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Tech Tock, Tech Tock: New Technologies and the Countdown to Your Ethical Demise

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Tech Tock, Tech Tock: Social Media and the Countdown to Your Ethical Demise Seminar Materials

Our activities in Social Networking all have both professional and ethical repercussions. Just about every professionalism concept ever considered seems to be implicated when lawyers use social media—or at least that's how it seems. In addition, the Rules of Professional Conduct are in play in a host of ways when we engage in activity like Blogging, Tweeting, Facebooking and participating in LinkedIn. The truth is, the professional and ethical overlap is deep and sometimes indistinguishable. Clearly, social media is turning the practice of law on its head, and as a result, there are a host of new problems for lawyers.. This text addresses those activities, the professionalism issues that arise, as well as particular Rules of Professional Conduct that are in play and provides some advice for keeping on the right side of the ethical divide.

Given the fast paced nature of technology itself, there's no way we could possibly resolve all of the pitfalls you'll face, but we can at least alert you to the issues.

1. Competence

Competence is the most fundamental principle of professionalism in the so-called book. I think that's why we find discussions about competence in every professionalism statement, as well as in the actual "book." The *ethics* book, that is. Here's how Rule 1.1, Competence reads:

RULE 1.1 COMPETENCE[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.

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[1] This paper purports to analyze the ABA Model Rules, but since copyright restrictions prohibit me from referencing the ABA Rules, most references in this paper to the "Rules" are actually references to the Delaware Rules of Professional Conduct.

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Obtaining the requisite "knowledge and skill" through our interaction in social media

When discussing professionalism and social media, I'd like to come at you from a different angle. I realize that it may sound like a completely off the wall statement, but I think there's a realistic argument that social networking can make you a *better* lawyer.

Anyone who's spent even a few minutes on line can tell that a tremendous number of lawyers who are active in social networking are simply out there for self promotion-- to "build their brand." In order to make themselves appear credible, these attorneys behave as self-anointed experts in their given legal field. Don't get me wrong, many of our colleagues are genuinely trying to advance the public's knowledge of the law or providing helpful information to other members of the bar, but the "brand builders" among us could be somewhat irritating. However, those lawyers may actually be providing you with a nice benefit.

Consider that one way these brand builders get themselves noticed is by being the first to mention a hot new case. As soon as an interesting holding comes out, this part of the blogosphere jumps all over it because they want to get noticed—they tweet a link to the case, or a link to a news article talking about the case, or a link to their blog where they analyzed the case. You wonder if some of these bloggers are hiding under the robes of the judges- that's how fast they get to things. Like I said, the first person to get the link out there and is known as the person who cracked the story and their message is re-tweeted into cyber-history (which incidentally lasts for about 12 seconds!). The silver lining? Essentially, these attorneys are a research resource for the rest of us.

Use the self-serving nature of those on twitter and other social networking sites to your advantage – identify those people who practice in your area of the law and are proficient bloggers/ tweeters and follow them. Let them do the research for you. If they have a blog, subscribe to the RSS feed so you get the information as they post it. Provided that the information is accurate, it's like having a subscription to a new law-notification service—for free!

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That's the rub, though, isn't it? We need to be concerned about the accuracy of the information we're provided. At the very least, however, we receive timely notification that some development in the law has occurred-- then it's our job to research those developments in a thorough manner.

When seen in that light, isn't it true that social networking platforms allow us to maintain a higher level of legal knowledge? In fact, Comment [6] to Rule 1.1 sets forth the mandate that **"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."** We've just seen that social networking can help attorneys keep abreast of changes in the law and practice, thus enhancing their competence. Plus, we're not limited to a passive role. An attorney who is seeking information about any legal development can simply post a question on LinkedIn or a similar platform and they'll soon receive a flurry of answers. Social networking platforms are the latest tools that attorneys can use help to fulfill the mandate set forth in Rule 1.1.

Twitter and blogs may redefine what's expected of us.

Of course there's a negative side. Take, for example, the requirement that we stay abreast of changes in the law as set forth in Comment 6 to Rule 1.1. For years, that's meant reading the case reports in our local bar association newspaper or going to some CLE courses to stay on top of things. However, these days, information about new cases is disseminated by way of social networking. As we discussed above, people in cyberspace actually race to be the first to blog or tweet about the latest hot topic and court holdings. These days you don't have to wait for the snail mail to send your copy of the law journal to hear about the latest landmark holding. You can get it through the social networking world. And therein lies the danger.

The more social media becomes part of the rubric of our daily practice, the greater the

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likelihood that it will turn from something that attorneys want to do, to something that we must do. I can envision a disciplinary hearing or an argument in a legal malpractice case where the plaintiff is trying to establish whether a lawyer "should have known" about a new development in the law and they bring out evidence from the social networking world. "Hey," the savvy lawyer will argue, "if all of these people on Twitter were talking about this development for 6 months, you should have known about it."

Thus, the increased availability of information may be an interesting, useful tool today, but the more prevalent it becomes, the greater the likelihood it will transform into an expectation. Will social networking become considered part of the bare minimum investigation that a "competent" attorney performs. Could it lead the establishment of a "duty to tweet?" Will the commentary to the ethics rules in the future include a recommendation that attorneys "check the chatter" as a prerequisite to being properly thorough? It may seem far fetched, but it's not so crazy. It's happening in other areas of business—today it's common practice for an employer to Google you or check out a prospective employee's Facebook pages as part of the interview process. That didn't exist a few short years ago.

Can we help another lawyer in an emergency situation via social networks?

Rule 1.1, Comment [3] states, **In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.**

I can envision situations where lawyers in emergency situations run to Twitter or to LinkedIn to obtain desperately needed information from colleagues who might be more knowledgeable than them. The emergent nature can be fulfilled in this medium, given the real-time nature of the Internet and the vast number of experts who may be logged on at a given time.

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The question, however, is whether you want to be responsible for advising that attorney without having the opportunity to provide adequate supervision or follow up. Think about it-- in the person-to-person world, you'd give advice to a colleague and you could follow up with that person to see how things work out. However, once you give advice to a person in cyberspace, you may never see or hear from them again...until there's a problem! And I think we can all agree that if that attorney's head is on the ethical chopping block, he's going to do anything he can to get out of trouble, including throwing you under the cyber-bus.

This is a great illustration of the problem lawyers have with “buffers” in the virtual world. For some reason, there's a buffer that exists between us and the people with whom we're interacting in social networking. Maybe it's because we don't see them in front of us, or whatever, but something about the medium causes us to let our guard down and take certain risks that we wouldn't necessarily take otherwise. Which leads me to a discussion of confidentiality...

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2. Confidentiality, Rules 1.6 and 1.9

RULE 1.6 CONFIDENTIALITY OF INFORMATION
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosures is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(6) to comply with other law or a court order.

RULE 1.9 DUTIES TO FORMER CLIENTS
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by
Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

I haven't seen many grievances alleging a breach of confidentiality during my time on the ethics committee. I think that it's going to change, however, given the prevalence of social networking.

Social networking is quickly becoming the primary mode of conversation for our clients.

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Chances are that our clients will be trying to use that medium to communicate with you as well. The problem, of course, is that posting information on a social networking site-- even on a client's Facebook “Wall” for example, is still out there all for the world to see. Remember that the lawyer's duty to retain confidential information about a client is not altered just because we are dealing with a new medium.

I realize that it seems almost ridiculous to mention the idea that lawyers should not use social media as a means of communication with our clients, but I promise you that it's not. Remember, social media causes us to let our guard down-- being reminded of these pitfalls is, therefore, essential.

Also, it's very tempting to tell "war stories" in any context, but social networking seems to make them even more attractive. Be mindful, however, of the restriction in Rule 1.9, our “Duties to Former Clients.”

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3. Unauthorized Practice of Law, Rule 5.5

Pertinent Rules:

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW
(a) 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.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

The actions we take in social networking situations sometimes rise to the level of practicing law. For instance, we could be answering a question on Facebook and, in doing so, inadvertently provide advice to a potential client. In addition, there are some hidden dangers associated with the unauthorized practice of law that lurk beneath the surface. Here are some issues about which to be aware.

It's so easy to unwittingly establish a lawyer-client relationship in the social networking world that it's scary. Just think about the basic, law school textbook definition of how that relationship is

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established: If someone seeks advice and you give advice in circumstances where it's reasonable for a person to rely on that advice, an attorney-client relationship has been created. Each one of us is only a few postings, e-mails or chat sessions away from getting into trouble.

If the mere existence of that problem wasn't enough, consider the idea that the conversation you may be having with the person on the other end of the modem may not be from your jurisdiction! Not only could you have a new client (and not realize it), but you also could be practicing law in a jurisdiction where you're not licensed. I'd say that qualifies as a "pitfall."

Something to think about: this idea of being able to "transport knowledge across state lines," as I like to put it, may give some ammunition to the proponents of liberalizing the rules regarding multi-jurisdictional practice. It also lends credibility to the argument that we need some sort of federally mandated ethics code that can govern cyberspace, like the FCC in the case of radio and TV.

Some other concerns in this area: As I mentioned above, it's common for attorneys to seek information in specialized areas of knowledge via LinkedIn "Answers" and other similar services. Be careful, however, when you're doling out such information. It's not difficult to foresee a situation where one unwittingly assists a lay person in the unauthorized practice of law, or an attorney who's licensed in another jurisdiction from practicing law in violation of Rule 5.5(b).

Finally, this pitfall may be a bit of a stretch, but it should be mentioned nonetheless. Could you have a problem if you focus your networking in one particular region where you're not licensed? What if you engage in persistent social networking that's directed to a particular area by consistently addressing legal issues that are germane to a particular geographical location where you're not licensed? Say, for example, if you have a New York based health care practice, but you continually comment on issues related to the Massachusetts system. Could you end up establishing a "systematic and continuous presence" in that jurisdiction for the practice of law, in violation of 5.5(b)(1)? I understand that the rule talks about having an "office" in the jurisdiction and probably

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contemplated a physical presence, but this could be a genuine concern given the way information is passed around in the social networking world.

4. ***Marketing and Solicitation, Rule 7***

Pertinent Rules:

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES
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.

RULE 7.2 ADVERTISING
(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not- for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and
(3) pay for a law practice in accordance with Rule 1.17.
(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS
(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.
(b) A lawyer shall not solicit professional employment from a prospective client by written, or recorded or electronic communication or by in-person, telephone or real time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.
(c) Every written, recorded or electronic communication from a lawyer soliciting professional

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employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION
(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;
(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
(2) the name of the certifying organization is clearly identified in the communication.

The 7 Not-So-Deadly Sins of Rule 7: Here are some concerns, many of which don't have clear answers...

1. Does anyone really know when we're "advertising" anymore? Rule 7.2, and the Ethics 2000 amendment.

The manner in which attorneys are permitted to advertise is set forth pretty clearly in the rules. The old Rule 7.2, before the revisions in 2002, referred to, "public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television...communication." Today, as you can see from the rule quoted above, advertising includes, "recorded or electronic communication, including public media," Rule 7.2(a).

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Query: Is a blog advertising? Seems like a gray area. Most of them are certainly self-serving--you may intend to disseminate useful information, but very often they're designed to attract attention to your practice. Are these blog postings, "electronic communications" per the rule? You don't actively send a blog posting to someone else, but you do make it available in cyberspace. Maybe it's more analogous to a billboard ad and, therefore, considered, "public media?"

If blogging is considered a form of advertising, then everything we write in our legal blogs may be governed by the requirements of Rule 7.1. We must make sure that we don't make any false or misleading statements about ourselves or our practice. Who ever thought that our blogs would be subject to the ethics rules?

I'm quite concerned that every self serving posting on the Internet can arguably fall into the definition of advertising. If that were the case, then just about everything we say on LinkedIn, for example, would be in play. After all, the whole purpose of the site is to promote your business.

