if any, by the purchase of a deal. A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client under Rule 1.18.¹¹ However, mere purchase of a deal for legal services does not make the buyer either a prospective client or a current client, entitled to the attendant duties owed by the lawyer. Prior to establishing a client-lawyer relationship, it is incumbent upon the lawyer to first determine whether conflicts of interest exist and whether the lawyer can competently handle the particular matter based on the expected scope of representation and the buyer's needs. Therefore, the lawyer's advertisement and communications should explain that until a consultation takes place with the lawyer, no client-lawyer relationship exists and that such a relationship may never be formed if the lawyer determines there is a conflict of interest, the lawyer is unable to provide the required representation, or the lawyer declines representation for some other reason.¹²

Lawyers should recognize that purchased deals generally can be traded or given as gifts. Lawyers must ensure that the coupon or voucher and all materials marketing the lawyer's services contain language cautioning any holder to review all terms of the purchase on the marketing organization's website, including whether the coupon is transferable. There may be some legal services that are not appropriate for transfer or gift giving due to the nature of the services or the marketing program's technical inability to adequately provide necessary information to the lawyer. For example, we noted earlier that it is not clear whether a prepaid deal can be structured to be consistent with the Model Rules. Similarly, it is not clear whether a prepaid deal, if it can be structured to comply with ethical requirements, could be transferable. Thus, another decision that the lawyer must make in evaluating the marketing program provider and in structuring a deal-of-the-day marketing program is whether or not the service offered can or should be transferable.

Competent Representation and Diligence

Competent handling of a matter requires a preliminary inquiry into, and analysis of, the factual and legal elements of a problem.¹³ A lawyer who is offering deals should limit the type

¹¹ Indiana State Bar Ass'n Legal Ethics Comm., Advisory Op. 1, *supra* note 3, states that the court could reasonably find that a person who has deposited money with the lawyer or lawyer's agent to form a client-lawyer relationship qualifies as a prospective client under Rule 1.18. Comment [1] to ABA MODEL RULES OF PROF'L CONDUCT R. 1.18 states: "Prospective clients, like clients, may ... place documents or other property in the lawyer's custody ..."

¹² While not all jurisdictions require lawyers to use retainer agreements, such use is advised. If the advertising lawyer expects as part of the deal to require one who is accepted as a client to execute a retainer agreement, that information likely should be disclosed on the website as well.

¹³ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

of services and practice area(s) covered in the offer to those in which the lawyer is competent so that individuals can make informed decisions whether to purchase the deal. Then, before establishing a client-lawyer relationship pursuant to a deal purchase, a lawyer must determine whether the services required by the purchaser are within the lawyer's competence. A lawyer offering deals should also specify any limitations on the types of matters the lawyer handles.

Even with proper disclosures, a legal matter may be more complex and require more work than contemplated by the offered deal. The lawyer should assess the amount of time and effort necessary to complete the matter, and, if the offer limits the number of hours of legal services the lawyer is obligated to provide, should address the possibility that the allotted time may expire before the representation is concluded. Where appropriate to the scope of services to be provided, the lawyer has an obligation to communicate¹⁴ the fact that additional services may or will be required to complete the representation beyond those included in the deal, and to advise whether the client will be obligated to pay additional fees in that event, and if so, in what amount or at what hourly rate.¹⁵

In addition, the lawyer must be careful in establishing the maximum number of deals to be sold by the marketing organization. Businesses have been harmed by overselling deals and then struggling to meet the ensuing demand. For a lawyer, setting too high a cap on the number of deals sold could lead to a violation of the Model Rules if the result is excessive work that the lawyer cannot handle promptly, competently, and diligently.¹⁶ The duty to provide competent representation and the duty to act with reasonable diligence and promptness require the lawyer to provide the necessary time and effort appropriate to each case accepted.

Properly Managing Advance Legal Fees

As noted above, deal offers are typically made through marketing organizations that collect payments and retain a portion of those payments for their advertising services. The remainder is transferred to the lawyer, generally in a lump sum, reflecting the number of deals sold without identification of individual purchasers. Whether this lump sum constitutes "legal fees ... paid in advance" within the meaning of Model Rule 1.15(c) depends on the nature of the deal.

