AMERICAN BANKRUPTCY INSTITUTE

2019 Mid-Atlantic Bankruptcy Workshop

PLENARY SESSION

When to Draw the Line: Ethical Pitfalls in Bankruptcy and Social Media

Jill B. Bienstock, Moderator
Cole Schotz P.C.; Hackensack, N.J.

Arielle B. Adler
Lowenstein Sandler LLP; Roseland, N.J.

Christopher J. Giaimo
Squire Patton Boggs; Washington, D.C.

2019

DISCLOSURE REQUIREMENTS UNDER RULE 2014 AND THE WAR BETWEEN JAY ALEX AND MCKINSEY

I. The Bankruptcy Standard for Retention

It is generally understood that professionals in bankruptcy cases must establish a higher standard than simply an absence of a conflict of interest in order to be retained to represent the estate. The Bankruptcy Code sets out more stringent standards than the Model Rules of Professional Conduct or applicable state ethics rules for estate professionals. Specifically, Section 327(a) of the Bankruptcy Code provides that the Trustee and/or Debtor may, with the Court's approval, retain a professional *only if* the professional is *both* "disinterested" *and* "does not hold or represent an interest adverse to the estate." 11 U.S.C. §372 (emphasis added); *In Re Caesars Entertainment Operating Co., Inc., et al.,* 561 B.R. 420 (Bankr.N.D.Ill. 2015). The factual basis for establishing compliance with Section 327(a) is set forth in the professional's retention application and the accompanying disclosures must be continuously updated and maintained throughout the pendency of the professional's employment.

The purpose of the requirements of "disinterestedness" and "no interest adverse to the estate" is to ensure that all professionals provide their professional services with "undivided loyalty" by providing "untainted advice and assistance in furtherance of their fiduciary responsibilities." *In Re Crivello,* 134 F.3d 831, 836 (7th Cir.1998) (quoting *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994)).

II. The Disclosure Requirements

Whether a conflict of interest is actual, potential or disqualifying can be a murky area. The requirement of a proposed professional to disclosure any conflict, actual or potential, is (or was) generally understood to be abundantly clear, unequivocal and necessary. Rule 2014 of the Federal Rules of Bankruptcy Procedure provides that an order approving the employment of estate professionals pursuant to Section 327 and others, shall be made only on application which application shall contain, *inter alia*, "*to the best of the applicants knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accounts, the United States trustee, or any person employed in the office of the United States trustee*." Fed. R. Bankr. Proc. 2014. Moreover, the foregoing information must be disclosed in a timely manner in the form of a verified statement. *Id*. Such disclosures must be detailed and accurate enough to enable the court to evaluate and determine the extent of any potential conflict of interest. *In Re Park-Helena Corp.,* 63 F.3d 877 (9th Cir. 1995).

On its face, Rule 2014's disclosure requirements seem logical and easily satisfied by diligent professionals. However, with the size and complexity of bankruptcy cases increasing as well as the size and complexity the professional organization seeking to be retained, identifying and disclosing such connections is becoming much more difficult. This difficulty is often exacerbated by a lack of clear protocols and consistent case law. Yet, compliance is neither optional nor is failure to comply excusable. Indeed, failure to strictly meet the disclosure requirements of Rule 2014(a) of the Federal Rules of Bankruptcy Procedure is, in and of itself, grounds for disqualification, denial of compensation or, even more concerning, a basis to order disgorgement of fees. *Rome v. Braunstein*, 63 F.3d at 881; *In Re EWC, Inc.,* 138 B.R. 276, 280 (Bankr. W.D.Okla. 1992); *In Re Rusty Jones, Inc.,* 134 B.R. 321, 341 (Bankr.N.D.Ill. 1991). And, as set forth above, there is a continuing and affirmative duty on behalf of a retained professional to monitor any conflicts and to provide an updated Rule 2014 disclosure as circumstances change. *In Re Sauer*, 191 B.R. 402, 408 (Bankr.D.Neb. 1995).

As many a professional can attest, the importance of disclosure simply cannot be underestimated, especially since retention applications are reviewed by the U.S. Trustee's office. If there is an objection to the application (typically, but not exclusively, asserted by the Trustee's office) the analysis undertaken by

courts starts with the Rule 2014 affidavit and the disclosure of connections set forth therein. The court's analysis is both fact intensive and performed on a case-by-case basis. While a properly completed Rule 2014 affidavit containing full disclosure of any and all conflicts and connections can form the basis of a finding that the professional is not disqualified, a less than complete Rule 2014 affidavit will likely expose the professional to disqualification, if not worse. Such a finding can have other adverse consequences such as denial and/or disgorgement of compensation or other financial penalty. Accordingly, the rule of thumb is that the professional should always (and continuously) fully and completely make all required statements and disclosures of connections in the Rule 2014 affidavit and, when in doubt, **Disclose, Disclose, Disclose!**

III. Jay Alex takes on McKinsey

As noted above, while any party in interest can raise an objection to a professional's retention application, this is typically done by the U.S. Trustee's office, as the government's bankruptcy watchdog. The U.S. Trustee's office carefully scrutinizes each and every retention application filed by all professionals seeking to be employed by the estate. This makes sense, as in some cases, the resources simply do not exist for other parties, such a creditors' committee, to review such applications. Moreover, as a general matter, creditors and other parties in interest are more concerned with getting paid than with who the debtor retains and whether such professional makes proper Rule 2014 disclosures.

Therefore, it was somewhat unusual that in 2014, Jay Alex, the founder of Alix Partners, took it upon himself to review retention applications filed by McKinsey & Co's ("McKinsey") recently formed bankruptcy firm, McKinsey Recovery & Transformation Services U.S., LLC ("RTS"). At the time, neither Mr. Alex nor Alix Partners were involved in cases where RTS was retained, except purely at a competitor to RTS. In any event, what Mr. Alex discovered was that RTS was not, at least in his opinion, filing adequate disclosures as required by Rule 2014. His attempt to have McKinsey self-rectify the problem allegedly went unheeded. It was then, that Mr. Alex began to bring his concerns to the bankruptcy courts where RTS was retained as a restructuring advisor.