2. If we know we're advertising, how do we comply? Rule 7.2(c)

Rule 7.2(c) requires that the advertising communication includes your address and the name of an attorney in your office. Consider this: If every posting you place on the Internet can be considered a communication covered by 7.2(a), then you need to include the identifying information mandated by 7.2(c) on every electronic comment/posting you make. Also, what about Google Ads or ads you place on Facebook? None of those ads have the requisite identifying information. Is it enough that the viewer can follow a link back to a page where this information is listed?

3. Is exchanging testimonials giving "value" in exchange for a recommendation in violation of Rule 7.2(b)?

An interesting part of the LinkedIn service is the ability to give "recommendations" to

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colleagues. There probably isn't any ethical issue if the recommendation is unsolicited, but what about those situations where they are solicited? It's common for a person to offer to recommend a colleague, in exchange for a reciprocal recommendation. In that case, you'd have to believe that there's some value to the recommendation-- if not, why would it be offered or sought? And if there is some value, then it may run afoul of Rule 7.2(b) which prohibits a lawyer from giving anything of value to a person for recommending his services.

Another way recommendations like that can be dangerous is where the recommendation you are given is not accurate. If the "recommender" posts a false or misleading statements about you or your services in their testimonial and you permit it to be displayed on your profile, you could be violating Rule 7.1.

4. Fuzziness regarding the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client. Rule 7.3(a)

Social Networking blurs the definition of when "contact" with another person constitutes the "solicitation" of a prospective client. Like everything in the wonderful world of attorney ethics, each case is highly fact dependent. So what about the fact that you might initiate a conversation with a layperson in a chat room, or via the chat function on Facebook about an issue in your area of expertise-- is that a prohibited solicitation? What if, for example, you posted a comment directly on someone else's Facebook wall telling them that you represent them in an appeal of their property taxes? Is that the type of solicitation the rule envisioned?

The First Amendment is always at issue when you talk about restrictions on attorney advertising, but it seems to be making a resurgence with the increased use of social networking. For example, if you practice health care law and you're commenting on the Obama plan, is that solicitation or political speech?

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5. A wolf in sheep's clothing: Is your "profile" on LinkedIn really a "website" in disguise? (And therefore subject to Rule 7)

It really can't be argued (and it's already well established) that a website is advertising, so I'm not going to get into that issue at all. I will however, mention a related matter that's not nearly as settled. What about your "profile" on social networking sites such as LinkedIn? People post their name, address area of practice, roster of notable clients, and more. In reality, it's the functional equivalent of a mini-website. If that's the case, then the contents thereof would be subject to all of the rules on attorney advertising.

The same may be said for blogs. Are they really just places for you to post interesting articles, like a newsletter? Heck, if they are, they're advertising. But even so, sometimes a blog isn't just a blog, eh Dr. Freud? As blogs get more sophisticated and include more information, it may be considered a website and a website is advertising.

6. When touting your achievements can get you in trouble.

Rule 7.1, Comment [3] was a new addition to the Rules in 2002. It doesn't deal with social media in particular, but it's worth reviewing in the context of blogs and testimonials. The comment states, "An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or

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otherwise mislead a prospective client."

What if someone you represented makes an improper comparison of your services that violates the spirit of this rule/comment? Clearly, if you don't say it and you don't know about it, you're in the clear. But what if you happen to see it? What if it's made in the context of a LinkedIn answer that you see, or posted as a comment on your client's Facebook wall that you happen to notice? Are you required to request that the comment be taken down? Does your knowledge of it's existence give you some ownership of it or at least confer some duty on you to make a request that it be removed? I could envision a situation where an attorney runs into a problem if they allow statements made by another to remain posted in cyberspace when the attorney knows that the statements would've been a violation of the rules had they been posted by that attorney.

7. Being careful about claims of specialization (not just by you- how about those who "recommend" you on LinkedIn?) Rule 7.4

Closely related to the previous issue are claims of specialization. We can all envision a satisfied client shouting your praises for all the world to hear. Well, maybe some of us can expect that more than others, but that's not the point right now. The point is, that social networking changes the situation.

Someone might tell a friend at a cocktail party that you specialize in real estate law and that wouldn't be a problem. After all, it may be a claim of specialization that's prohibited by the rules, but you're not saying it, so you're in the clear. However, take a situation like we discussed above, where the statement is posted on your site, your blog or another website that you frequent. If you see it and knowingly allow the claim of specialization to be perpetuated, you could be running afoul of Rule 7.4.

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5. ***Investigations***

The first lawyer to realize that we could find valuable information for our client matters on the Internet must have felt like they struck gold. I could see their facial expression in my mind's eye, reflecting a combination of revelation, shock, and opportunity. Their eyes most likely grew even wider when they found the treasure trove of information that exists on people's social media accounts. But for a certain time only the most technologically savvy lawyers availed themselves of this tool. Some didn't understand the new medium and others, even if they were familiar with the technology, weren't quite sure about the permissibility of trolling Facebook and the Internet in general in search of information to be used in the course of the practice. And there was good reason- for some time the matter was unresolved.

For that reason, I used to tell lawyers at my CLE seminars that social media searches were not a substitution for legitimate discovery techniques. But times have changed. Today, Internet and social media searches *are* legitimate discovery techniques.

It is almost commonplace these days to receive interrogatories where the opposing party asks for information regarding at least some aspect of your client's social media behavior. They might also include statements made on social media in the definition of "statements" in the Instruction section of the rogs. Your individual jurisdiction will likely have an entire progeny of cases that addresses whether, and to what extent, lawyers are permitted to ask about a party's social media use, account information, etc. I'd expect that this issue is among the most hotly debated pre-trial motions that lawyers are seeing these days.

Most likely, that line of cases begins with an analysis of the seminal decision out of New York, Romano v. Steelcase Inc., 2010 NY Slip Op 20388 (N.Y. Sup. Ct. Sept. 21, 2010). In that case the court was presented with a plaintiff who claimed she sustained permanent injuries in an accident that

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prevented her from participating in certain activities (pg3). However, the other party found evidence on the public portion of her Facebook page that revealed an active lifestyle. 2010 NY Slip Op at 3. The fight was obviously over whether the postings on social media were discoverable, an issue that had not been decided in the jurisdiction at the time. The court held that the postings were discoverable.

The court granted access to the party's, "current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information…" 2010 NY Slip Op at 7. The Romano court separated their analysis into two parts: whether the content of the postings was discoverable according to local discovery standards and whether it was appropriate to seek discovery of publicly available social media posts. While the former question was a question of local evidence law that isn't relevant to our discussion, the latter is a wider-reaching privacy issue that impacts Technethics.

The court cited Katz v. United States, 398 US 347 (1967) and explained that in determining if there is a recognizable right to privacy, it must be determined that a person has a subjective expectation of privacy and that the expectation is one that society finds reasonable. 2010 NY Slip Op at 5. The court evaluated decisions from around the country and also reviewed the privacy policies of both Facebook and MySpace and came to a clear conclusion when it stated, "Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy." 2010 NY Slip Op at 6. The court made is clear that "Users…lack a legitimate expectation of privacy in materials intended for publication or public posting" (quoting, U.S. v. Lifshitz, 369 F3d 173 (2d Cir. 2004).

The "legitimate expectation of privacy standard" applies to the ethics world as well. There have been numerous decisions throughout the country confirming that lawyers are not breaking any ethical rules by downloading information that is publicly available on the Internet. Those cases rely on

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the same rationale as the Romano court. Those concepts have been extended beyond general Internet searches to include social media posts that could be viewed by the public. Also note the New York State Bar Opinion #843 (9/10/2010) which stated that a lawyer may view and access the social media profiles of a party if the profile is available to the public.

Thus, a lawyer is not violating any ethical principles by conducting investigations on social media sites, if they are viewing posts which are readily available to the public. But isn't that the easy question?

The Romano case and the ethics opinions cited above all dealt with information that was available to the public, whether a person purposefully put information out there for public consumption, or because a person's chosen privacy settings (or lack thereof) permitted public consumption. In either case there is a lack of expectation of privacy. But what about searching for and using information that is not posted for public consumption? What if a person intends for their postings to be seen only by their network of friends/contacts and their privacy settings are consistent with that intention? Can we search for that data? After all, there is some assumption of risk on the part of the poster isn't there?

As users of social media most people acknowledge that there is no such thing as complete privacy. The share button, the retweet, these are all functions that allow our handpicked network to deliver our pictures and comments to those people outside of our circle of friends. Users know that these facets of the platforms exist, yet they use the programs anyway. In fact, this vulnerability is exploited all the time. People who want to find out information for personal reasons or business purposes can get pretty crafty in doing social media searches and many of us both understand that and accept some element of risk in that regard. Everyone from a prospective suitor to a prospective employer checks up on people by perusing the social media platforms. But the person seeking your information may not be that cute guy or gal you met at the movies last week, it could be a lawyer

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searching for information to be used against you in a legal matter. Can a lawyer take advantage of that risk you're assuming? How far can they go?

Stated another way, can a lawyer "mine" for information? How far can a lawyer go, beyond trolling[2] the Internet for publicly available information? The only way we could mine for information is if we somehow obtain access to a person's Facebook page. We know that hacking into someone's profile would be criminal and, therefore, a violation of Rule 8.4(b).[3] But what about using some other assertive tactic that's short of criminal behavior? To explore that, consider the following hypothetical:

> You represent someone who is involved in a dispute. You think your adversary will be filing a complaint soon, so you're getting prepared for the apparent litigation. You know that you will need to call Susan as a witness in that litigation, but you don't know much about her. Before you commence litigation you ask your client, Andrew, to "friend" Susan on Facebook. You tell Andrew, "just try to be social and let's gather information we could use against her in litigation."

When I present that hypo to people face-to-face, I get a lot of furled brows and pursed lips. "That doesn't smell right," they say. One person from the Midwest hit the nail on the head when he said, "That's just dirty pool." Both reactions reveal two things: the behavior doesn't feel right, and yet it's hard to articulate the exact problem.

The conduct isn't an outright lie. Neither the lawyer or it's agent is actually making an improper misrepresentation. If it were, the statement(s) might violate one of the rules on misrepresentation in the disciplinary code. I call those rules the "Fab Five of Attorney Lies." The 5 rules that address misrepresentation are Rules 8.1, Rule 3.3, Rule 4.1, Rule 7.1, and Rule 8.4. Each one of these explains when misrepresentations are inappropriate and they address those improper statements in different contexts.[4] This appears to be some sort of manipulative conduct, rather than an outright lie, which makes it a bit more difficult to assess. After all, much of what we do in the adversary system

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[2] Is this the right word?

[3] See the appendix for the full rule.

[4] We talk more the specifics of those rules in detail elsewhere.

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has some manipulative flavor to it, right?

This fact pattern isn't one that I came up with on my own- it's a question that was raised to the Philadelphia Bar Association Professional Guidance Committee. In March of 2009 the Committee released Opinion 2009-02 that addressed the topic. An inquirer asked the Committee to determine if it was reasonable for a lawyer to use a third person to gain access to someone's social media page in order to gather information that might be used against that person. The third person wouldn't be instructed to speak any untruths, only to remain silent about their true motives. The Committee opined that the behavior would be improper.

The Committee stated 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" 2009-02 at 3. You might recall that Rule 8.4(c) is a critical part of the rule on Misconduct (or as I've referred to it elsewhere in this text, "the Stupid Rule"). That section states that it is professional misconduct for a lawyer, "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation…" The opinion further explained that the conduct was problematic because , "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" 2009-02 at 3. Thus, it isn't an affirmative misrepresentation that triggers the ethical violation, rather it's the omission of a material fact that constitutes deception.

The Committee made that clear when they stated, "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

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was to obtain information for the purpose of impeaching her testimony. 2009-02 at 3.[5]

So the Committee disapproved of the conduct because it was deceptive. But it's not that simple because in rendering this opinion, the Committee touched on the third rail of a debate raging in the ethics world today. Some sort of deception seems to be at the root of every clandestine investigation. So can lawyers ever engage in that conduct? The issue has been hotly debated in several jurisdictions.