If a lawyer offers a coupon deal, the purchase of a coupon merely establishes the discount applicable to the cost of future legal services. No legal fees are involved unless and until a client-lawyer relationship is formed, time is spent, and the discounted legal fees are collected directly by the lawyer. In other words, the funds that a marketing organization collects and forwards from the sale of coupon deals are not legal fees. Thus, the aggregate amount transmitted by the marketing organization from such sales may be deposited into the lawyer's general account. On

¹⁴ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

¹⁵ At least one state opinion concludes that it would be unethical to charge the client additional fees to complete the representation. North Carolina Bar, Formal Op. 10, *supra* note 7, states that the lawyer's duty of competent representation under Rule 1.1 requires the lawyer to complete the representation without additional fees if the matter requires more time than originally anticipated to satisfy the advertised service. This Committee does not agree that it is *per se* improper to charge additional fees for supplemental services not covered by the terms of the original offer.

¹⁶ See ABA MODEL RULES OF PROF'L CONDUCT R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

the other hand, if a transaction is structured as a prepaid deal, then the money that a lawyer receives from the marketing organization constitutes advance legal fees, because the marketing organization collects all of the money to which the lawyer will be entitled for legal services that fall within the terms of the deal. Those advance legal fees need to be identified by purchaser's name and deposited into a trust account.¹⁷ The lawyer who chooses to offer a prepaid deal must make appropriate arrangements with the marketing organization to obtain sufficient information about deal buyers in order to appropriately discharge all obligations associated with handling trust funds. Regardless of whether tracking deal buyers and accounting for prepaid fees may prove difficult when a lawyer uses a marketing organization, the lawyer is still responsible for properly handling advanced legal fees.

Additionally, deals may be purchased and then never used. So long as the lawyer has offered a coupon deal, the lawyer may retain the proceeds.¹⁸ While some jurisdictions have concluded that retaining funds from an unredeemed deal constitutes an excessive fee under Rule 1.5, the Committee does not agree with these jurisdictions to the extent the lawyer has offered a coupon deal and explained as part of the offer that the cost of the coupon will not be refunded.¹⁹ The Committee does agree that monies paid as part of a prepaid deal likely need to be refunded in order to avoid the Model Rules prohibition of unreasonable fees.²⁰

In one jurisdiction, if a deal purchaser decides before the expiration of the deal that he or she does not want to be represented by the lawyer, the purchaser is entitled to discharge the lawyer and receive a full refund of the funds paid.²¹ The Committee disagrees with this opinion to the extent the lawyer offers a coupon deal and properly explains as part of the offer that there is no right to obtain a refund of the purchase price of the coupon; in such circumstances, the coupon purchaser waives the right to compel a refund. On the other hand, if the purchaser of a prepaid deal decides, prior to the deal's expiration, that he or she does not want to proceed, the lawyer likely must refund unearned advanced fees to avoid the collection of unreasonable legal fees.²²

¹⁷ To avoid issues of improper handling of trust funds and fee sharing, a lawyer should be sure that any prepaid deal offer explains to the buyer what percentage is not a legal fee and will be retained by the marketing organization. The Committee does not agree that a lawyer always must return the entire amount of the purchase price, including any portion retained by the marketing organization, if legal services are not rendered for any reason whatsoever. *See* State Bar of Arizona, Formal Op. 13-01, *supra* note 7.

¹⁸ *See* New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897 (2011) (lawyer may retain coupon proceeds if buyer never seeks the discounted services).

¹⁹ *See* North Carolina Bar, Formal Op. 10, *supra* note 7; Maryland State Bar Ass'n Comm. on Ethics, Op. 2012-07, *supra* note 7. Rule 1.5 of the North Carolina Rules of Professional Conduct prohibits the charging of an "excessive" fee while the Model Rules and the Maryland Lawyers' Rules of Professional Conduct both prohibit the charging of an "unreasonable" fee. However, the Model Rules, the Maryland Rules of Professional Conduct, and the North Carolina Rules of Professional Conduct all use the same factors to determine whether a fee is unreasonable or excessive.