Because Mr. Alex was not a party in interest in the cases in which he sought to challenge RTS's retention, he formed an investment company called Mar-Bow Value Partners, LLC ("Mar-Bow"), a sly reference to Marvin Bower, the esteemed financial advisor credited with establishing McKinsey's image of integrity. Mar-Bow's sole function was to acquire distressed debt from bankruptcy companies which had retained RTS, giving Mr. Alex the necessary standing to object to their retention. There are four such pending cases[1]:

- The NII Holdings;
- The SunEdison bankruptcy cases;
- The Alpha Natural; and
- The Westmorland Coal Company cases.

A. Jay Alex's Issues with McKinsey's 2014 Disclosures

While Mar-Bow's pleadings in each of the foregoing cases differs slightly, the main theme is consistent and appears, in large part, to stem from McKinsey's size and complexity as a consulting firm. McKinsey had revenue of approximately $10 billion in 2018, thousands of employees in 126 cities and 65

[1] Jay Alix also filed a personal RICO lawsuit against various McKinsey entities in the Southern District of New York.

countries and numerous divisions and affiliated companies, including but not limited to, an internal multi-billion dollar investment company called MIO Partner, Inc. ("MIO"), which invested in numerous entities for the benefit of McKinsey partners and alumni.

Mar-Bow argues that Bankruptcy Rule 2014 requires RTS or McKinsey, to disclose all of McKinsey's connections, including those of the MIO and the applications in the foregoing cases all fall well short of this requirement. More candidly, Mar-Bow's objection states that the McKinsey employment application is an "encyclopedic treatise on how to violate Rule 2014 and 11 U.S.C. § 327."

According to Mar-Bow, McKinsey, its partners and its employees hold disqualifying equity interests in certain debtors through their investments in MIO, and the same parties also hold disqualifying equity interests in other interested parties in the same cases, in some instances, holding investments in the debtors' secured lenders, asset purchasers, plan sponsors and *ad hoc* committee members. The objections assert, *inter alia*, that disclosure of MIO's equity interests in the debtors and in all other interested parties is "crucial" because those equity interests are "per se disqualifying under 11 U.S.C. §§ 327(a) and 101(14)." Mar-Bow further asserts that despite its size, complexity, and numerous affiliates, such as MIO, McKinsey is really one firm and, as such, Rule 2014's disclosure requirements need to be at every level, not just solely with respect to RTS.

The U.S. Trustee's office came to similar conclusions in both the ANR cases and in the SunEdison cases, stating that RTS' disclosures and declarations "give the appearance of compliance without actually complying with Bankruptcy Rule 2014." Further, in Westmoreland, Judge David Jones ordered that the U.S. Trustee to review Mar-Bow's allegations and report back to the court on "how best to proceed" while noting that if Mar-Bow's allegations are true, they "could violate Title 18…."

For its part, McKinsey maintains that it has always complied with Rule 2014, has always acted in good faith and diligently made the disclosures it believed were required to be made under Rule 2014 and Section 327. In making such argument, McKinsey primarily relied on the separateness of RTS and MIO, among others, as well as stressing the confidential nature of its clients. McKinsey maintains that the identities of clients could not be disclosed due to confidentiality agreements with such clients and that Rule 2014 was satisfied by providing generic categories of such clients, rather than specifically identifying such clients. For example, in a recent a court filing in the Westmoreland cases, RTS claimed that it was contractually bound to maintain the confidentiality of a certain "client that accounts for more than 17.5% of RTS's gross annual revenues." According to the supplemental declaration filed by RTS, disclosing the client's identity could "(a) result in a significant movement in the price of its publicly traded stock, and (b) have a negative effect with respect to ongoing litigation between the client and others unrelated to the Debtors." RTS further supports its position by noting that the client is not on the official unsecured creditors committee, is not among the debtors' top 50 creditors, is not a lender and is not *ad hoc* group member. Moreover, with respect to other affiliated entities, RTS identifies its affiliates from which the service team "borrowed consultants" to serve the debtors, and completed its connection searches for such entities.

B. Court Ordered Multi-Case Mediation and UST Settlement

In mid-January, Judge Kevin Huennekens, in the ANR cases, after consultation with Judge David Jones who is presiding over the Westmoreland cases, ordered judicial mediation of the parties' disputes surrounding McKinsey's disclosures. Judge Marvin Isgur of the U.S. Bankruptcy Court for the Southern District of Texas, was appointed to preside over the mediation.

Notably, Judge Huennekens also ordered the public disclosure of materials related to MIO's investments that were previously only disclosed to the court and certain parties in interest. McKinsey continued to resist such disclosures arguing it would risk the "corporate separateness" of MIO. Mar-Bow,

on the other hand, argued that such disclosures will prove that McKinsey profited in investments related to the ANR cases.

Ultimately, the cross-case mediation resulted in a settlements between RTS and Westmoreland[2] (the "Westmoreland Settlement") and McKinsey and the U.S. Trustee (the "U.S. Trustee Settlement"). No settlement was reached between Mar-Bow and McKinsey and the parties continue extensive litigation in several courts.

The Westmoreland Settlement required, among other things, for RTS to develop new disclosure protocols for application in the Westmoreland cases (and potentially, beyond) and for RTS to provide additional disclosures in compliance with such protocols. The proposed protocols are discussed below.

The U.S. Trustee Settlement requires McKinsey to pay $5 million each to the reorganized debtors in the ANR and SunEdison cases, as well as an additional $5 million payment to the bankruptcy estate in the Westmoreland cases. Significantly, and somewhat reflective of Mar-Bow's disinterested arguments, the settlement provides that if any of the settlement payments made by McKinsey are ultimately received by McKinsey (or MIO) as distributions to in interest holders in those cases, McKinsey will be required to refund such distributions.

The U.S. Trustee Settlement also includes certain mutual releases. Notwithstanding the settlement was reached in a mediation covering only the ANR and Westmoreland cases, the releases contained therein will be applicable to nine (9) other cases, including but not limited to, SunEdison, NII Holdings, UAL Corporation, Mirant Corp and Harry & David.

The U.S. Trustee reserved all rights to object to McKinsey's disinterestedness or its retention in the Westmoreland cases on any grounds "other than the adequacy of its past retention related disclosures." Further, the settlement term sheet provides that McKinsey "will request the United States Bankruptcy Court for the Southern District of Texas to defer consideration of McKinsey's retention application until after McKinsey has made additional disclosures[] in the Westmoreland case."