Throughout the country there have been a series of cases over the last decade which reinforce that deception by lawyers will not be tolerated in almost any context. For instance, in Colorado, Chief Deputy District Attorney Mark Pautler helped negotiate the surrender of a suspected violent, vicious criminal. In Re: Mark C. Pautler, Sup, Ct. Colorado, No. 01SA129, May 13, 2002.[6] When the perpetrator demanded to speak with a lawyer, Pautler posed as a public defender. While he wasn't honest with the perpetrator, he also didn't provide any legal advice and his tactics helped secure the man in a peaceful manner. In a scathing opinion, the Supreme Court of Colorado found that Pautler intentionally deceived the perpetrator and that he should be suspended. Pautler claimed that his actions were necessary to protect the public, but the court was not swayed.[7]

In their decision, the Supreme Court of Colorado spoke in lofty terms about the responsibility of the profession to remain above the fray. The case appeared to strike at the heart of the integrity of the profession. The Court stated, "In this proceeding we reaffirm that members of our profession must adhere to the highest moral and ethical standards. Those standards apply regardless of motive.

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[5] It should be noted that the opinion doesn't only state that the omission is deception. The Committee mentioned very briefly that they believed that the conduct also constituted the making of a false statement of material fact to the witness and would therefore be a misrepresentation that violates Rule 4.1. Unfortunately, the opinion says absolutely nothing else about the apparent 4.1 violation, so it's unclear how they arrive at that conclusion.

[6] All quotes retrieved from the case at http://caselaw.findlaw.com/co-supreme-court/1378086.html, last checked by the author on September 13, 2013.

[7] The court Affirmed a three month suspension, which was stayed during a 12 month probationary period.

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Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure the surrender of a murder suspect. A prosecutor may not deceive an unrepresented person by impersonating a public defender." Pautler at ___.

The Philadelphia Committee opinion about social media friending was an extension of that anti-deception approach that is common throughout the country. In that case, there was no overt lie, rather the lawyer omitted some material information and that omission constituted deception. It seems a logical extension, given the tendency of the ethics authorities to hold a high standard for lawyers when dealing with Misconduct and Rule 8.4(c). However, not every jurisdiction agrees.

The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics issued Formal Opinion 2010-2 regarding obtaining information from social networking websites. In a somewhat curious opinion, the Association came to a different decision than the Philadelphia Committee. The New York Association addressed, "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 an affirmatively "deceptive" behavior to "friend" potential witnesses." It appears they used quotation marks because they weren't convinced that the word deception applies to the situation.

The New York Association acknowledged that the City had a somewhat assertive approach to discovery. It stated that it would be inconsistent with that policy to, "flatly prohibit lawyers from engaging an any and all contact with users of social networking sites" 2010-2 at 1. They concluded that a lawyer 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" 2010-2 at 1.

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The New York City Association was clear that deception is not permitted, they just had a different view of what deception actually entailed. They agreed that creating a false persona to obtain information or other such tactics were a violation of the rules. But the Association considered the truthful friending of unrepresented parties to be a permissible informal discovery. 2010-2 at 2. The opinion stated that "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" 2010-2 at 1.

Thus, in the Philadelphia and New York City opinions, have two matters with exact opposite results. In both opinions you have a lawyer (or their agent) who friends a litigation target, but remains silent about their identity. In Pennsylvania, the lawyer's silence was considered a material omission and constituted deception, but in New York, the lawyer's silence was an acceptance type of informal discovery mechanism.

I would be wary of that NYC decision for a few reasons. First, it doesn't seem consistent with the litany of preceding opinions. If anything, the trend across the country is to ratchet up the pressure on lawyers. Courts and advisory boards seem to be more stringent about what constitutes deception, rather than less. The second reason is that the decision left what I call an "escape clause." At the very end of the decision the New York Association made it clear that the friending would be permitted, subject to compliance with all other ethical requirements." That phrase gives the Association a lot of wiggle room. Rarely is any disciplinary matter cut and dry- there are often some other facts that muddy the waters. Every disciplinary matter is fact sensitive and, therefore, easily distinguishable. It wouldn't take much for a tribunal to find some facts that don't comply with "all other ethical requirements."

Third, it's not clear that the New York City opinion would even be honored in it's own state. You might recall that we discussed an opinion out of the New York State Association, Committee on Professional Ethics (Opinion #843). While that opinion dealt with the easier question of observing a

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person's public profile, it referenced the Philadelphia opinion. The New York State Bar didn't opine on the issue of friending-deception, and it even distinguished the facts it was presented from that of the Philadelphia matter, but it didn't disagree with the Philadelphia rationale.

Finally, and most significantly, the NYC opinion isn't grounded in the same logic as the other opinions regarding deception. All of the previous decisions on deception focus on the point of view of the target. They all hold that the attorney's actions take advantage of a vulnerable layperson and the Philadelphia opinion is written from that point of view as well. The New York City opinion, however, is grounded in the lawyer's pseudo-right to a certain form of informal discovery. That approach isn't consistent with the logic of most disciplinary authorities in the country. My gut tells me that most states would abide by the Pennsylvania view.

So what's the takeaway? I believe that we need to look at the issue of deception from the point of view of the target. What is the expectation of the person from whom we are seeking the information? Better yet, what is the reasonable expectation of that person.

The opinions seem to be saying that it's not reasonable for the target to have a full expectation of privacy when using social media. Rather, there is emerging something akin to an expectation to be free from infiltration.

If a party puts information in places accessible to the public, then it's reasonable to expect that anyone can see it. Advisory boards don't have a problem with lawyers observing how someone holds themselves out to the public, even if it's clandestine observation by that lawyer. But if the target only reveals information in a controlled or limited situation, it's reasonable for them to have somewhat different expectations.

When they posted something on their personal social media page, in circumstances where other people must receive approval before viewing that page, the poster expected to show the information to their circle of friends. Of course, they understood and probably even expected that

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someone in their circle might reveal the information outside of that circle. But they didn't expect someone to sneak into the circle and see if for themselves.

When you evaluate the situation from the point of view of the target, it's easier to understand why the authorities are likely to believe that material omission constitutes deception, even if there is no affirmative untruth spoken. They key here is to realize that the ethics authorities view it all from the expectation of the target because they are the protected party. As we discussed earlier, the goal of the disciplinary system is to protect the public and protect the client.

There is another issue that was raised in both the New York State Bar opinion and Philadelphia opinion mentioned above that affects the investigation issue. During the course of our investigations, lawyers frequently reach out to other parties directly. We might interview a business executive, speak to a homeowner, or have a variety of other types of conversations. The people with whom we speak may or may not be represented by counsel. Our obligations to those people differ drastically, depending on that status. Let's talk about contact with unrepresented people first. The applicable rule is Rule 4.3:

> **Rule 4.3. Dealing with unrepresented person**
>
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Lawyers' actions are heavily scrutinized when we interact with people who are in vulnerable positions, and an individual who is not represented by counsel is one such person. The drafters of the disciplinary code realize that lawyers have the upper hand when interacting with such people because

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we have an intimate understanding of the system and the roles of all the players. The unrepresented person is in a position where they could be taken advantage of, so the rules are have been crafted to avoid that.

Rule 4.3 is designed to curtail manipulation by the lawyer. To do so, it prohibits lawyers from making it seem as if we're a neutral party. Essentially, this is simply prohibiting a misrepresentation—we would be telling an untruth if we stated that we were disinterested. However, the drafters understood that simply refraining from a misrepresentation might not be enough. There could be a situation where the lawyer's interest isn't a specific topic of discussion, and in that case, there could be confusion on the part of the unrepresented party. There's an obvious incentive for lawyers to perpetuate that state of confusion, for the benefit of their client. The rules don't want to allow the lawyer to get away with that, so the text goes further than just prohibiting a misrepresentation.

Rule 4.3 places somewhat of an affirmative duty on lawyers who are speaking with unrepresented parties. If 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." Thus, the rules place an obligation on a lawyer to speak up if they have some unfair advantage over a person in a vulnerable position. This is a sentiment that we see elsewhere in the rules. It's important to see how this manifests itself elsewhere in the code, because this concept must inform our behavior.

Lawyers have an enhanced duty when they solicit work from a prospective client, as seen in Rule 7.3. This may be the most counter-intuitive rule on the books. After all, if we know that someone is in need of our legal services, our first instinct is to run toward them. However, Rule 7.3 tells us to do the opposite.

Rule 7.3 is broken down by modes of communication, in decreasingly order of severity. Subsection (a) addresses person-to-person communication—the most intense type of communication.

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That's the type of communication where lawyers pose the biggest threat to vulnerable people. In those intense situations we have the greatest ability to convince another party to act in the lawyer's best interest, instead of the potential client's best interest. As a result, contact is permitted in very limited circumstances:

> **Rule 7.3. Direct contact with prospective clients** *(in part)*
>
> (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
> (1) is a lawyer; or
> (2) has a family, close personal, or prior professional relationship with the lawyer.

Subsection (b) of the rule addresses a less onerous mode of communication, writing. It imposes restrictions as well, in the form of required disclaimers, etc. The point is the drafters restricted our behavior because we are dealing with a person in a vulnerable position. The theory is that we are supposed to protect our clients, not prey upon them.

Likewise we see an enhanced duty when dealing with clients with another category of vulnerable people, those with diminished capacity. Consider Rule 1.14:

> **Rule 1.14. Client with diminished capacity** *(in part)*
>
> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

This rule begins with the concept of "respect." In subsection (a) the lawyer is required to do they best to maintain a normal lawyer client relationship. Among other things, this shows the need to

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respect the client's desire to make decisions for themselves, regardless of the fact that they might have diminished capacity. The increased responsibility is revealed in section (b).

If a lawyer believes that this type of vulnerable person is at risk of certain types of harm, we could take protective action. Granted, the rule is phrased in a discretionary manner (the rule states that the lawyer "may" take action), but I think that's just to give the lawyer the ability to be flexible, depending on the circumstances of a particular case. The expectation is clear- when dealing with a person of diminished capacity, we may need to take steps to protect them.

How is this all invoked in social media investigations? We started this section by talking about Rule 4.3 and dealing with unrepresented people. If a lawyer tries to friend a third party and that third party is not represented by counsel, Rule 4.3 is invoked. Our enhanced duties when dealing with vulnerable people are then invoked. The New York State Bar Association Opinion acknowledged this in its Opinion #843 (see footnote [1]). The Philadelphia Committee opinion had a little different take.

Remember, the Philadelphia Committee dealt with deceptive tactics. In the fact pattern that was presented to them, the lawyer was not revealing that she was a lawyer, rather there was purposeful silence about the fact so as to avoid tipping off the other party. In that case, the Committee stated that Rule 4.3 would not be implicated, because the unrepresented party was unaware that they were dealing with a lawyer. I don't feel very comfortable with that analysis.

What we've seen in the situations where lawyers deal with vulnerable people is that it's the lawyer's responsibility to do the protecting. The very nature of being vulnerable may cause that other person to be unaware of dangers. And one of those dangers might be emanating from the lawyer herself. Plus, I could envision a situation where a lawyer is silent about their role in a matter, which causes another person to misunderstand that lawyer's role in the matter, per 4.3(b). Thus, I can foresee a disciplinary tribunal, when faced with similar facts, holding a lawyer to the standards of Rule 4.3, even if the other party is unaware that the person with whom they are dealing is a lawyer.

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6. Supervision

It's clear that the ethics rules demand that we understand this topic, from a competence and diligence standpoint. But, despite what our mommies and daddies told us as children, it's not all about us. The ethics rules regarding supervision demand that we understand these platforms as well. Consider the two key rules: Rule 5.1, which addresses the supervision of lawyers, and Rule 5.3 which addresses the supervision of nonlawyer assistants. The ABA version of both rules mirror each other (of course, these are actually the Delaware version, but we've already been through that disclaimer).