²⁰ A refund might not be required in all circumstances. For example, the Committee can envision a deal that offers a reduced flat rate only for an initial consultation. If the overall cost were modest, and if the offer explained that there would be no refund except for situations of conflict or lawyer unavailability, an unreasonable fee would not arise and no refund would be required.

²¹ *See* New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 897, *supra* note 18.

²² If the prepaid offer were for a simple service at a modest charge, along the lines of the initial consultation discussed at footnote 20, it is possible no refund would be required, provided proper and full disclosure of a no-refund policy had been made.

Finally, in the event the lawyer cannot perform legal services in accordance with a deal, such as when a conflict of interest or other ethical impediment prevents representation, the duty to refrain from receipt of an unreasonable fee compels a full refund to the purchaser. This is true for both coupon and prepaid deals. The lawyer cannot avoid this obligation to make a refund by stating otherwise in the offer.

In those instances in which a lawyer must refund money from the purchase of a deal, e.g., the lawyer has a conflict and cannot render legal services, the lawyer must refund the entire amount paid, regardless of whether the lawyer is entitled to recoup that portion of the amount that was retained as an advertising fee by the marketing organization. The Committee bases this opinion on the fact that it would be unreasonable to withhold any portion of the amount paid by the purchaser if the lawyer is precluded from providing the proffered services through no fault of the purchaser. The lawyer cannot avoid this obligation to make a full refund by providing otherwise in the offer. On the other hand, if a lawyer is not obligated to give a refund but chooses to do so, e.g., a coupon purchaser has failed to use a coupon deal before it has expired, then the lawyer may choose to refund only the portion of the payment the lawyer received, provided this limitation has been clearly disclosed at the time of purchase.

Conclusion

Offering services through deal-of-the-day or group-coupon marketing programs presents a new way for lawyers to market their services and to provide consumers with legal assistance. Lawyers who make use of this form of advertising, however, must observe their ethical and professional obligations. The Committee believes that coupon deals can be structured to comply with the Model Rules. The Committee has identified numerous difficult issues associated with prepaid deals, especially how to properly manage payment of advance legal fees, and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Ethics Advisory Opinions

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Ethics Advisory Opinion 09-10

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

Full Text

Applicable Rules: 7.1, 7.2, 8.4(a)

Facts:

Company X offers a free website that provides information about attorneys nationwide. Lawyers need not actively sign up to have their names listed on the website. Instead, Company X uses information obtained through requests to state courts and bar associations under the Freedom of Information Act and creates web site entries for the lawyers whose information is retrieved through these FOIA requests.

Company X collects information about attorneys and generates an internal rating for each listed attorney. Individual attorneys can "claim" their profiles and update their information. Company X has already created listings and ratings for a number of South Carolina attorneys regardless of each lawyer's knowledge of the listings.

The website also features peer endorsements. Attorneys are able to write comments about one another that are then displayed on the attorney's profile. It is possible to remove these endorsements from public view. Peer endorsements help raise an individual's rating.

The website also features "client ratings." Anyone can submit a client rating about any lawyer, and the lawyer may invite current and former clients to submit ratings. Client ratings do not impact an attorney's internal rating by Company X, but the client comments are prominently posted on the attorney's listing. While Company X monitors and inspects the client ratings and peer reviews, attorneys are unable to control who endorses or rates them.

Questions:

- 1) May a South Carolina lawyer claim his or her Company X website listing, including peer endorsements, client ratings, and Company X ratings?
- 2) May a South Carolina lawyer invite peers, clients, or former clients to post comments and/or rate the lawyer ?

Summary

- 1) Yes, a lawyer may claim the website listing, but all information contained therein (including peer endorsements, client ratings, and Company X ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing.
- 2) A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but all such comments are governed by the Rules of Professional Conduct, and the lawyer is responsible for their content.

Opinion

Lawyers are responsible for all communications they place or disseminate, or ask to be placed or disseminated for them, regarding their law practice, and all such communications are governed by Rule 7.1 of the Rules of Professional Conduct. See Cmt. 1 ("This Rule governs *all communications about a lawyer's services.... Whatever means are used to make known a lawyer's services, statements about them must be truthful.*")(emphasis added). However, a lawyer is not responsible for statements about the lawyer or the lawyer's practice that are not placed or disseminated by the lawyer. Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer's behalf.