Mar-Bow filed a limited objection to the U.S. Trustee Settlement, arguing, *inter alia*, that the proposed order approving the settlement improperly dictates the distribution of McKinsey's sanctions by providing that they will be distributed pursuant to the confirmed plans, rather than directly to those who were "injured by McKinsey's wrongful conduct." Mar-Bow continues to press for extensive discovery in the matter.

The U.S. Trustee released a statement that McKinsey failed to satisfy applicable disclosure requirements and "repeatedly demonstrated a lack of candor with the Courts and the UST in connection therewith," but that the U.S. Trustee maintains that the settlement is "reasonable and reflect[s] a good faith compromise of the disclosure-related disputes between McKinsey and the UST that holds McKinsey accountable and eliminates the uncertainty and delay of protracted discovery and litigation." The statement further provides that the settlement "neither excuses McKinsey from its obligation to be free from conflicts, nor does it dictate that McKinsey's employment be approved in the Westmoreland case." Rather, the settlement "ensures that McKinsey will either make retention disclosures in compliance with bankruptcy law (including in the Westmoreland case) or face further actions and potentially more severe consequences in the future." Moreover, despite Mar-Bow's assertions to the contrary, the U.S. Trustee stated that the settlement would bind only the U.S. Trustee and McKinsey, without prejudice to the claims of third parties, including the applicable bankruptcy estates and Mar-Bow.

[2] McKinsey entered into a separate settlement with the SunEdison Litigation Trust, which included a payment of $17.5 million.

Notably, the U.S. Trustee stated that the settlement should be approved despite McKinsey's attempt to "excuse past violations as the product of a mere misunderstanding," and further stating that the U.S. Trustee's office has "historically taken the position that: (1) bare identification of connections as 'confidential clients' does not satisfy Rule 2014; and (2) the duty to disclose connections reaches all affiliates unless the professional firm can establish that the affiliates are sufficiently separate and that there are appropriate information barriers, especially with respect to investments."

C. Settlement with Westmoreland and Proposed Disclosure Protocol

As required by the Westmoreland Settlement, McKinsey, with assistance from noted bankruptcy professionals D.J. (Jan) Baker and Paul Singerman, prepared and filed with the court proposed protocols to addresses the "complex legal and business issues surrounding" proposed professionals' disclosure obligations in bankruptcy cases involving over $50 million in claims, called the "Houston Disclosure Protocol."

The Houston Disclosure Protocol (the "Protocol") states that it focused on a proposed professional's disclosures of connections to parties that could affect that professionals' disinterestedness as required by Section 327 and contemplates a debtor's creation and maintenance of an interest-party list, or IPL, to facilitate the identification of such connections. The Protocol includes an exhibit setting forth guidelines and a template for the IPL.

The Protocol provides that a proposed estate professional secure relevant data to support its disclosures of connections, including by distributing a questionnaire to its professional personnel and any unretained affiliates controlled by the professional (a form of which is attached to the protocol) and perform an inquiry of the proposed professional's affiliates or divisions that are "actively engaged in managing or owning financial investments." However, this inquiry would not apply "to assets that might be held through investment vehicles or to such investment vehicles, e.g., mutual funds, but does [include] the entity managing such investment vehicles, i.e., a mutual fund manager". While acknowledging that a proposed professional bears the burden of adequate disclosures in its application, the Protocol provides that such the disclosures of connections should be based on the proposed professional's "actual knowledge of them, including from the results of a computer search and questionnaire process, as applicable."

The Protocol differentiates connections based upon the different types of affiliates, including, for example, "Retained Affiliates" classified as giving rise to direct connections and "Unretained Affiliates" classified as giving rise to indirect connections. The protocol classifies affiliates or divisions into four types, with the recommended process for obtaining and disclosing connections varying to the extent the affiliate or division "(i) is subject to Securities Registration, Regulatory Oversight, and/or Independent Personnel and Management; (ii) refrains from investing directly in Named Issuers; and (iii) accepts investment funds from third parties rather than Related Investors."

Lastly, the Protocol recognizes that disclosure of connections may vary in response to, *inter alia*, the size of the bankruptcy case and should exclude *de minimis* matters. The *de minimis* concept is applicable to both the IPL and the disclosure of connections in a proposed professional's retention application. McKinsey provides in the Protocol summary that "*de minimis* exclusions can be based, for example, on the small value of a claim, the small ownership percentage and value of an equity interest, or other, similar considerations." However, the Protocol provides that a proposed professional's disclosure of connections with an IPL in its retention application, should state the criteria applied in making *de minimis* exclusions."

SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED MAY 11, 2017

Mark A. Berman, Section Chair
Ignatius A. Grande, Co-Chair of the Social Media Committee
Ronald J. Hedges, Co-Chair of the Social Media Committee

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

76670596_3

PREPARED BY

THE SOCIAL MEDIA COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION

CO-CHAIRS

Ignatius A. Grande
Hughes Hubbard & Reed LLP

Ronald J. Hedges
Dentons US LLP

TWITTER ACCOUNT MANAGER

Scott L. Malouf

MEMBERS

Daniel Marc Braude
Damian R. Cavaleri
Philip H. Cohen
Tarique N. Collins
Joseph V. DeMarco
Jonathan DeMay
Dauphine Alexandra Dunlap
Marcy Einhorn
Alfred L. Fatale, III
Tom M. Fini
Gail Gottehrer
David SS Hamilton
David Paul Horowitz
David Jaroslawicz
Jessica L. Jimenez
Shawndra Jones
Janelle Lewis
Daniel Eric Lust
Scott L. Malouf
Marc A. Melzer
Catherine Montesano
Yitzy Nissenbaum
Michael J. Parker
Peter J. Pizzi
Gina Sansone
Loree J. Shelko
Maryanne Stanganelli
Aaron E. Zerykier
Paul Josef Zola

LAW SCHOOL INTERNS

Zahava Moedler
Princess Uchekwe

TABLE OF CONTENTS

INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools for legal professionals and the people with whom they communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethics issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association is updating these social media guidelines – which were first issued in 2014[1] – to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the "Guidelines"). In particular, these Guidelines add new content on lawyers' competence, the retention of social media by lawyers, client confidences, potential positional conflicts of interest associated with social media posts, the tracking of client social media use, communications by lawyers with judges, and lawyers' use of social media platforms, such as LinkedIn, to communicate with selected audiences, or with the public in general.