> **Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers**
> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reason-able assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
>
> **Rule 5.3. Responsibilities regarding non-lawyer assistants**
> With respect to a nonlawyer employed or retained by or associated with a lawyer:
> (a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the

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person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Subsection 5.1(a) basically requires that lawyers in a managerial role create appropriate policies that ensure that lawyers are confirming to the rules. The primary difference between this section and it's counterpart in 5.3(a) is that nonlawyer assistants don't need to conform to the ethics rules because they're not lawyers. As a result, you can see at the end of subsection 5.3(a) that the slightly different language. Instead of requiring that lawyers conform to the "Rules of Professional Conduct," Rule 5.3(a) insists that the nonlawyer's conduct be, "compatible with the professional obligations of the lawyer." One could argue that such language may actually create a more difficult situation since "professional standards" is more vague and amorphous than "Rules of Professional Conduct." Regardless, there are similar obligations in both instances.

Subsection (b) of both rules imposes duties on lawyers who have direct supervisory responsibilities over other lawyers and nonlawyer personnel. It imposes a direct responsibility for supervision upon lawyers with such authority. However, the subsection that puts a lump in many-a-lawyer's throat is subsection (c). In both rules, subsection (c) addresses when we may have vicarious liability for the actions of another lawyer or assistant.

We all know that our associates and nonlawyer assistants are using social media. Some of them are only using it on their own time and yet others are using it in firm-sanctioned blogs or even marketing efforts. Yet some of us remain ignorant, lazy or otherwise unmotivated to stay abreast of the topic. Well, if we know that they are using the platforms and we know that there are ethical concerns with their use (as you'll see shortly), then how can we claim to be exercising proper supervision if we don't understand the very platforms that these lawyers are using? The answer is, of course, we can't. Thus, just like competence and diligence, the rules on supervision demand that all lawyers understand SM.

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Let's hammer this point home with some illustrations. What are you going to say if someone approached you in the courthouse and says,

Colleague: "Hey Jim, I'm so sorry to hear about that problem you're having with that new paralegal you hired last month."
You: "What problem with that new paralegal?"
Colleague: "Wow, you didn't see that twitpic he posted with that Judge while they were out at a club last weekend? It's been retweeted a thousand times!"
You: Ummmm...what's a twitpic?"

Or maybe you'll be the victim of this go-around:

Client: "Hey Lauren, how are you dealing with your partner's blog post."
You: "What blog post, what do you mean."
Client: "You didn't read that racist rant that your associate threw down on his blog, 'This Week in New Jersey Criminal Law?' You don't subscribe to his RSS feed?"
You: "Ummmm...what's an RSS feed?"

Right now I know what some of you are thinking. You're thinking, "Ummmm...what's an RSS feed?"[8] The bottom line is that you need to understand the platforms that your associates and nonlaw staff are using if you want to be providing adequate supervision.

[8] I'm not going to tell you. Go look it up

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Ethics Opinion 370

Social Media I: Marketing and Personal Use

Introduction

Social media and social networking websites are online communities that allow users to share information, messages, and other content, including photographs and videos. The Committee defines social media as follows:

> Social media include any electronic platform through which people may communicate or interact in a public, semi-private or private way. Through blogs, public and private chat rooms, listservs, other online locations, social networks and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo and Lawyers.com, users of social media can share information, messages, e-mail, instant messages, photographs, video, voice or videoconferencing content.[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn1) This definition includes social networks, public and private chat rooms, listservs, and other online locations where attorneys communicate with the public, other attorneys, or clients. Varying degrees of privacy may exist in these online communities as users may have the ability to limit who may see their posted content and who may post content to their pages.[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn2)

Increasingly, attorneys are using social media for business and personal reasons. The Committee wants to raise awareness of the benefits and pitfalls of the use of social media within the practice of law and to emphasize that the District of Columbia Rules of Professional Conduct (the "Rules") apply to attorneys in the District of Columbia (the "District") who use, or may use, social media for business or personal reasons.[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn3) This Opinion applies to all attorneys who use social media, regardless of practice area or employer and applies regardless of whether the attorney engages in advertising or client communications via social media. The Committee notes that any social media presence, even a personal page, could be considered advertising or marketing, and lawyers are cautioned to consider the Rules applicable to attorney advertising, even if not explicitly discussed below. Lawyers reviewing this Opinion may also wish to review Opinion 371 (Social Media II), which addresses use of social media by lawyers in providing legal services.

Social networking websites provide an online community for people to share daily activities, their interests in various topics, or to increase their circle of personal or business acquaintances. There are sites with primarily business purposes, some that are primarily for personal use and some that offer a variety of different uses. According to the 2014 ABA Legal Technology Survey, among attorneys and law firms, in addition to blogs, LinkedIn, Facebook and Twitter are among the more widely used social networks.[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn4) On these sites, members create online "profiles," which may include biographical data, pictures and other information that they wish to post. These services permit members to locate and invite other members of the network into their personal networks (to "connect" or "friend" them) or to invite the friends or contacts of others to connect with them.

Members of these online social networking communities communicate in a number of ways, publicly or privately. Members of these online social networking communities may have the ability, in many instances, to control who may see their posted content, or who may post content to their pages. Varying degrees of privacy exist. These privacy settings allow users to restrict or limit access of information to certain groups, such as "friends," "connections" or the "public."

Social media sites, postings or activities that mention, promote or highlight a lawyer or a law firm are subject to and must comply with the Rules.[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn5) Attorneys who choose to use social media must adhere to the Rules in the same way that they would if using more traditional forms of communication.

The Rules, as well as previous Opinions of this Committee, apply to a number of different social media or social networking activities that an attorney or law firm may be engaged in, including:

1. Connecting and communicating with clients, former clients or other lawyers on social networking sites;
2. Writing about an attorney's own cases on social media sites, blogs or other internet-publishing based websites;
3. Commenting on or responding to online reviews or comments;
4. Self-identification by attorneys of their own "specialties," "skills" and "expertise" on social media sites;
5. Reviewing third-party endorsements received by attorneys on their personal or law firm pages; and,
6. Making endorsements of other attorneys on social networking sites.

The Committee concludes that, generally, each of the activities identified above are permissible under the Rules; but not without caution, as discussed in greater detail below. Consistent with our mandate, we consider only the applicability of the D.C. Rules of Professional Conduct. Given that social media does not stop at state boundaries, we remind members of the District of Columbia Bar that their social media presence may be subject to regulation in other jurisdictions, either because the District applies another state's rules through its choice-of-law rule,[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn6) or because other states assert jurisdiction over attorney conduct without regard to whether the attorney is admitted in other states.[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn7)

Lawyers must be aware of the ethical rules regarding social media in the principal jurisdiction where they practice, consistent with Rule 8.5. However, adherence to the ethical rules in the jurisdiction of one's principal practice may not insulate an attorney from discipline. There is considerable variation in choice of law rules across jurisdictions. We specifically wish to caution lawyers that the disciplinary rules of other jurisdictions, including our neighboring jurisdictions of Maryland and Virginia, allow for the imposition of discipline upon attorneys who are not admitted in that jurisdiction, if the lawyer provides or offers to provide any legal services in the jurisdiction. ABA Model Rule 8.5(b)(2) provides a limited safe harbor to this provision, by stating that "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." We note, however, that not every state has adopted this safe harbor. This Committee undertook a detailed evaluation of choice of law rules in non-judicial proceedings in Opinion 311.[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn8)

We explicitly note that this Opinion is limited to the use of social media as a communications device. This Opinion does not address issues related to the ethical use of social media in litigation or other proceedings, or with regard to issues related to advising clients on the use of social media. Those issues are addressed in Opinion 371 (Social Media II).

Applicable Rules

The Rules that are potentially implicated by social media include:

Rule 1.1 (Competence)
Rule 1.6 (Confidentiality of Information)
Rule 1.7 (Conflict of Interest: General)
Rule 1.18 (Duties to Prospective Client)
Rule 3.3 (Candor to Tribunal)
Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants)
Rule 7.1 (Communications Concerning a Lawyer's Services)
Rule 8.4 (Misconduct)
Rule 8.5 (Disciplinary Authority; Choice of Law)

Discussion

I. Social Media in General

The guiding principle for lawyers with regard to the use of any social network site is that they must be conversant in how the site works. Lawyers must understand the functionality of the social networking site, including its privacy policies. Lawyers must understand the manner in which postings on social media sites are made and

whether such postings are public or private. Indeed, comment [6] to Rule 1.1 (Competence) provides:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

As discussed in more detail herein, lawyers must be cognizant of the benefits and risks of the use of social media and their postings on social media sites. Social networking sites, and social media in general, make it easier to blur the distinctions between communications that are business and those that are personal. Communications via social media are inherently less formal than more traditional or established forms of communication. Lawyers and law firm employees must be reminded of the need to maintain confidentiality with regard to clients and client matters in all communications. It is recommended that all law firms have a policy in place regarding employees' use of social networks. Lawyers in law firms have an ethical duty to supervise subordinate lawyers and non-lawyer staff to ensure that their conduct complies with the applicable Rules, including the duty of confidentiality. *See* Rules 5.1 and 5.3.

Content contained on a lawyer's social media pages must be truthful and not misleading. Statements on social media could expose an attorney to charges of dishonesty under Rule 8.4 or lack of candor under Rule 3.3, if the social media statements conflict with statements made to courts, clients or other third parties, including employers. Similarly, statements on social media could expose a lawyer to civil liability for defamation, libel or other torts.

II. Permissible Uses of Social Media

A. Attorneys may connect with and communicate with clients, former clients or other lawyers on social networking sites, but not without caution.

There are no provisions of the Rules that preclude a lawyer from participating in social media or other online activities. However, if an attorney connects with, or otherwise communicates with clients on social networking sites, then the attorney must continue to adhere to the Rules and maintain an appropriate relationship with clients. Lawyers must also be aware that, if they are connected to clients or former clients on social media, then content made by others and then placed on the attorney's page and content made by the attorney may be viewed by these clients and former clients. Attorneys should be mindful of their obligations under Rule 1.6 to maintain client confidences and secrets.

Some social networking sites, like Facebook, offer users the option to restrict what some people may see on a user's page. These options also allow a user to determine who may post content publicly on the lawyer's page. It is advisable for lawyers to periodically review these settings and adjust them as needed to manage the content appearing publicly on the lawyer's social media pages. Attorneys should be aware of changes to the policies of the sites that they utilize, as privacy policies are frequently changed and networks may globally apply changes, pursuant to the updated policies.

i. Avoiding the formation of an inadvertent attorney-client relationship

As we opined in Opinion 316, it is permissible for lawyers to participate in online chat rooms and similar arrangements through which attorneys could engage in real time, or nearly real time communications with internet users. However, that permission was caveated with the caution to avoid the provision of specific legal advice in order to prevent the formation of an attorney-client relationship. In Opinion 302, we provided "best practices" guidance on internet communications, with the intent of avoiding the inadvertent formation of an attorney-client relationship. One of the suggested "best practices" included the use of a prominent disclaimer. *Id*. However, we have reiterated "that even the use of a disclaimer may not prevent the formation of an attorney-client relationship if the parties' subsequent conduct is inconsistent with the disclaimer." D.C. Ethics Op. 316.

These same principles are applicable to the use of social media. Disclaimers are advisable on social media sites, especially if the lawyer is posting legal content or if the lawyer may be engaged in sending or receiving messages from "friends," whether those friends are other attorneys, family or unknown visitors to the lawyer's social media page, when those messages relate, or may relate, to legal issues.[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn9)

Rule 1.18 imposes a duty of confidentiality with regard to a prospective client, who is defined in Rule 1.18(a) as "a person who discusses … the possibility of forming a client-lawyer relationship with respect to a matter." However, comment [2] to Rule 1.18 notes that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of [the Rule]." The guidance of Rule 1.18 is of particular importance in social networking, where lawyers may self-identify themselves as attorneys and where, most likely, those "connected" to the lawyer will be aware that the user is an attorney; however, without more, the mere knowledge that a friend is an attorney does not give rise to a reasonable expectation that interactions with that attorney would create a prospective or actual client relationship, or its attendant duty of confidentiality.

ii. Avoiding the creation of conflicts of interest

Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or the lawyer's firm. Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict. Rule 1.7(b)(4) states that an attorney shall not represent a client with respect to a matter if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property or personal interests," unless the conflict is resolved in accordance with Rule 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts.