In the Committee's view, to "claim" one's website listing is to "place or disseminate" all communications made at or through that listing after the time the listing is claimed. For example, in Advisory Opinion 99-09, this Committee addressed a client's website that advertised the lawyer's services but was created without the lawyer's knowledge. The Committee advised that, once the lawyer became aware of the advertisement, the lawyer should counsel the client to conform the advertisement to the Rules of Professional Conduct and that, if the client refused, the lawyer's continued representation of the client may imply the lawyer's authorization or adoption of the advertisement. Similarly, we advised in Advisory Opinion 00-10 that a lawyer who participates in an internet service for locating attorneys should review, for compliance with Rules 7.1 and 7.2, all information about the lawyer provided through the service. By claiming a website listing, a lawyer takes responsibility for its content and is then ethically required to conform the listing to all applicable rules.

Likewise, a lawyer who adopts or endorses information on any similar web site becomes responsible for conforming all information in the lawyer's listing to the Rules of Professional Conduct. Martindale-Hubbell, SuperLawyers, LinkedIn, Avvo, and other such websites may place their own informational listing about a lawyer on their websites without the lawyer's knowledge or consent, and allow lawyers to take over their listings. The language employed by the website for claiming a listing is irrelevant. (Martindale.com, for example, uses an "update this listing" link for lawyers to claim their listings). Regardless of the terminology, by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing.

Information on business advertising and networking websites are both communications and advertisements; therefore, they are governed by Rules 7.1 and 7.2. While mere participation in these websites is not unethical, all content in a claimed listing must conform to the detailed requirements of Rule 7.2(b)-(i) and must not be false, misleading, deceptive, or unfair. In order to be exempt from the filing requirement of Rule 7.2(b), an advertisement must be limited to directory information only and must not be disseminated through a public medium. Comment 5 to Rule 7.2 specifically excludes from the filing requirement "basic telephone directory listings, law directories such as 'Martindale Hubbell' or a desk book created by a bar association." The Comment does not address online versions of such directories; however, to require lawyers to file copies of online directory listings would be to require them to file copies of not only Martindale.com listings, but the South Carolina Bar's online directory listing as well. The Committee does not believe the Court intended the rules to require such filing and therefore does not believe that an online listing containing only directory information must be filed pursuant to Rule 7.2(b). However, if an online listing is updated to include anything beyond directory information (which includes "the name of the lawyer or law firm, a lawyer's job title, jurisdictions in which the lawyer is admitted to practice, the lawyer's mailing and electronic addresses, and the lawyer's telephone and facsimile numbers," according to Comment 5), then 7.2(b) requires that a copy be filed with the Commission.

Soliciting peer ratings does not violate the Rules of Professional Conduct. Martindale-Hubbell has employed a lawyer rating system for more than 100 years, and federal courts have held that advertising factual information about such verifiable, independent ratings does not violate state advertising prohibitions against statements likely to mislead or create unjustified expectations about results. See, e.g., *Mason v. Florida Bar*, 208 F.2d 952 (11 th Cir. 2000). More recently, advertisements about newer ratings organizations, such as SuperLawyers, have been given the same regulatory berth by state agencies. See, e.g., *In re Opinion 39 of the Committee on Attorney Advertising*, 961 A.2d 722 (N.J. 2008)(per curiam)(vacating the court's own committee's 2006 advisory opinion prohibiting advertising of "SuperLawyers" and "Best Lawyers in America" designations, on the grounds that the prohibition is likely unconstitutional because such designations are factually verifiable). Therefore, provided that the rating is presented in a non-misleading way and is independently verifiable, including one's rating in an online listing or elsewhere appears permissible.

Client comments may violate Rule 7.1 depending on their content. 7.1(d) prohibits testimonials, and 7.1(d) and (b) ordinarily also prohibit client endorsements. See Cmt. 1. In the Committee's view, a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation or statement of approval of the lawyer. A lawyer should not solicit, nor allow publication of, testimonials. A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations. "The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client." Cmt. 3 (emphasis added).