These Guidelines should be read as guiding principles rather than as "best practices." The world of social media is rapidly changing and "best practices" will continue to evolve to keep pace with such developments. Since there are multiple ethics codes that govern attorney conduct throughout the United States, these Guidelines do not attempt to define a universal set of "best practices" that will apply in every jurisdiction. In fact, even where different jurisdictions have enacted nearly-identical ethics rules, their individual ethics opinions on the same topic may differ due to different social mores, the priorities of different demographic populations, and the historical approaches to ethics rules and opinions in different localities.

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

---

1. The Social Media Ethics Guidelines were most recently updated in June 2015.

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

3. NY RULES OF PROF'L CONDUCT (NYRPC) (NY STATE UNIFIED CT. SYS. 2013). (These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court In addition, the New York State Bar Association has promulgated comments regarding particular rules, but these comments, which are referenced in these Guidelines have not been adopted by the Appellate Divisions of the Supreme Court).

Social media communications that reach across multiple jurisdictions may implicate other states' ethics rules. Those rules may differ from the NYRPC. Lawyers should consider the controlling ethical requirements the jurisdictions in which they practice.

The ethical issues discussed in the NYRPC frequently arise in the information gathering phase prior to, or during, litigation. One of the best ways for lawyers to investigate and obtain information about a party, witness, juror or another person, without having to engage in formal discovery, is to review that person's social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer's research may have ethical consequences.

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet "community," attorney advertising rules and other ethical rules must be considered when a lawyer uses social media. For example, it is not always readily apparent whether a lawyer's social media communications constitute regulated "attorney advertising." Similarly, privileged or confidential information can be unintentionally divulged beyond the intended recipient if a lawyer communicates to a group using social media. In addition, lawyers must be careful to avoid creating an unintended attorney-client relationship when communicating through social media. Finally, certain ethical obligations arise when a lawyer counsels a client about the client's own social media posts and the removal or deletion of those posts, especially if such posts are subject to litigation or regulatory preservation obligations. These ethical obligations will also be discussed herein.

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

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

1. ATTORNEY COMPETENCE

Guideline No. 1.A: Attorneys' Social Media Competence

A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation.

NYRPC 1.1(a) and (b).

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

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer uses in connection with the practice of law or that his or her client may use if it is relevant to the purpose or purposes for which the lawyer was retained.

Maintaining this level of understanding is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Opinion 466 (2014)[4] states:

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

A lawyer must "understand the functionality and privacy settings of any [social media] service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies."[6] The ethics opinion also holds that

---

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

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

6. Ass'n of the Bar of the City of New York Prof'l Ethics Comm. ("NYCBA"), Formal Op. 2012-2 (2012). Accord D.C. Bar Legal Ethics Comm., Ethics Op. 370 (2016) ("The guiding principle for lawyers with regard to the use of any social network site is that they must be conversant in how the

"[i]f an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site..."[7]

Indeed, a lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the lawyer's use of social media. In fact, Comment 8 to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

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

Commentary to Rule 1.1 of the NYRPC, which is offered by the New York State Bar Association as informal guidance to practitioners, has also been amended to provide:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.[8]

Many other states have also adopted a duty of competence in technology in their ethical codes. [9] Although a lawyer may not delegate his or her obligation to be competent, he or she may rely, as appropriate, on other lawyers or professionals in the field of electronic discovery and social media to assist in obtaining such competence. As NYRPC 1.1 (b) requires, "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it."

---

site works. Lawyers must understand the functionality of the social networking site, including its privacy policies.").

7. NYCBA, Formal Op. 2012-2.

8. NYRPC 1.1 cmt. 8.

9. As of this writing, 27 states have included a duty of competence in technology in their ethical codes. See Robert Ambrogi, *27 States Have Adopted Ethical Duty of Technology Competence*, LAWSITES (retrieved on April 30, 2017).

For a discussion of eDiscovery competence in general, see ethics opinions issued by the New York County Lawyers Association Professional Ethics Committee[10] and the State Bar of California's Committee on Professional Responsibility and Conduct.[11]

10. New York County Lawyers Association Professional Ethics Committee, Formal Op. 749 (Feb. 21, 2017).

11. The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Op. 2015-93.

2. ATTORNEY ADVERTISING

Guideline No. 2.A: Applicability of Advertising Rules

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

NYRPC 1.0, 7.1, 7.3., 7.4, 7.5, 8.4(c)

Comment: It is clear that a social media profile that is used for work purposes is subject to attorney advertising[12] and solicitation rules.[13] In the case of a lawyer's profile on a hybrid account that is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.

The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[14] According to NYCLA Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."[15]

The NYCLA ethics opinion states that if an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2)

---

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

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

14. New York County Lawyers' Association ("NYCLA"), Formal Op. 748 (2015); see also Andrew Strickler, *Many Atty LinkedIn Profiles Don't Count as Ads, NYC Bar Says*, LAW360 (Jan. 5, 2016).

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

statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome."[16]

The NYCLA opinion provides that attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[17] Also, the NYCLA opinion noted that if an attorney claims to have certain skills, they must also include this disclaimer because a description of one's skills – even where those skills are chosen from fields created by LinkedIn – constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).[18]

After NYCLA Formal Opinion 748 was issued, the New York City Bar Association issued Opinion 2015-7 addressing attorney advertising. The New York City Bar opinion addressed attorney advertising in a different manner and provides that an attorney's LinkedIn profile may constitute attorney advertising only if it meets the following five criteria:

> (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising.[19]

The New York City Bar Association opinion notes that it should not be presumed that an attorney who posts information about herself on LinkedIn is doing so for the primary purpose of attracting paying clients.[20] If someone merely includes a list of "Skills," a description of one's practice areas, or displays "Endorsements" or "Recommendations," without more on their LinkedIn account, this does not, by itself, constitute attorney advertising.[21]

---

16. Id.

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

18. NYCLA, Formal Op. 748.

19. New York City Bar Formal Op. 2015-7: Application of Attorney Advertising Rules to LinkedIn (Dec. 30, 2015).

20. Id.

21. Id.

New York City Bar Formal Op. 2015-7 also notes that if an attorney's LinkedIn profile meets the five-pronged attorney advertising definition, he or she must comply with requirements of Article 7 of the NYRPC, which include, but are not limited to:

> (1) labeling the LinkedIn content "Attorney Advertising";
> (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and
> (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising.[22]