Moreover, online communications and interactions with people who are unknown to the lawyer may unintentionally cause the development of relationships with persons or parties who may have interests that are adverse to those of existing clients.

iii. Protecting client confidences and secrets

Protecting client information is of the utmost importance when using social media. Most attorneys are aware of the importance of protecting attorney-client communications, attorney work-product or other privileged information. The obligation to protect this information extends beyond the termination of the attorney-client relationship.

Rule 1.6 distinguishes between information that is "confidential" and that which is a "secret," and requires attorneys to protect both kinds of information. In the District of Columbia,

> "Confidence" refers to information protected by the attorney-client privilege under applicable law. "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Rule 1.6(b). Comment [8] to Rule 1.6 makes clear that the Rule potentially applies to all information gained in the course of the professional relationship, and exists without regard to the nature or source of the information, or the fact that others share the knowledge.

No less critical are considerations of the level of confidentiality available on the social media sites themselves. If an attorney uses social media to communicate with potential or actual clients or co-counsel, then careful attention must be paid to issues of privacy and confidentiality. It is critically important that lawyers review the policies of the social media sites that they frequent, particularly policies related to data collection. Privacy settings on social media are not the equivalent of a guarantee of confidentiality.

Particular consideration must be given to the issue of maintaining and protecting the confidentiality of communications on social networking sites.[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn10) Messaging and electronic mail services provided by social networking sites may lack safeguards sufficient for communicating with clients or prospective clients. Moreover, the messaging and electronic mail services provided by these sites should not be assumed to be confidential or private. Therefore, when appropriate, clients or potential clients should be advised by lawyers of the existence of more secure means of communicating confidential, privileged, sensitive or otherwise protected information. Messages with clients that are sent or received via social networks must be treated with the same degree of reasonable care as messages sent or received via electronic mail or other traditional means of communication. Social media sites may not permanently retain messages or other communications; therefore care should be taken to preserve these communications outside of the social media site, in order to ensure that the communications are maintained as part of the client file. It is advisable that communications regarding on-going representations or pending legal matters be made through secured office e-mail, and not through social media sites.

Certain social media sites collect information about the people and groups that the user is connected to and the interactions with that group or person. The information collected is gathered from both the lawyer and the person communicating with the lawyer and can include content, information and frequency of contact.[11] (/bar-

resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn11) These sites also collect information about uses of their partner products and/or websites, allowing the social media service to collect and integrate information about its users, which can be used for targeted advertising and/or research purposes.[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn12) Thus, depending on the intended use of the social media site, it is advisable for a lawyer to give careful consideration to which social media sites, if any, may be more appropriate for business-related uses or for communications with potential or actual clients.

When inviting others to view a lawyer's social media site, or profile, a lawyer must be mindful of the ethical restrictions relating to solicitations and other communications. Most social networking sites require an e-mail address from the user as part of the registration process. Then, once the social networking site is accessed by a lawyer, the site may access the entire address book (or contacts list) of the user. Aside from any data collection purposes, this access allows the social media site to suggest potential connections with people the lawyer may know who are already members of the social network, to send requests or other invitations to have these contacts connect with the lawyer on that social network, or to invite non-members of the social network to join it and connect with the lawyer.

However, in many instances, the people contained in a lawyer's address book or contact list are a blend of personal and professional contacts. Contact lists frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site. The connection services provided by many social networks can be a good marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure. Accordingly, great caution should be exercised whenever a social networking site requests permission to access e-mail contacts or to send e-mail to the people in the lawyer's address book or contact list and care should be taken to avoid inadvertently agreeing to allow a third-party service access to a lawyer's address book or contacts.

B. Attorneys may write about their own cases on social media sites, blogs or other internet-based publications, with the informed consent of their clients.

The scope of the protections provided in Rule 1.6 militates in favor of prudence when it comes to disclosing information regarding clients and cases. While lawyers may ethically write about their cases on social media, lawyers must take care not to disclose confidential or secret client information in social media posts. Rule 1.6(e)(1) states that a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the attorney has obtained the client's informed consent to the use in question. Because Rule 1.6 extends to even information that may be known to other people, the prudent lawyer will obtain client consent before sharing any information regarding a representation or disclosing the identity of a client. Even if the attorney is reasonably sure that the information being disclosed would not be subject to Rule 1.6, it is prudent to obtain explicit informed client consent before making such posts. With or without client consent, attorneys should exercise good judgment and great caution in determining the appropriateness of such posts. Consideration should be given to the identity of the client and the sensitivity of the subject matter, even if the client is not overtly identified. It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client consent in a written form.

Consideration must also be given to ensure that such disclosures on social media are compliant with Rule 7.1. Rule 7.1 governs all communications about a lawyer's services, including advertising. These Rules extend to online writings, whether on social media, a blog or other internet-based publication, regarding a lawyer's own cases. Such communications are subject to the Rules because they have the capacity to mislead by creating the unjustified expectation that similar results can be obtained for others. Care must be taken to avoid material misrepresentations of law or fact, or the omission of facts necessary to make the statement considered as a whole not materially misleading. Accordingly, social media posts regarding a lawyer's own cases should contain a prominent disclaimer making clear that past results are not a guarantee that similar results can be obtained for others.

Law firms that have blogs or social media sites or that allow their lawyers to maintain their own legal blogs or social media pages should take appropriate steps to ensure that such content is compliant with the Rules, consistent with the duties set forth in Rule 5.1. Non-attorney employees who create content for their own or their employers' social media sites should be educated regarding the protection of client information and, if appropriate, be supervised by their employing law firm or lawyer, as required by Rule 5.3.[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn13)

As noted above, all social media postings for law firms or lawyers, including blogs, should contain disclaimers and privacy statements sufficient to convey to prospective clients and visitors that the social media posts are not intended to convey legal advice and do not create an attorney-client relationship.

C. Attorneys may, with caution, respond to comments or online reviews from clients.

The ability for clients to place reviews and opinions of the services provided by their counsel on the internet can present challenges for attorneys. An attorney must monitor his or her own social networking websites, verify the accuracy of information posted by others on the site, and correct or remove inaccurate information displayed on their social media page(s). As set forth in comment [1] to Rule 7.1, client reviews that may be contained on social media posts or webpages must be reviewed for compliance with Rule 7.1(a) to ensure that they do not create the "unjustified expectation that similar results can be obtained for others."[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn14)

Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion. Rule 1.6(e) states that:

> A lawyer may use or reveal client confidences or secrets:
>
> (3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, ***or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client [emphasis added].***

Thus, the lawyer's ability to reveal confidences under Rule 1.6(e)(3) is limited to only "specific" allegations by the client concerning the lawyer's representation of the client. Comment [25] to Rule 1.6 specifically excludes general criticisms of an attorney from the kinds of allegations to which an attorney may respond using information otherwise protected by Rule 1.6. However, even when the lawyer is operating within the scope of the Rule 1.6(e)(3) exception, the comments to Rule 1.6 caution that disclosures should be no greater than the lawyer reasonably believes are necessary. There is no exception in Rule 1.6 that allows an attorney to disclose client confidences or secrets in response to specific or general allegations regarding an attorney's conduct contained in an online review from a third party, such as opposing counsel or a non-client.[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn15)

Other jurisdictions have taken a more restrictive view of responding to comments or reviews on lawyer-rating websites. For example, the New York State Bar Association Committee on Professional Ethics, in its Opinion 1032 (2014), held that "[a] lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a [lawyer-rating website]." The New York analysis turned on the language contained in New York's Rule 1.6, which requires "accusations," rather than allegations, in order to trigger the "self-defense" exception of N.Y. Rule 1.6. Attorneys licensed in the District of Columbia who are admitted to practice in multiple jurisdictions are cautioned that they may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct. Under the District's choice of law rule, Rule 8.5(b)(2)(ii),

> the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

See notes 6 and 7, *infra.*[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn16)

We recognize that there are limitations on the control that any individual can assert over his or her presence on the internet. That is why we recognize that an attorney's ethical obligations to review and regulate content on social media extends only to those social media sites or webpages for which the attorney maintains control of the content, such as the ability to delete posted content, block users from posting, or block users from viewing. However, notwithstanding the scope of the attorney's affirmative obligations, it is highly advisable for attorneys to be aware of content regarding them on the internet.

D. An attorney or law firm may identify "specialties," "skills" and "expertise" on social media, provided that the representations are not false or misleading.

Many social media sites, like LinkedIn, allow attorneys to identify skills and areas of practice. The District of Columbia does not prohibit statements regarding specialization or expertise. Accordingly, District of Columbia attorneys are ethically permitted to identify their skills, expertise and areas of practice, subject to Rule 7.1(a).[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn17)

As we previously opined in Opinion 249, "Rule 7.1(a) permits truthful claims of lawyer specialization so long as they can be substantiated." Rule 7.1(a) states that an attorney is prohibited from making a "false or misleading communication about the lawyer or the lawyer's services." The relevant comment [1] to this Rule states that "[i]t is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters." Accordingly, we conclude that social media profiles or pages that include statements by the attorney setting forth an attorney's skills, areas of specialization or expertise are subject to Rule 7.1(a) and, therefore, cannot be false or misleading.

E. Attorneys must review their social media presence for accuracy.

Consistent with the goals of networking, marketing and making connections, some social networking sites permit members of the site to recommend fellow members or to endorse a fellow member's skills. Users may also request that others endorse the lawyer for specified skills that the lawyer has indicated he or she possesses. LinkedIn and other sites also allow clients or others to submit written reviews or recommendations of the lawyer. Other legal-specific social networking sites focus exclusively on endorsements or recommendations. It is our view that a lawyer is ethically permitted, with caution, to recommend other attorneys, and to accept endorsements, written reviews and recommendations, subject to the Rules.

As noted above, it is our opinion that lawyers in the District of Columbia have a duty to monitor their social network sites. If a lawyer controls or maintains the content contained on a social media page, then the lawyer has an affirmative obligation to review the content on that page. A lawyer must remove endorsements, recommendations or other content that are false or misleading. Lawyers are advised that it is appropriate to reject or refuse endorsements from people who lack the knowledge necessary for making the recommendation. It would be misleading for an attorney to display recommendations or endorsements of skills that are received from people who do not have a factual basis to evaluate the lawyer's skills. Lawyers must reject or refuse endorsements that indicate that the lawyer possesses skills or expertise that the lawyer does not possess. It would be misleading for an attorney to display a recommendation that contained incorrect information. The operative questions asked by the lawyer when reviewing endorsements or recommendations received on their social media pages should be whether the person making the endorsement knows the lawyer and whether the person can fairly comment on the lawyer's skills.

We recommend that lawyers who are using social media sites that allow for the review of posts, recommendations or endorsements prior to publication avail themselves of the settings that allow review and approval of such information before it is publicized on the lawyer's social media page. Some sites, like LinkedIn, provide settings that allow the user to review and approve endorsements that are received before the endorsements are posted publicly. Users may also choose to keep endorsements hidden so that they are not seen by others.[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftn18) Other social networking sites, like Facebook, allow users to adjust their privacy settings to require user approval before certain content, such as photos, can be displayed on a user's home page. Some social media sites allow users to adjust their privacy settings to require approval before a user can be "tagged," a practice that allows content on another person's page to be displayed on the user's page.

It is suggested that lawyers, particularly those who do not frequently monitor their social media pages, those who may not know everyone in their networks well, or those who wish to have an added layer of protection, utilize these heightened privacy settings. Aside from the potential ethical issues discussed herein, there are many good reasons for a lawyer to want to maintain a higher level of control over what content others may place on a lawyer's social media page(s).

It is permissible under the Rules for a lawyer to make an endorsement or recommendation of another attorney on a social networking site, provided that the endorsement or recommendation is not false or misleading. Such endorsements and recommendations must be based upon the belief that the recipient of the endorsement does in fact possess said skills or legal acumen. Rule 8.4(c) prohibits an attorney from being dishonest, or engaging in fraud, deceit or misrepresentation. Therefore, a lawyer must only provide an endorsement or recommendation of someone on social media that the endorsing lawyer believes to be justified.