Lawyers soliciting client comments on web-based business listings are also cautioned to adhere to Rule 8.4(a), which prohibits lawyers from violating the Rules of Professional Conduct through the acts of another. Even absent a specific prohibition against testimonials, several states have concluded that client comments contained in lawyer advertising violate the prohibition against misleading communications if the comments include comparative language such as "the best" or statements about results obtained. See, e.g., Virginia State Bar Lawyer Advertising Opinion A-0113 (2000). Rule 7.1(c) prohibits comparative language in all communications, Rule 7.1(b) prohibits statements that are likely to create unjust expectations about results, and Rule 7.2(f) prohibits self-laudatory language in advertisements. Therefore, a lawyer should monitor a "claimed" listing to keep all comments in conformity with the Rules. If any part of the listing cannot be conformed to the Rules (e.g., if an improper comment cannot be removed), the lawyer should remove his or her entire listing and discontinue participation in the service.

This opinion does not take into consideration any constitutional-law issues regarding lawyer advertising.

Return

State Bar of Arizona Ethics Opinions

97-04: Computer Technology; Internet; Advertising and Solicitation; Confidentiality

4/1997

This opinion discusses several ethical issues with respect to lawyers using the Internet to communicate including, for example, confidentiality concerns when sending email to a client, advertising considerations for websites and the applicability of Arizona's Rules of Professional Conduct to communications disseminated from or received in Arizona [ERs 1.6, 1.7, 5.5, 7.1, 7.2, 7.3, 7.4, 7.5]

FACTS[1]

The State Bar of Arizona's Committee on the Rules of Professional Conduct has received several inquiries from Bar members with respect to lawyers using the Internet. Those inquiries have included questions about law firm web sites, communicating with clients via "e-mail", and engaging in legal discussions with unknown members of the public through on-line "chat groups". In an effort to assist Arizona Bar members in determining their ethical obligations in cyberspace, this Opinion addresses a variety of ethics questions pertaining to computerized legal communications. This opinion does not purport, however, to address all of the ethical issues associated with lawyers using the Internet.

RELEVANT ETHICAL RULES

- ER 1.6 Confidentiality of Information
- ER 1.7 Conflict of Interest: General Rule
- ER 5.5 Unauthorized Practice of Law
- ER 7.1 Communications and Advertising Concerning
a Lawyer's Services
- ER 7.2 Legal Service Information
- ER 7.3 Direct Contact with Prospective Clients
- ER 7.4 Communication of Fields of Practice
- ER 7.5 Firm Names and Letterheads

RELEVANT PRIOR OPINIONS

Arizona Op. 95-11 (Dec. 6, 1995)

OPINION

Several other state ethics committees have issued ethics opinions on use of computerized communications by lawyers. The most recent ethics opinions from other jurisdictions regarding ethics and the Internet are:

- IL. Op. 92-23 (computer referral system)
- IA. Op. 96-01 (firm web sites)
- MI. Op. RI-276 (direct solicitation)
- NC. Ops. 239, 241 (web sites & directories)
- NE. Op. 95-3 (internet referral service)
- OR. Op. 94-137 (on-line legal info.)
- PA. Op. 96-17 (internet)
- SC. Op. 94-27 (on-line office)
- TN. Op. 95-A-576 (unpublished)(e-mail)

These opinions, for the most part, conclude that attorney ethical rules do apply to attorney communications via the Internet. Florida and Texas also have issued guidelines, through their Advertising Committees, which confirm that lawyer solicitation via the Internet is subject to each state's ethical rules on lawyer advertising. Tennessee has forged the next step and adopted a specific ethical rule that defines "solicit" and "written communication" as including "computer on-line transmission". Tenn. Code of Prof. Res., DR 2-104 (adopted 3/15/96).

The American Bar Association has not yet issued a formal opinion on use of the Internet by lawyers.