Attorneys practicing in New York should be aware of both opinions when complying with New York's attorney advertising rules. An attorney's ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a "tweet") is deemed attorney advertising, the rules require that a lawyer must include disclaimers similar to those described in NYCLA Formal Op. 748.[23]

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's 140 character limit (which in practice may be even less than 140 characters when including links, user handles or hashtags) may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, attorneys should consider only posting tweets that would not be categorized as attorney advertising to avoid having to comply with the attorney advertising rules within the Twitter environment.[24]

Rule 7.1(k) of the NYRPC provides that all advertisements "shall be pre-approved by the lawyer or law firm." It requires that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies a one-year retention period for advertisements contained in a "computer-accessed communication" and yet another retention scheme for websites.[25] Rule 1.0(c) of the NYRPC defines ''computer-accessed communication'' as any communication made by or on behalf of a lawyer or law

---

22. New York City Bar Formal Op. 2015-7: Application of Attorney Advertising Rules to LinkedIn (Dec. 30, 2015); see also Peter Geraghty, *Social Media Endorsements: Undue Flattery Will Get You Nowhere*, YOURABA (July 2016); Andrew Strickler, *Many Atty LinkedIn Profiles Don't Count as Ads, NYC Bar Says*, LAW360 (Jan. 5, 2016).

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

24. NYSBA, Op. 1009.

25. Id.

firm that is disseminated through "the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto."[26] Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."[27]

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

Guideline No. 2.B: Prohibited Use of Term "Specialists" on Social Media

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[28]

NYRPC 7.1, 7.4.

Comment: Although LinkedIn's headings no longer include the term "Specialties," lawyers still need to be cognizant of the prohibition on claiming to be a "specialist" when creating a social media profile.[29] To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer's experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.[30]

---

26. Id.

27. Id.

28. See NYSBA, Op. 972 (2013).

29. One court has found that the prohibition on the words "expertise" and "specialty" in relation to attorney advertising is unconstitutional; see Searcy v. Florida Bar, 140 F. Supp. 3d 1290 (N.D. Fla. 2015).

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

A lawyer shall not list information under the ethically prohibited heading of "specialist" in any social media network unless appropriately certified as such. Skills or practice areas listed on a lawyer's profile under the headings "Experience" or "Skills," do not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4.[31] A lawyer may include information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings such as "expert."

A limited exception to identification as a specialist may exist for lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example, identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.[32]

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

A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.[33]

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she may wish to ask that person to remove it.[34]

NYRPC 7.1, 7.2, 7.3, 7.4.

---

31. NYCLA, Formal Op. 748.

32. See NYRPC 7.4.

33. See Fl. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised May 9, 2016); see also Peter Geraghty, *Social Media Endorsements: Undue Flattery Will Get You Nowehere*, YOURABA (July 2016).

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

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

Guideline No. 2.D: Attorney Endorsements

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

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must monitor and verify that posts about them made to profiles they control[35] are accurate. "Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists," as well as to confirm the accuracy of any endorsements or recommendations.[36] A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.[37] Certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

When an attorney provides information on social media related to successful results she has achieved for a client, she should be careful to avoid disclosing confidential information about her client and the matter. The risk of disclosure of confidential

---

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

36. NYCLA, Formal Op. 748.

37. See NYCLA, Formal Op. 748; Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-300; North Carolina State Bar Ethics Comm., Formal Op. 8 (2012); see also Mary Pat Benz, *New Guidance for Lawyers on the Ethics of Social Media Use*, ATTORNEYATWORK (Oct. 23, 2014).

information can also arise when a lawyer deems it necessary to correct adverse comments made by clients or former clients about the lawyer's legal skills made on social media (known as "reverse advertising"). New York has not addressed the issue, but the Texas Center for Legal Ethics recently opined that in such a situation, a lawyer may post a "proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct."[38]

Guideline No. 2.E: Positional Conflicts in Attorney Advertising

When communicating and stating positions on issues and legal developments, via social media or traditional media, a lawyer should attempt to avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on behalf of her clients and the clients of her firm.

NYRPC 1.7, 1.8

Comment: While commenting on issues and legal developments can certainly assist in advertising a lawyer's particular knowledge and strengths, a position stated by a lawyer on a social media site in an attempt to market her legal services could inadvertently create a business conflict with a client. A lawyer needs to be cognizant of the fact that conflicts are imputed to the lawyer's firm.

While no New York ethics opinion has addressed the issue, the D.C. Bar Legal Ethics Committee recently provided guidance on this subject stating, "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. [D.C. Rule of Professional Conduct] 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 [D.C. Rule of Professional Conduct] 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts."[39]

---

38. Tex. Ctr. Legal Ethics Op. 662 (Aug. 2016); see also Kurt Orzeck, *Texas Attys Can Use Rivals in Ad Keywords, Ethics Panel Says*, LAW360 (Aug. 1, 2016) (discussing the Panel's decision to allow use of competing attorneys or firms in a lawyer's online advertising).

39. D.C. Bar Ethics Op. 370: Social Media I: Marketing and Personal Use (Nov. 2016).

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

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

Due to the "live" nature of real-time or interactive computer-accessed communications,[40] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[41] business from the public through such means.[42]

---

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

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

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

If a potential client[43] initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format.[44] Emails and attorney communications via a website or over social media platforms, such as Twitter,[45] may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client.[46]

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

Comment: Answering general questions[47] on the Internet is analogous to writing for any publication on a legal topic.[48] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites

---

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

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

44. "If a lawyer subject to the D.C. Rules of Professional Conduct engages in chat room communications of sufficient particularity and specificity to give rise to an attorney-client relationship under the substantive law of a state with jurisdiction to regulate the communication, that lawyer must comply with the full array of D.C. Rules governing attorney-client relationships." D.C. Ethics Op. 316.

45. Whether a Twitter or Reddit communication is a "real-time or interactive" computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See NYSBA, Op. 1009.

46. NYRPC 7.3(a)(1).

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

48. See NYSBA, Op. 899.

cannot be construed as a 'specific request' to retain the lawyer."[49] In responding to questions,[50] a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.[51]

Moreover, a lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.[52]

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[53] As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.[54] However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by

---

49. See id.

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

51. Id.

52. In addition, when "answering general questions on the Internet, specific answers or legal advice can lead to … the unauthorized practice of law in a forum where the lawyer is not licensed." Paul Ragusa & Stephanie Diehl, *Social Media and Legal Ethics—Practical Guidance for Prudent Use*, BAKER BOTTS LLP (Nov. 1, 2016).