Rule 8.4(a) states that it is misconduct for a lawyer to violate or to attempt to violate ethics rules through the acts of others. Thus, clients and colleagues cannot say things about the lawyer that the lawyer cannot say. The lawyer's obligation to monitor, review and correct content on social media sites for which they maintain control exists regardless of whether the information was posted by the attorney, a client or a third party.

We reiterate that, for websites or social media sites where the attorney does not have editorial control over content or the postings of others, we do not believe that the Rules impose an affirmative duty on a lawyer to monitor the content of the sites; however, under certain circumstances, it may be appropriate for the attorney to request that the poster remove the content, to request that the social networking site remove the content, or for the attorney to post a curative response addressing the inaccurate content.

Conclusion

Social media is a constantly changing area of technology. Social media can be an effective tool for providing information to the public, for networking and for communications. However, using such tools requires that the lawyer maintain and update his or her social media pages or profiles in order to ensure that information is accurate and adequately protected.

Accordingly, this Committee concludes that a lawyer who chooses to maintain a presence on social media, for personal or professional reasons, must take affirmative steps to remain competent regarding the technology being used and to ensure compliance with the applicable Rules of Professional Conduct.

The world of social media is a nascent area that continues to change as new technology is introduced into the marketplace. Best practices and ethical guidelines will, as a result, continue to evolve to keep pace with such developments.

[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref1) "Content" means any communications, whether for personal or business purposes, disseminated through websites, social media sites, blogs, chat rooms, listservs, instant messaging, or other internet presences, and any attachments or links related thereto.

[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref2) The Merriam-Webster Dictionary defines "social media" as "forms of electronic communication … through which users create online communities to share information, ideas, personal messages, and other content…." More specifically to the legal profession, the New York State Bar Association Committee on Professional Ethics, in its Formal Opinion No. 2012-2 (May 30, 2012), stated:

> We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives.

[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref3) We have previously addressed issues related to attorneys' participation in certain kinds of internet and electronic communications, but have not yet addressed the broader uses of social media. In Opinion 316, we concluded that attorneys could take part in online chat rooms and similar arrangements through which they could engage in communications in real time or nearly real time, with internet users seeking legal information. D.C. Legal Ethics Op. 316 (2002). In Opinion 281, we addressed issues related to the use of unencrypted electronic mail. D.C. Legal Ethics Op. 281 (1998). In Opinion 302, we stated that lawyers could use websites to advertise for plaintiffs for class action lawsuits and use websites that offer opportunities to bid competitively on legal projects. D.C. Legal Ethics Op. 302 (2000).

[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref4) **www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html (javascript:HandleLink('cpe_0_0','CPNEWWIN:_blank^top=10,left=10,width=300,height=300,toolbar=1,location=1,directories=1,status=1,menubar=1,scrollbars=and-social-media.html');)** (last visited Oct. 26, 2016).

[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref5) The Committee further notes that even social media profiles that are used exclusively for personal purposes might be viewed by clients or other third parties, and that information contained on those social media websites may be subject to the Rules of Professional Conduct. The Rules extend to purely private conduct of a lawyer, in areas such as truthfulness and compliance with the law. *See* Rule 8.4.

[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref6) In accordance with D.C. Rule 8.5(b), the Office of Disciplinary Counsel will apply the rules of another jurisdiction to an attorney's conduct in two circumstances:

> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
>
> (2) For any other conduct, . . .
>
> > (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Note that, in contrast to ABA Model Rule 8.5 (*see infra* note 7), D.C. Rule 8.5 does not provide for jurisdiction over attorneys not admitted to practice in the District and does not apply the rules of another jurisdiction unless the attorney is either practicing before a tribunal in another jurisdiction, or is licensed to practice in another jurisdiction.

[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref7) In contrast to D.C. Rule 8.5 (discussed *supra* in note 6), ABA Model Rule 8.5(a) states that "[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." Moreover, ABA Model Rule 8.5(b)(2) states that for conduct not in connection with a matter pending before a tribunal, the rules to be applied are "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." Accordingly, Model Rule 8.5(b)(2), unlike D.C. Rule 8.5(b)(2), may result in the application of rules of jurisdictions to which the lawyer is not admitted.

[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref8) D.C. Legal Ethics Op. 311 (2002). The revisions to Rule 8.5(b)(1) that became effective on February 1, 2007 have modified Opinion 311 to the extent that the Opinion now applies more broadly to conduct in connection with a "matter pending before a tribunal" rather than only in connection with a "proceeding in a court before which a lawyer has been admitted to practice." These revisions, however, do not change this Committee's analysis in Opinion 311 as to "other conduct" under Rule 8.5(b)(2).

[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref9) As we discussed in Opinion 302, in the District of Columbia, the question of what conduct gives rise to an attorney-client relationship is a matter of substantive law. Neither a retainer nor a formal agreement is required in order to establish an attorney-client relationship in the District of Columbia. *See, e.g. In re Lieber*, 442 A.2d 153 (D.C. 1982) (attorney-client relationship formed where attorney failed to indicate lack of consent to accept a court appointed client after receiving notification of appointment by mail). Further, even casual legal advice can give rise to an attorney-client relationship if the putative client relies upon it. *See, e.g., Togstad v. Vesely, Otto, Miller & Keffe*, 291 N.W.2d 686 (Minn. 1980) (finding an attorney-client relationship where the attorney stated that he did not think a prospective client had a cause of action but would discuss it with his partner, did not call prospective client back, and prospective client relied on attorney's assessment and did not continue to seek legal representation).

[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref10) *See also* D.C. Legal Ethics Op. 281.

[11] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref11) An example is contained in Facebook's data policy. (https://www.facebook.com/about/privacy/ (javascript:HandleLink('cpe_0_0','CPNEWWIN;_blank^@https://www.facebook.com/about/privacy/');)) (last visited Oct. 26, 2016).

[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref12) Miller, C., *The Plus in Google Plus? It's Mostly for Google*, Feb. 14, 2014 http://www.nytimes.com/2014/02/15/technology/the-plus-in-google-plus-its-mostly-for-google.html?_r=0 (javascript:HandleLink('cpe_0_0','CPNEWWIN;_blank^@http://www.nytimes.com/2014/02/15/technology/the-plus-in-google-plus-its-mostly-for-google.html?_r=0');) (last visited Oct. 26, 2016).

[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref13) *See, e.g.*, Gene Shipp, *Bar Counsel: 20/20: The Future of the Rules of Professional Conduct*, WASHINGTON LAWYER (June 2013), sharing the example that our world is changing so fast that "a high-profile celebrity, who comes to your office on a highly confidential matter and graciously pauses to allow a picture with your receptionist, may be unhappy with your staff's violation of Rule 1.6 when their picture appears on the Internet even before you have had a chance to say hello."

[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref14) The Committee does not distinguish between client comments that are solicited and those that are unsolicited. Rule 7.1 governs all communications about a lawyer's services.

[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref15) Although beyond the scope of this Opinion, the Committee notes that the Rule 1.6(e)(3) exception allows an attorney to respond to wrongs alleged by a third party, but only if the third party has formally instituted a civil, criminal or disciplinary action against the lawyer. *See* comments [23] and [24] to Rule 1.6.

[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref16) Other jurisdictions have sanctioned attorneys for disclosures of client confidences or secrets on social media or other websites. In 2013, the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission held, in the *Matter of Betty Tsamis*, that it was a violation of Rule 1.6(a) for an attorney to respond to an unfavorable review on the legal referral website AVVO with a response that revealed confidential information about the client's case. In *Tsamis*, the attorney first requested that the client remove the posting from the website, which is also a permissible response in the District of Columbia. The client responded that he would remove the post, but only if the attorney returned his files and refunded his fees. Thereafter, AVVO removed the posting from its online client reviews. The client then posted a second negative client review to the same website, which the attorney responded to, disclosing client information. The Hearing Board found that the response exceeded what was necessary to respond to the client's accusations and a reprimand was recommended.

[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref17) Prudent attorneys should consider the most restrictive rules applicable to them when using self-promotional features on social media. We note that other jurisdictions, like New York, do not permit lawyers to identify themselves as "specialists" unless they have been certified as such by an appropriate organization. They are, however, permitted to detail their skills and experience. *See* N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 748 (Mar. 10, 2015).

[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm#ftnref18) Lawyers are advised to review the guidance provided by other jurisdictions in which they are admitted to practice regarding the use of endorsements or the skills and expertise sections in a LinkedIn profile. *See, e.g.*, Maryland State Bar Ass'n, Comm. on Ethics, Ethics Docket No. 2014-05;Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 2012-8 (Nov. 2012); South Carolina Ethics Advisory Comm., Op. 09-10; *see also* note 17.

November 2016

Ethics Opinion 371

Social Media II: Use of Social Media in Providing Legal Services

Introduction

Information posted on social media and use of social media in the substantive practice of law raise multiple issues under the Rules of Professional Conduct in all practice areas. This Opinion provides the Committee's guidance about advice and conduct by lawyers related to social media in the provision of legal services, including whether certain advice and conduct are required, permitted, or prohibited by the Rules. The Opinion also identifies issues for lawyers to spot as they provide legal services. Opinion 370 (Social Media I) addresses lawyers' use of social media in marketing and personal use.

The Committee defines social media as follows:

> Social media include any electronic platform through which people may communicate or interact in a public, semi-private, or private way. Through blogs, public and private chat rooms, listservs, other online locations, social networks, and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo, and Lawyers.com, users of social media can share information, messages, e-mail, instant messages, photographs, video, voice, or videoconferencing content.[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn1) This definition includes social networks, public and private chat rooms, listservs, and other online locations where attorneys communicate with the public, other attorneys, or clients. Varying degrees of privacy exist in these online communities as users may have the ability to limit who may see their posted content and who may post content to their pages.[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn2)

Applicable Rules of Professional Conduct

- Rule 1.1 (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 3.1 (Meritorious Claims and Contentions)
- Rule 3.3 (Candor to 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 3.8 (Special Responsibilities of a Prosecutor)
- Rule 4.1 (Truthfulness in Statements to Others)
- Rule 4.2 (Communication Between Lawyer and Person Represented by Counsel)
- Rule 4.3 (Dealing with Unrepresented Person)
- Rule 4.4 (Respect for Rights of Third Persons)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.4 (Misconduct)

I. Understanding Social Media

Because the practice of law involves use or potential use of social media in many ways, competent representation under Rule 1.1[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn3) requires a lawyer to understand how social media work and how they can be used to represent a client zealously and diligently[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn4) under Rule 1.3.[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn5) Recognizing the pervasive use of social media in modern society, lawyers must at least consider whether and how social media may benefit or harm client matters in a variety of circumstances. We do not advise that every legal representation requires a lawyer to use social media. What is required is the ability to exercise informed professional judgment reasonably necessary to carry out the representation. Such understanding can be acquired and exercised with the assistance of other lawyers and staff.[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn6)

We agree with ABA Comment [8] to Model Rule 1.1 that to be competent "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Although the District's Comments to Rule 1.1 do not specifically reference technology, competent representation always requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to carry out the representation. Because of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct.

Similarly, the requirement of D.C. Rule 1.3(b)(1) to "seek the lawful objectives of a client through reasonably available means" may require that a lawyer utilize social media if it would assist zealous and diligent representation. In using social media for representation, however, a lawyer must at all times stay within the "bounds of the law,"[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn7) including for example the general prohibition on misrepresentation by pretexting and the duty of truthfulness discussed in this and other Opinions.[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn8)

II. Communication with Clients

The duty to maintain client confidences under Rule 1.6,[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn9) the duty to provide competent representation under Rule 1.1, and the duty to communicate with clients under Rule 1.4[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn10) are all implicated by lawyer-client social media communication. Because social media communication often is public or semi-public, confidentiality of lawyer-client communication is an important concern.