The following are the ethical issues most frequently presented to the State Bar of Arizona's Committee on the Rules of Professional Conduct on lawyers using computerized communications:

1. Is a firm "web site" considered a "communication" about a lawyer that would be subject to the ethics rules?

Yes. A lawyer's web site is a "communication" about the lawyer or the lawyer's services that is subject to the ethics rules. Thus, all of the ethical requirements set forth in Rules 7.1 through 7.5 apply to such communications. Specifically, lawyers should review the requirements of the general advertising rule, ER 7.1, which includes the general premise that lawyer communications should be predominantly informational (ER 7.1(b)). ER 7.1 also includes some obscure requirements, such as: 1) a communication must include the cities where the lawyer has offices and/or will actually perform the work; 2) a copy of the communication must be maintained for three years; and 3) communications that include a factual statement must be able to be substantiated. Communications and advertising about a lawyer's services shall not be false or misleading, as required by ER 7.1(a). Other general considerations when deciding what information may be on a law firm web site are: 1) the information should not create an unjustified expectation; 2) fee information must comply with ER 7.1(e); 3) if a firm wants to list some of its existing clients and/or include an endorsement from an existing client, the firm must obtain the clients' consents prior to including their identities in the web site; and 4) if the site provides links to other firms' sites, there should be clear explanations as to whether or not the firms are affiliated (as

required by ER 7.1(p)).

2. If a law firm has offices in many states, must the firm comply with Arizona ethics rules if the firm either has an office in Arizona or attorneys admitted to practice in Arizona?

Yes. Pursuant to ER 8.5, if you are a member of the State Bar of Arizona, you must follow the Arizona Model Rules of Professional Conduct, even if your advertisement will appear, electronically, both inside and outside of the state.

3. Can a "web site" use a tradename as the law firm name?

No. ER 7.5 prohibits the use of tradenames for law firms. Domain names, however, are not firm names and thus are not subject to this limitation.

4. Can a lawyer mention either in a web site or simply in responding to a question in a "chat room" that he or she specializes in water law?

No. Lawyers may only state that they "specialize" in an area of practice if they are so certified by the State Bar of Arizona's Board of Legal Specialization or otherwise authorized, pursuant to ER 7.4. Water law is not an area that is certified as a specialty.

5. Is it a violation of ER 7.3 to contact a prospective client directly via e-mail if you know that the person needs legal representation for a particular matter?

Maybe, unless the lawyer complies with the requirements set forth in ER 7.3. ER 7.3 prohibits telephone and in-person solicitation. Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with the prohibited mediums. A potential client reading his or her e-mail, or even participating in a "chat room" has the option of not responding to unwanted solicitations.

ER 7.3 might still apply, however, to certain computerized solicitations. That Rule requires certain disclosures in written communications, initiated by a lawyer, to persons "known to need legal services of the kind provided by the lawyer in a particular matter." ER 7.3(b)(emphasis added). In order for this portion of ER 7.3 to apply to a computerized solicitation, the following elements would be necessary:

1) the lawyer must initiate the contact (thus, lawyer responses to questions posed by potential clients in "chat rooms" or inquiries sent directly to a particular lawyer would not need to comply with this rule); and

2) the potential client would have to have a known legal need for a particular matter. Thus, for instance, solicitations sent to all members of an environmental listserv would not be affected because those members might be interested in environmental issues but not necessarily have a need for representation in a particular environmental case.

If those elements exist, then the lawyer must comply with the disclosure obligations

set forth in ER 7.3(b). Part of that disclosure obligation requires that such written communications:

"be clearly marked on the envelope and on the first page of the communication contained in the envelope as follows: ADVERTISING MATERIAL: THIS IS A COMMERCIAL SOLICITATION. Said notification shall be printed in red ink, in all capital letters, in type size at least double the largest type size used in the body of the communication."

These requirements pose a slight application dilemma for electronically transmitted solicitations; how will an attorney mark an e-mail envelope and contents with the requisite disclaimer - in red ink? If technologically feasible, lawyers should make reasonable efforts to comply with this requirement and send a copy of their communications, as required by ER 7.3(c), to the Clerk of the Supreme Court and the State Bar. Absent further clarification of these requirements by the Arizona Supreme Court, this Committee suggests that practitioners, at a minimum, include the disclaimer language in all capital letters on the e-mail "subject" line and in the body of the communication.