53. See NYRPC 7.1(f), (h), (k).

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

email, telephone, etc., and second, the lawyer's actual response should not be made through a real-time communication.[55]

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

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

NYRPC 1.1, 1.15.

Comment: A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or representation...".[56] NYRPC 1.0(x), the definition of "writing," was expanded in late 2016 to specifically include a range of electronic communications.[57]

The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation."[58] The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, which the lawyer believes need to be saved.[59] However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted

---

55. Id.

56. NYRPC 1.0(n), Terminology.

57. NYRPC 1.0(x): "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, email or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

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

59. Id.

by the counterparty to the communication without the knowledge of the lawyer.[60] Casual communications may be deleted without impacting ethical rules.[61]

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

> As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.
>
> We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.[62]

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

---

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

61. Id.

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

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

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

A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer.

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

> *Comment*: A lawyer is ethically permitted to view the public portion of a person's social media website,[63] profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.[64]
>
> This allowance is based, in part, on case law that holds that a person is said to have very little expectation of privacy with respect to their social media content, let alone those that are specifically designated as "public."[65]

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

A lawyer may communicate with an unrepresented party and also request permission to view a restricted portion of the party's social media website or profile.[66] However, the lawyer must use her full name and an accurate profile, and may not create a different or false profile in order to mask her identity. If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the person or otherwise cease all further communications and withdraw the request if applicable.

NYRPC 4.1, 4.3, 8.4.

---

63. A lawyer should be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.

64. See NYSBA, Op. 843 (2010); see also Colorado Bar Ass'n Ethics Comm., Formal Op. 127 (Nov. 2015).

65. Romano v. Steelcase Inc., 30 Misc.3d 426 (Sup. Ct. Suffolk Cty. 2010) ("She consented to the fact that her personal information would be shared with others, notwithstanding her privacy setting. Indeed that is the very nature and purpose of these social networking sites else they would cease to exist.")

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

Comment: It is permissible for a lawyer to join a social media network solely for the purpose of obtaining information concerning a witness.[67] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using any form of "deception."[68]

In New York, no "deception" occurs when a lawyer utilizes his or her "real name and profile" to contact an unrepresented person to send a "friend" request to obtain information from that person's account.[69] In New York, the lawyer is **not** required to initially disclose the reasons for the communication or "friend" request.[70]

However, other states require that a lawyer's initial "friend" request must contain additional information to fully apprise the witness of their true identity and intention. For example, the New Hampshire Bar Association, holds that an attorney must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[71] The Massachusetts and San Diego Bar Associations simply require disclosure of the lawyer's "affiliation and the purpose for the request."[72] The Philadelphia Bar Association notes that failure to disclose the attorney's true intention constitutes an impermissible omission of a "highly material fact."[73]

In Oregon, there is an opinion that if the person being sought out on social media "asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[74]

---

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

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

69. Id.

70 See id.

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

72. Massachusetts Bar Ass'n. Comm. On Prof Ethics Op. 2014-5 (2014); San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011); see also Tom Gantert, *Facebook 'Friending' Can Have Ethical Implications*, LEGALNEWS (Sept. 27, 2012).

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

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

Guideline No. 4.C: Contacting a Represented Party and/or Viewing Restricted Social Media Website

A lawyer shall not contact a represented person or request access to review the restricted portion of the person's social media profile unless express consent has been furnished by the person's counsel.

NYRPC 4.1, 4.2.

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

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible."[75]

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

Note that there is an apparent gap in authority with respect to whether a represented party's receipt of an automatic notification from a social media platform constitutes an impermissible communication with an attorney, as opposed to within the juror context, which has been covered by several jurisdictions.

Nevertheless, in New York, drawing upon those opinions addressing jurors, receipt of an automatic notification can be considered an improper communication with someone who is represented by counsel, particularly where "the attorney is aware that their actions would cause the juror to receive such message or notification." [76]

Conversely, ABA, Formal Op. 466 opined that, at least within the juror context, an automatically generated notification does not constitute an impermissible communication since "the ESM service is communicating with the

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

76. See NYCBA, Formal Op. 2012-2 (May 30, 2012); NYCLA, Formal Op. 743 (May 18, 2011).

juror based on a technical feature of the ESM," and the lawyer is not involved.[77] This view has also been adopted by the DC and Colorado Bar Associations.[78]

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

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

NYRPC 5.3, 8.4.

Comment: This would include, *inter alia*, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent[79] and could, as well, apply to the lawyer's client.[80]

77. See American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (Apr. 24, 2014).

78. See D.C. Bar Ethics Formal Op. 371, Social Media II: Use of Social Media in Providing Legal Services (Nov. 2016); Colorado Bar Ass'n Ethics Comm., Formal Op. 127 (Nov. 2015).

79. See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2010-2 (2010).

80. See N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2013).

5. COMMUNICATING WITH CLIENTS

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

A lawyer may advise a client as to what content[81] may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings.[82] A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations.[83] Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

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

> *Comment*: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[84] or where preservation is required by common law, statute, rule, regulation or other requirement. Failure to do so may result in sanctions or other penalties. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,[85] there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."[86] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after litigation has commenced,

---

81. "Content" may, as appropriate, include metadata.

82. Mark A. Berman, *Counseling a Client to Change Her Privacy Settings on Her Social Media Account*, NEW YORK LEGAL ETHICS REPORTER (Feb. 2015).

83. N.Y. Cty. Lawyers Ass'n, Formal Op. 745 (2013); see also Phila. Bar Ass'n. Guidance Comm. Op. 2014-5 (2014).

84. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33,36 (N.Y. App. Div 1st Dep't 2012).

85. See Phil. Bar Ass'n. Prof'l Guidance Comm. Op. 2014-5 (noting that, a lawyer "must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware *if the lawyer knows or reasonably believes it has not been produced by the client.*").

86. N.Y. Cty. Lawyers Ass'n, Formal Op. 745 (2013).

as long as social media is appropriately preserved in the proper format and such is not a violation of law or a court order.[87]

A lawyer should be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology or other means. Similarly, a post or other data shared with others may have been copied by another user or in other online accounts not controlled by the client.