Protecting the confidentiality of lawyer-client communication under Rule 1.6 requires a lawyer to understand in particular how non-clients can access client social media communication and postings.[11] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn11) For example, social media sites usually have a range of privacy settings, and clients may give others access to content posted behind private settings. In addition, site privacy settings can unexpectedly change with new terms and conditions imposed by the site host. Rules 1.1, 1.4 and 1.6 may require[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn12) that a lawyer advise clients about how non-client access to posted information about legal matters risks inappropriate disclosure of the information, waiver of the attorney-client privilege, and loss of litigation work-product protection.[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn13) *See, e.g., Lenz v. Universal Music Corp.*, in which the plaintiff "made comments in emails and electronic 'chats' with friends, [and] postings on her blog," which comments disclosed her discussions with counsel.[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn14) The Court held that the emails and chats waived the attorney-client privilege regarding the matters discussed.

A lawyer should consider reaching agreement with clients about how their attorney-client communication will occur, including whether or not social media should ever be used for such communication because of the confidentiality risks. Agreements about these subjects could be included in engagement letters.

III. Social Media as Sources of Information about Cases or Matters

Social media have become sources of relevant information in litigation and other adversarial proceedings, as well as in a broad array of transactional and advisory practices, including regulatory work.

A. Client Social Media

Rules 1.1 and 1.3 require a lawyer to consider the potential risks and benefits that client social media could have on litigation, regulatory, and transactional matters undertaken by the lawyer, and Rule 1.4 requires a lawyer to discuss such risks and benefits with clients.[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn15)

1. Review by Client's Lawyer

Competent and zealous representation under Rules 1.1 and 1.3 may require lawyer review of client social media postings relevant to client matters.[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn16) In litigation, client social media postings could be inconsistent with claims, defenses, pleadings, filings, or litigation/regulatory positions. For example, if a client initiated an action claiming serious injuries, the client's social media profile could disclose activity inconsistent with the injuries alleged.[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn17) A lawyer must address any such known inconsistencies before submitting court or agency filings to ensure that claims and positions are meritorious

under Rule 3.1, which requires a non-frivolous basis in law and fact,[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn18) and that misrepresentations are not made to courts or agencies[19] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn19) in violation of Rules 3.3 and 8.4.[20] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn20)

Client social media also can present risks and benefits for transactions and regulatory compliance. For example, review of client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements could be important because inconsistency could create rights or remedies for counterparties. Similarly, competent and zealous representation under Rules 1.1 and 1.3 in regulatory matters may require ensuring that representations to agencies are consistent with social media postings and that advice to clients takes such postings into account.

2. Review by Adversaries

In litigation and adversarial regulatory matters, social media postings without privacy settings are subject to investigation. Lawyers can and do look at the public social media postings of their opponents, witnesses, and other relevant parties, and as discussed below, may even have an ethical obligation to do so. Postings with privacy settings on client social media are subject to formal discovery and subpoenas.[21] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn21) To provide competent advice, a lawyer should understand that privacy settings do not create any expectation of confidentiality to establish privilege or work-product protection against discovery and subpoenas.[22] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn22)

3. Document Preservation

Because social media postings are subject to discovery and subpoenas, a lawyer may need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection.[23] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn23) A lawyer also may need to determine whether under applicable law, which varies from jurisdiction to jurisdiction, clients may modify their social media presence once litigation or regulatory proceedings are anticipated. For example, are clients permitted to change privacy settings or to remove information altogether from social media postings? Such analysis may need to include consideration of obstruction statutes, spoliation law,[24] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn24) and procedural rules applicable to criminal and regulatory investigations and cases;procedural rules and spoliation law in civil cases;and the duty under Rule 3.4(a) not to "[o]bstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so. . . ."[25] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn25) Before any lawyer-counseled or lawyer-assisted removal or change in content of client social media, at a minimum, an accurate copy of such social media should be made and preserved, consistent with Rule 3.4(a).[26] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn26)

Transactional and regulatory representation also can include advice about adjusting client social media. In the absence of unlawful activity or anticipation of litigation or adversary proceedings, that advice may not be constrained by spoliation or obstruction of justice considerations. In order to comply with Rule 1.1, however, a lawyer should not advise a client to make fraudulent or unlawful adjustments;nor should a lawyer participate in such activity or in misrepresentations or material omissions in violation of Rules 1.2(e),[27] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn27) 4.1,[28] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn28) or 8.4(c).

4. Substantive Regulatory Risks

In regulatory practice, competent and zealous representation also may require advice about whether social media postings or use violate statutory or rule-based limits on public statements or marketing. The Securities and Exchange Commission, Federal Trade Commission, Consumer Product Safety Commission, Food and Drug Administration, and other federal, state, and local agencies have promulgated such limits or guidelines. For example, in April 2013 the SEC Division of Enforcement applied Regulation FD and the Commission's 2008 Guidance to the use of social media.[29] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn29) Communications about initial public offerings pose regulatory risk, and those risks apply fully to issuer social media.[30] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn30) Inadequately disclosed interactive internet downloads may constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.[31] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn31) Other agencies have published guidelines, such as a Guidance on social media issued by the

Federal Financial Institutions Examination Council.[32] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn32)

B. Social Media of Adverse Parties, Counsel, and Experts

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of potentially relevant social media postings of adverse parties and their counsel, other agents, and experts.[33] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn33) In litigation, discovery requests should expressly include social media as sources, and discovery responses should not overlook them. Transactional practice may require review of social media both informally by investigation and formally by including social media in due diligence requests. In conducting such investigations, a lawyer should take into consideration that some social media networks automatically provide information to registered users or members about persons who access their information.[34] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn34) This is sometimes referred to as a digital footprint.

1. Media of Represented Persons

Rule 4.2[35] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn35) generally forbids communicating with represented persons without the consent of their counsel. The Rule applies to some aspects of social media investigation. A lawyer's review of a represented person's public social media postings does not violate the Rule because no communication occurs. On the other hand, requesting access to information protected by privacy settings, such as making a "friend" request to a represented person, does constitute a communication that is covered by the Rule.[36] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn36)

2. Media of Unrepresented Persons

Rule 4.3[37] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn37) governs lawyer contacts with unrepresented persons, including when they are adverse parties. This Rule also applies to social media investigation. As with Rule 4.2, review of public postings of an unrepresented person does not implicate the Rule because it does not constitute a communication. On the other hand, requesting access to information protected by privacy settings would trigger the requirements of Rule 4.3(b). Rules 4.1 and 8.4(c) also apply to such social media communication. To comply with these three Rules, in social media communication with unrepresented persons, lawyers should identify themselves, state that they are lawyers, and identify whom they represent and the matter.[38] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn38)

3. Pretexting

Rules 4.1 and 8.4 generally preclude pretexting or other misrepresentation during review of social media by a lawyer or his or her agents, including requesting access to information protected by privacy settings.[39] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn39) Unannounced review of publicly available sites usually does not involve pretexting or misrepresentation.[40] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn40)

4. Document Preservation

Competent and zealous representation under Rules 1.1 and 1.3 may require imposing on adversaries reasonable litigation holds that cover social media and pursuing spoliation remedies of adversaries who have not preserved relevant social media as required by law.[41] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn41)

5. Inadvertent Disclosure

If an investigation of social media reveals inadvertent disclosure of privileged or work product protected information, a lawyer should consider whether Rule 4.4[42] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn42) or other law, rules, or orders apply.[43] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn43) This is consistent with the responsibility of a lawyer to refrain from seeking information that is protected by the attorney-client privilege of another party.[44] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn44)

6. Trial Evidence and Service of Process

At the time of social media investigation or later, competent and zealous representation under Rules 1.1 and 1.3 may require consideration of how social media information will be authenticated and presented as evidence at trials or hearings.[45] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn45)

In some jurisdictions, social media also may be used to effect alternative service on opposing parties.[46] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn46)

C. Social Media of Fact Witnesses and Other Sources of Facts

All of the above considerations about investigation and use of social media of adverse parties apply to non-party sources of facts, including witnesses.

D. Social Media of Jurors

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of jurors or potential jurors to discover bias or other relevant information for jury selection.[47] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn47)

Accessing public social media sites of jurors or potential jurors is not prohibited by Rule 3.5 as long as there is no communication by the lawyer with the juror in violation of Rule 3.5(b),[48] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn48) and as long as such access does not violate other applicable Rules of Professional Conduct.[49] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn49) As noted above, some social media networks automatically provide information to registered users or members about persons who access their information. In the Committee's view, such notification does not constitute a communication between the lawyer and the juror or prospective juror.

Ex parte communication with jurors or potential jurors is prohibited by Rule 3.5(b).[50] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn50) Because requesting access to a juror's or potential juror's private media sites involves communication with the juror, such requests would violate the Rule.[51] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn51) In addition, if a court or judge forbids access to the social media of jurors and potential jurors, then a violation of a court rule or order could raise questions under Rule 3.4(c).[52] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn52)

Review of juror or potential juror social media could reveal misconduct by the juror or others. Whether and how such misconduct must or should be disclosed to a court is beyond the scope of the Rules of Professional Conduct, except to the extent that the review has revealed information clearly establishing that a fraud has been perpetrated upon the tribunal[53] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn53) under Rule 3.3(d).[54] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn54)

E. Social Media of Judges, Arbitrators, and Regulators

Social media of judges, arbitrators, regulators, and agencies could contain information relevant to cases and other matters in which a lawyer provides representation.

To the extent not prevented by court, agency, or professional responsibility rules, competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of decision-makers. For example, to formulate regulatory advice, a lawyer may need to review public social media of agencies and their decision-makers, while avoiding inappropriate *ex parte* communication, pretexting not authorized by law, and influence prohibited by law.

As with social media of jurors, lawyer review of public social media of judges, arbitrators, regulators, and other neutrals does not constitute communication and therefore is not an *ex parte* contact in violation of Rule 3.5, even if it occurs during the pendency of a case or matter.

The ABA and several ethics opinions have opined that judges can participate in social media, and a lawyer can be a "friend" of judges on social media sites, as long as the contacts comply with the Code of Judicial Conduct; do not undermine the judges' independence, integrity, or impartiality; and do not create an appearance of impropriety.[55] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn55) D.C. Rule 3.5(a)[56] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn56) prohibits seeking to influence a judge or other official by means prohibited by law.

When no case or proceeding involving a lawyer is pending, Rule 3.5 does not forbid the lawyer from becoming a "friend" of judges, arbitrators, regulators, or other neutrals. Nor does it forbid public or private social media communication with such persons, as long as Rule 3.5(a) is not violated.[57] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn57) When a case or matter is pending before a decision-maker, the prohibition of *ex parte* communication in Rule 3.5(b) applies to all communication, including by social media.[58] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn58) In such a circumstance a lawyer should consider whether to remove, at least temporarily, the decision-maker as a "friend" or other connection on social media.

F. Lawyer Social Media

Many lawyers and law firms have social media accounts to facilitate review of the internet presence of clients and others as discussed above. In addition, lawyers also use social media sites to comment on legal issues, cases, and matters. Although such social media postings, including about litigation, are not necessarily prohibited, the Rules impose some constraints. *See* Opinion 370, which addresses lawyers' use of social media for their own marketing and other purposes.

As with all communications by a lawyer, Rule 1.6 prohibits disclosure in social media postings of client confidences or secrets unless expressly or impliedly authorized by the client or unless another specific exception is provided by the Rules. When a client consents to social media posting related to a matter, the lawyer should be careful not to disclose, without specific client consent, attorney-client privileged information. Purposeful disclosure of privileged information could result in a subject matter waiver, and even inadvertent disclosure could result in waiver of particular communications.[59] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn59) Such care also should be taken regarding identification, financial, health, and other sensitive personal information. In addition, social media postings should not violate protective orders or confidentiality agreements.

Regarding trials and other adversary proceedings, Rule 3.6[60] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn60) prohibits statements by a lawyer, on social media or otherwise, that the lawyer knows or reasonably should know will create a serious and imminent threat of material prejudice to a proceeding. As noted above, Rule 3.5 forbids communications seeking to influence a judge, juror, prospective juror or other official by means prohibited by law or to disrupt any proceeding or tribunal. Rule 3.8(f)[61] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn61) prohibits statements by prosecutors that heighten condemnation of the accused and do not serve a legitimate law enforcement purpose.[62] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn62) All of these Rules apply to social media postings by a lawyer.