6. Should lawyers answer specific legal questions posed in "chat rooms" or "news groups"?

Probably not because of both the inability to screen for a potential conflict with an existing client (in violation of ER 1.7) and the possibility of disclosing confidential information (in violation of ER 1.6). In Formal Opinions 87-23 and 92-10, which pertain to lawyers giving legal seminars to lay people, one of the guidelines suggested by this Committee was that lawyers should not answer specific legal questions from the audience. Ethically, it would follow that lawyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific.

Lawyers may, however, provide articles or newsletters to individuals on the Internet or in their web sites, just as lawyers currently may disseminate general information on particular legal topics through firm white papers and brochures.

7. May a lawyer join an on-line lawyer referral service?

Probably not unless the service is in compliance with ER 7.1(r)(3), which requires that the referral service be "operated, sponsored, or approved by a bar association". At present that would require approval by the State Bar of Arizona. There are no on-line referral services currently approved by the State Bar.

8. Should lawyers communicate with existing clients, via e-mail, about confidential matters?

Maybe. Lawyers may want to have the e-mail encrypted with a password known only to the lawyer and the client so that there is no inadvertent disclosure of confidential information. Alternatively, there is encryption software available to secure transmissions. E-mail should not be considered a "sealed" mode of transmission. See American Civil Liberties Union v. Reno, 929 F.Supp. 824, 834 (E.D.Pa 1996). At a

minimum, e-mail transmissions to clients should include a cautionary statement either in the "re" line or beginning of the communication, indicating that the transmission is "confidential" "Attorney/Client Privileged", similar to the cautionary language currently used on facsimile transmittals. Lawyers also may want to caution clients about transmitting highly sensitive information via e-mail if the e-mail is not encrypted or otherwise secure from unwanted interception. One state ethics opinion went so far as to require that lawyers obtain a written consent from clients before transmitting sensitive information via e-mail. Iowa Supreme Court Board of Professional Ethics and Conduct Op. 96-01 (8/29/96). Such a written waiver, according to the Opinion, must disclose the risks associated with e-mail.

These recommendations are consistent with this Committee's prior Formal Op. 95-11 regarding use of cellular phones by lawyers. In that Opinion, the Committee cautioned lawyers against discussing sensitive information via a cellular phone even though the interception of such a conversation would be illegal. The Opinion stated, however, that it is not unethical for a lawyer to communicate with a client via cellular phone. Similarly with e-mail, it is not unethical to communicate with a client via e-mail even if the e-mail is not encrypted; this Committee simply suggests that it is preferable to protect the attorney/client communications to the extent it is practical. Lawyers also are reminded that e-mail records may be discoverable, including the records of time and date of transmission and recipients. This information thus should be included in the lawyer's decision as to whether or not confidential information should be communicated via e-mail.

9. May lawyers place on-line intake forms for prospective clients on their web sites and, if so, may the client respond via the web site?

Probably. Placing the forms on the web site, for clients to download and complete off-line is ethically permissible because: 1) there is no unethical solicitation involved; and 2) there is no communication of confidential information through cyberspace. As noted above, prospective clients should be cautioned to avoid possible inadvertent disclosures of confidential information, and thus prospective clients should not be able to send the completed form electronically.

10. Do lawyers need to submit a copy of their web sites to the State Bar and the Supreme Court pursuant to ER 7.3?

Probably not. Web sites probably will not fall within the requirements of ER 7.3, which requires lawyers to submit a copy of all direct mail solicitation letters to the State Bar and the Supreme Court. Lawyers only need to send copies of direct mail correspondence to the Bar and the Court when the solicitation is sent to a prospective client who has a known need for legal services for a particular matter. Presumably web sites are designed to provide general information about a law firm and are not sent directly to certain prospective clients and thus do not need to follow ER 7.3.

11. Do lawyers need to keep a copy of their web sites and any changes that they make to their web sites pursuant to ER 7.1(o)?

Yes. Lawyers need to keep a copy of their web sites in some retrievable format for three years after dissemination along with a record of when and where the web site was used. Additionally, if

there is a material substantive change to the web site, the lawyer should retain a copy of all material changes as well.

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