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

A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."[88]

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

Comment: A lawyer may review what a client plans to publish on social media in advance of posting[89] and guide the client, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may, for example, counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the posts may be perceived; and discuss how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client that social media content or data that the client considers highly private or personal, even if not shared with other social media users, may be reviewed by opposing parties, judges and others due to court order, compulsory process, government searches, data breach, sharing by others or unethical conduct. A lawyer may advise a client to refrain from or limit social media posts, including during the course of a litigation or investigation.

---

87. See N.C. State Bar Ass'n 2014 Formal Ethics Op. 5 (2014); Phil. Bar Ass'n Prof'l Guidance Comm. Op. 2014-5 (2014); Fla. Bar Ass'n Prof'l Ethics Comm., Opinion 14-1 (2015) (online version revised September 21, 2016).

88. N.Y. Cty. Lawyers Ass'n, Formal Op. 745 (2013).

89. A lawyer may consider periodically following or checking her client's social media activities, especially in matters where posts may be relevant to her client's claims or defenses. Monitoring a client's social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client's posts on existing or future litigation or on their implication(s) for other issues relating to the lawyer's representation of the client. An attorney may wish to notify a client if he or she plans to closely monitor a client's social media postings.

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

Guideline No. 5.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion and if proper inquiry of the client does not negate that conclusion.[90]

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

> *Comment*: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[91] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[92]

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

A lawyer may review a represented person's non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain non-public information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

NYRPC 4.2.

> *Comment*: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[93] New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."[94]
>
> NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not "cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,"

---

90. See N.Y. Cty. Lawyers Ass'n, Formal Op. 745 (2013).

91. NYRPC 3.1(a).

92. NYRPC 3.1(b)(3).

93. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2002-3 (2002).

94. Id.

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

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

A New Hampshire opinion states that a lawyer's client may, for instance, send a friend request or request to follow a private Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations.[95] In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[96]

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."[97]

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

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media activities and a lawyer's website or blog must comply with these limitations.[98]

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool or practice

---

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

96. Id.

97. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011).

98. See NYRPC 1.6.

operates before using it and consider whether any activity places client information and confidences at risk.[99]

Where a client has posted an online review of the lawyer or her services, the lawyer's response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.[100]

---

99. D.C. Bar Legal Ethics Comm., Op. 370 (2016) explains one risk of services that import email contacts to generate connections: "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."

    Similarly, a lawyer's request to connect to a person who is represented by opposing counsel may be embarrassing or raise questions regarding NYRPC 4.2 (Communication with Persons Represented by Counsel).

100. NYRPC 1.6(c). The New York Rules of Professional Conduct were amended on November 10, 2016 and Rule 1.6(c) was modified to address a lawyer's use of technology. See Davis, Anthony, *Changes to NY RPCs and an Ethics Opinion On Withdrawing for Non-Payment of Fees*, NEW YORK LAW JOURNAL (January 9, 2017).

    NYSBA Comment 16 to NYRPC 1.6 provides:

> Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

NYRPC 1.1, 1.6, 1.9(c), 1.18.

> *Comment:* A lawyer is prohibited, absent a recognized exception, from disclosing client confidential information. Additionally, under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary … to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."[101] NYSBA Ethics Opinion 1032 indicates that the self-defense exception applies to "claims" and "charges" in formal proceedings or a "material threat of a proceeding," which "typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction" but not to a "negative web posting."[102] As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on platforms such as Avvo, Yelp or Facebook.[103]
>
> A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300

Comment 17 further provides:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

101. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Op. 1032 (2014).

102. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Op. 1032 (2014).

103. See Susan Michmerhuizen, *Client reviews: Your Thumbs Down May Come Back Around*, AMERICAN BAR ASSOCIATION (Mar. 3, 2015).

(2014) opined that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception."[104] Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events."[105]

If a lawyer chooses to respond to a former client's online review, a lawyer should consult the relevant definition of "confidential information" as the definition may be quite broad. For instance, pursuant to NYRPC 1.6(a), "confidential information" includes, but is not limited to "information gained during or relating to the representation of a client, whatever its source, that is . . . likely to be embarrassing or detrimental to the client if disclosed." Similarly, Texas Disciplinary Rule of Professional Conduct 1.05(a) defines "confidential information" as including "…all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." See also DC Bar Ethics Opinion 370 which states a "confidence" is "information protected by the attorney-client privilege" and a "secret" is "…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."

Moreover, any response should be limited and tailored to the circumstances. Texas State Bar Ethics Opinion 662. See also DC Bar Ethics Opinion 370 (even self-defense exception for "specific" allegations by client against lawyer only allows disclosures no greater than the lawyer reasonably believes are necessary).

---

104. Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014).

105. Pa. Bar Ass'n Ethics Comm., Op. 2014-200.

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[106] At this juncture, it is "not only permissible for trial counsel to conduct Internet research on prospective jurors, but [] it may even be expected."[107]
>
> The ABA issued Formal Opinion 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[108] There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[109] However, Opinion 466 does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[110]

---

106. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012).

107. See SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

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

109. Id.

110. Id.

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

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.[111]

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[112]

"Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper communication."[113] For example, ABA, Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.[114] This type of communication would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[115]

NYCLA, Formal Op. 743 and NYCBA, Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation. New York ethics opinions also draw a distinction between public and private juror information.[116] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic

111. See N.Y. Cty Lawyers Ass'n, Formal Op. 743 (2011); N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

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

113. Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015).

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

115. Id.

116. Id.

message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).[117]

In contrast to the above New York opinions, ABA, Formal Op. 466 opined that "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does *not* constitute a communication from the lawyer in violation" of the Rules of Professional Conduct (emphasis added).[118] The ABA held that, as a general rule, an automatic notification represents a communication between the juror and a given ESM platform, as opposed to an impermissible communication between the lawyer and the attorney. The Colorado Bar Association and DC Bar have since adopted the ABA's position, i.e., "such notification does not constitute a communication between the lawyer or prospective juror" as opposed to a "friend" request.[119]

According to ABA, Formal Op. 466, this type of notice is "akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."[120] Yet, this view has been criticized on the basis of the possible impact such communication might have on a juror's state of mind and has been deemed more analogous to the improper communication where, for instance, "[a] lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial knowing that a neighbor will advise the juror of this drive-by and the signage."[121]

Under ABA, Formal Op. 466, a lawyer must: (1) "be aware of these automatic, subscriber-notification procedures" and (2) make sure "that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the

---

117. If a lawyer logs into LinkedIn and clicks on a link to a LinkedIn profile of a juror, an automatic message may be sent by LinkedIn to the juror whose profile was viewed advising of the identity of the LinkedIn subscriber who viewed the juror's profile. In order for that reviewer's profile not to be identified through LinkedIn, that person must change his or her settings so that he or she is anonymous or, alternatively, be fully logged out of his or her LinkedIn account.