IV. Supervision of Lawyers and Staff

Under Rules 5.1[63] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn63) and 5.3,[64] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftn64) a lawyer should take reasonable measures to ensure that any social media investigation or posting by subordinate lawyers and staff—including personal posting—conforms to the Rules of Professional Conduct, including protection of confidential client information.

Conclusion

Social media, like other technology applicable to the practice of law, will continue to change. The principles explained in this Opinion should be applied to such change to ensure continuing compliance with the Rules of Professional Conduct.

[1] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref1) "Content" means any communication, whether for personal or business purposes, disseminated through websites, social media sites, blogs, chat rooms, listservs, instant messaging, or other internet presences, and any attachments or links related thereto.

[2] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref2) The Merriam-Webster Dictionary defines "social media" as "forms of electronic communication … through which users create online communities to share information, ideas, personal messages, and other content…." More specifically to the legal profession, the New York State Bar Association Committee on Professional Ethics, in its Formal Opinion No. 2012-2 (May 30, 2012), stated:

> We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives.

[3] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref3) Rule 1.1(a) states:

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

[4] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref4) *See, e.g.*, N.Y. State Bar Ass'n Social Media Comm., *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section* (2015) ("NYSBA Guidelines"); American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014) ("ABA Op. 466"); N.C. State Bar, Formal Ethics Op. 2014-5 (revised 2015) ("N.C. Op. 2014-5"); Pa. Bar Ass'n, Formal Op. 2014-300 ("Pa. Op. 2014-300"). *See generally* D.C. Bar Legal Ethics Op. 281 (1998) (noting in an early internet-related opinion about confidentiality risks from e-mail communication that it was important to understand how e-mails actually traveled over the internet).

[5] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref5) Rule 1.3(a) states:

> A lawyer shall represent a client zealously and diligently within the bounds of the law.

[6] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref6) *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2014).

[7] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref7) *See supra* note 5.

[8] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref8) *See generally* D.C. Legal Ethics Op. 323 (2004) and other Opinions addressing application of D.C. Rule 8.4(c).

[9] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref9) Rule 1.6(a) and (b) states in part:

> (a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:
>
> (1) [R]eveal a confidence or secret of the lawyer's client;. . . .
>
> (b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

[10] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref10) Rule 1.4(a) and (b) states:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[11] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref11) *See supra* note 4.

[12] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref12) In this Opinion the terms "may require" and "may need to" mean that whether the referenced Rules would establish a requirement in any given matter will depend on circumstances such as the scope of a lawyer's representation and the nature of the matter. At the same time, the term reflects the Committee's view that the referenced issue should be given serious consideration and could constitute a requirement. The term "should" has the meaning established in the first paragraph of the Scope page of the Rules. *See* Comment 3 to Rule 1.4.

[13] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref13) *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300.

[14] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref14) *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783 JF (PVT), 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010).

[15] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref15) *See generally* NYSBA Guidelines; N.Y. Cty. Lawyers' Ass'n, Ethics Op. 745 (2013) ("NYCLA Op. 745").

[16] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref16) *See, e.g.*, Pa. Op. 2014-300.

[17] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref17) *See, e.g., McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *1, *13 (Pa. Ct. Com. Pl., Jefferson Cty. Sept. 9, 2010) (plaintiff alleged substantial injures, including "possible permanent impairment," yet public Facebook postings showed him taking several trips, indicating he had exaggerated his injuries).

[18] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref18) Rule 3.1 states in part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

[19] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref19) *See, e.g.*, NYCLA Op. 745; *see* also NYSBA Guidelines.

[20] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref20) Rule 3.3(a)(1) states:

> (a) A lawyer shall not knowingly:
>
> > (1) Make a false statement of 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, unless correction would require disclosure of information that is prohibited by Rule 1.6.

Rule 8.4(c) states:

> It is professional misconduct for a lawyer to:
>
> > (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[21] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref21) *See, e.g., Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 3:12-cv-00127-PK, 2012 WL 3763545, at *1 (D. Or. Aug. 29, 2012) ("I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms."); *Loporcaro v. City of New York*, 950 N.Y.S.2d 723 (Sup. Ct., Richmond Cty. 2012) (unpublished table decision), 2012 WL 1231021, at *7 ("Clearly, our present discovery statutes do not allow that the contents of such [social media] accounts should be treated differently from the rules applied to any other discovery material. . . .").

[22] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref22) *See, e.g., Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) ("[M]aterial posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy."); *see also Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012); *Davenport v. State Farm Mut. Auto. Ins.*, No. 3:11-cv-632, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012) (stating that generally social media content "is neither privileged nor protected by any right of privacy"); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (App. Div. 2011).

[23] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref23) *See, e.g.*, Pa. Op. 2014-300.

[24] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref24) *See, e.g., Gatto v. United Air Lines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285, at *3, 2013 U.S. Dist. LEXIS 41909, at *10 (D.N.J. Mar. 25, 2013); *Torres v. Lexington Ins.*, 237 F.R.D. 533 (D.P.R. 2006); *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308 (2011), *aff'd in part, rev'd in part?*, 285 Va. 295 (2013).

[25] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref25) D.C. Rule 3.4. *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300;N.C. Op. 2014-5; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2014-5.

[26] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref26) *See, e.g.*, Pa. Op. 2014-300. Because adjusting privacy settings does not alter the content of social media postings, Rule 3.4(a) does not require content preservation before such adjustment. *Id*.

[27] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref27) Rule 1.2(e) states:

> (e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

[28] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref28) 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 assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[29] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref29) *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings Exchange Act, Release No. 69279, 105 SEC Docket 4327 (Apr. 2, 2013) (interpreting Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58288 (Aug. 7, 2008)).

[30] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref30) *See id.* at 5 ("[I]ssuer communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels [and] the principles outlined in the 2008 Guidance . . . apply with equal force to corporate disclosures made through social media channels.").

[31] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref31) Complaint and Decision and Order, *In Re. Sears Holdings Mgmt. Corp.*, FTC No. C-4264 (Aug. 31, 2009).

[32] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref32) Social Media: Consumer Compliance Risk Management Guidance, 78 Fed. Reg. 76,297 (Dec. 17, 2013).

[33] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref33) *See id.*; *see* also NYCLA Op. 745.

[34] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref34) *See, e.g.*, NYSBA Guidelines; Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("N.Y.C. Op. 2012-2"); *see also* N.Y. Cty. Lawyers' Ass'n Comm. On Prof'l Ethics, Formal Ethics Op. 743 (2011) ("NYCLA Op. 743").

[35] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref35) Rule 4.2(a) states:

> (a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

[36] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref36) *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010); *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015) ("Colo. Op. 127"); Ore. State Bar, Formal Op. 2013-189 ("Ore. Op. 2013-189"); San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2 ("SDCBA Op. 2011-2").

[37] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref37) Rule 4.3(a)(2) and (b) states:

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not. . . .:
>
> (2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.

> (b) 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.

[38] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref38) *See, e.g.*, Mass Bar Ass'n, Ethics Op. 2014-5; N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05; *see generally* D.C. Bar Legal Ethics Op. 321 (2003). *But* see SDCBA Op. 2011-; N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 2010-02; Colo. Op. 127; Ore. Op. 2013-189; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Pa. Op. 2014-300.

[39] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref39) *See, e.g.*, SDCBA Op. 2011-2; *see also* Colo. Op. 127; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Ore. Op. 2013-189; N.Y.C. Op. 2010-02. *See generally* D.C. Bar Legal Ethics Op. 323 (2004) (misrepresentation by government lawyers); Hope C. Todd, *Speaking of Ethics: Lies, Damn Lies: Pretexting and D.C. Rule 8.4(c)*, WASHINGTON LAWYER (Jan. 2015).

[40] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref40) The Committee does not express a view about whether pretexting can arise from site publication of terms and conditions for public access.

[41] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref41) *See, e.g.*, Margaret DiBianca, *Discovery and Preservation of Social Media Evidence*, BUS. L. TODAY (Am. Bar Ass'n Jan. 2014) (noting "social media content should be included in litigation-hold notices").

[42] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref42) Rule 4.4(b) states:

> (b) A lawyer who receives a writing relating to the representation of a client and knows, before [reading] the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

[43] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref43) *See* D.C. Bar Legal Ethics Op. 256 (1995).

[44] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref44) *See* D.C. Bar Legal Ethics Op. 287 (1998) ("[A] lawyer may not solicit information . . . that is reasonably known or which reasonably should be known to the lawyer to be protected from disclosure by statute or by an established evidentiary privilege.").

[45] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref45) See generally, *e.g., Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534 (D. Md. 2007) (Grimm, M.J.) (addressing evidence rules applicable to social media and other internet evidence).

[46] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref46) *See, e.g., Baidoo v. Blood-Dzraku*, 5 N.Y.S. 3d 709, (Sup. Ct., N.Y. Cty., 2015) and cases cited therein from the Southern District of New York, the Eastern District of Virginia and the Supreme Court of Richmond County, New York allowing alternative service by Facebook; and from the Southern District of New York, the Eastern District of Missouri, and the Supreme Court of Oklahoma not allowing such service. *See generally Christopher M. Finke, Internet Service Provided: The Movement Towards Service of Process Via Social Media*, U. BALT. L. REV.: ISSUES TO WATCH (Nov. 12, 2015), ubaltlawreview.org/2015/11/12/the-movement-towards-service-of-process-via-social-media.

[47] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref47) For example, some courts encourage pretrial investigation of jurors to uncover juror conduct before trials begin. *See, e.g., Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam).

[48] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref48) *See, e.g.*, NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; NYCLA Op. 743; Ore. Op. 2013-189.

[49] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref49) *Accord, e.g.*, ABA Op. 466;Pa. Op. 2014-300. *But see* NYSBA Guidelines;NYCLA Op. 743; N.Y.C. Op. 2010-2.

[50] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref50) Rule 3.5(b) states:

A lawyer shall not:

> (b) Communicate *ex parte* with [a judge or juror] during the proceeding unless authorized to do so by law or court order.

[51] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref51) *See, e.g.*, NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; Ore. Op. 2013-189; NYCLA Op. 743.

[52] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref52) Rule 3.4(c) states:

A lawyer shall not:

> (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

[53] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref53) *See, e.g.*, ABA Op. 466; NYCLA Op. 743.

[54] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref54) Rule 3.3(d) states:

> (d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon [a] tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

[55] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref55) American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) ("ABA Op. 462"); *accord* N.C. State Bar, Formal Ethics Opinion 2014-8 ("N.C. Op. 2014-8") (as long as no communication occurs during the pendency of a lawyer's case before the judge); Pa. Op. 2014-300 (as long as the purpose is not to influence the judge and no *ex parte* communication occurs).

[56] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref56) Rule 3.5(a) states:

A lawyer shall not:

> (a) Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law.

[57] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref57) *See id.*; Pa. Op. 2014-300.

[58] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref58) *See, e.g.*, NYSBA Guidelines;ABA Op. 462;N.C. Op. 2014-8; *see also Youkers v. State*, 400 S.W.3d 200, 206 (Tex. App. 2013) ("[W]hile the internet and social media websites create new venues for communications, our analysis should not change because an ex parte communication occurs online or offline.").

[59] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref59) *See, e.g.*, NYSBA Guidelines; D.C. Op. 256.

[60] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref60) Rule 3.6 states:

> A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.

[61] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref61) Rule 3.8(f) states:

> The prosecutor in a criminal case shall not:
>
> (f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused.

[62] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref62) *See, e.g.*, *United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015).

[63] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref63) Rule 5.1(b) states:

> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

[64] (/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm#ftnref64) Rules 5.3(b) states:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

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