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

119. See D.C. Bar Legal Ethics Comm., Formal Op. 371 (2016); see also Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015).

120. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014); see also Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014) ("[t]here is no *ex parte* communications if the social networking website independently notifies users when the page has been viewed.").

121. See Mark A. Berman, Ignatius A. Grande, & Ronald J. Hedges, *Why American Bar Association Opinion on Jurors and Social Media Falls Short*, NEW YORK LAW JOURNAL (May 5, 2014).

proceeding."[122] Moreover, ABA, Formal Op. 466 suggests that "judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds," including a juror's or potential juror's social media presence.[123]

New York guidance similarly holds that when reviewing social media to perform juror research, a lawyer needs to perform such research in a way that does not leave any "footprint" or notify the juror that the lawyer or her agent has been viewing the juror's social media profile.[124]

The New York opinions cited above draw a distinction between public and private juror information.[125] They opine that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror's profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

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

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: An "attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable."[126]

---

122. Id.

123. Id.

124. See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); N.Y. Cty. Lawyers Ass'n, Formal Op. 743 (2011); SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

125. Id.

126. See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012).

> "Subordinate lawyers and non-lawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access" to portions of social media accounts not otherwise accessible to the lawyer.[127]

Guideline No. 6.D: Juror Contact During Trial

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

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment:* The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.
>
> Yet, these later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.[128]
>
> > [W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.[129]
>
> ABA, Formal Op. 466 permits passive review of juror social media postings, in which an automated response is sent to the juror, of a reviewer's Internet "presence," even during trial absent court instructions prohibiting such conduct.[130] In one New York case, the review by a lawyer of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this to the attention of the court stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be

---

127. Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015).

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

129. See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012).

130. See D.C. Bar Legal Ethics Comm., Formal Op. 371 (2016).

objective."[131] This case demonstrates that a lawyer must take caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.[132]

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA, Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."[133]

Guideline No. 6.E: Juror Misconduct

In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[134]

NYRPC 3.5, 8.4.

Comments: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[135]

New York, however, provides that "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer

---

131. See Richard Vanderford, *LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial*, LAW360 (Sept. 27, 2013).

132. Id.

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

134. See N.Y. Cty. Lawyers Ass'n, Formal Op. 743 (2011); N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

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

has knowledge."[136] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[137] "Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney."[138]

The DC Bar opines that the determination of "[w]hether and how such misconduct must or should be disclosed is beyond the scope" of precise ethical guidance, except in instances "clearly establishing that a fraud has been perpetrated upon the tribunal."[139]

136. NYRPC 3.5(d).

137. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); see also SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

138. N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); see Pa. Bar Assn, Ethics Comm., Formal Op. 2014-300 (2014) ("A lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").

139. See D.C. Bar Legal Ethics Comm., Formal Op. 371 (2016).

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

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

NYRPC 3.5, 8.2 and 8.4.

Comment: There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should consider that any such communication can be problematic because the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether reposting a judge's posts would be improper.

A lawyer may connect or communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"[140] which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."[141]

It should be noted that New York Advisory Opinion 08-176 (Jan. 29, 2009) provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."[142] New York Advisory Committee on Judicial Ethics Opinion 08-176 further opines that:

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

---

140. Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014).

141. NYRPC 3.5(A)(1).

142. N.Y. Advisory Comm. on Judicial Ethics, Op.08-176 (2009).

> bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

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

APPENDIX – Social Media Definitions

This appendix contains a collection of popular social technologies and terminology, both general and platform-specific, and is designed for attorneys seeking a basic understanding of the social media landscape.

A. Social Technologies

Facebook: an all-purpose platform that connects users with friends, family, and businesses from all over the world and enables them to post, share, and engage with a variety of content such as photos and status updates. Founded in 2004, the site now has in excess of 1.5 billion active monthly users.

Instagram: a visually-focused platform that allows users to post photos and videos. Created in 2010, and later purchased by Facebook, it has approximately 500 million active monthly users.

LinkedIn: an employment-based networking platform which focuses on engagement with individuals in their respective professional capacities. Launched in 2002, it now boasts roughly 100 million active monthly users.

Periscope: a video-streaming mobile application that allows users to broadcast live video. Created in 2014, and purchased by Twitter shortly thereafter, it has in excess of 10 million active monthly users.

Pinterest: a platform that essentially functions as a social scrapbook, allowing users to save and collect links to share with other users. Started in 2010, it has in excess of 100 million active monthly users, majority of whom are female.

Reddit: a social news and entertainment website where all content is user-submitted and the popularity of each post is voted upon by the user base itself. Created in 2005, it has more than 240 million active monthly visitors.

Snapchat: an image messaging application that allows users to send and receive photos and videos known as "snaps," which are hidden from the recipients once the time limit expires. Officially released in September 2011, it has in excess of 200 million active monthly users.

Tumblr: a microblogging platform that allows users to post text, images, video, audio, links, and quotes to their blogs. It was created in 2007 and has more than 500 million active monthly users.

Twitter: a real-time social network that allows users to share updates that are limited to 140 characters. Founded in 2006, it has more than 315 million active monthly users.

Venmo: a peer-to-peer payment system where users send money from their bank or credit/debit card to another member. Introduced in 2009, and acquired by PayPal in 2013, it handles approximately 10 billion dollars of social transactions per year.

Waze: a social-based GPS platform that is based upon crowd sourcing of events such as accidents and traffic jams from its user base. Founded in 2008, and purchased by Google in 2013, it has 50 million active users.

WhatsApp: a cross-platform instant messaging service that allows users to exchange text, images, video, and audio messages for free. Launched in January 2010, and acquired by Facebook in 2014, it now has more than 1 billion users.

B. Social Terminologies

Add: process on Snapchat of subscribing to another user's account in order to receive access to their content. This is a "unilateral connection" that does not provide dual-access to both users' content or require the second user to expressly approve or deny the first user's access.

Automatic Notification: an automatic message sent by the social media platform to the person whose account is being viewed by another. This message may indicate the identity of the person viewing the account as well as other information about such person.

Bilateral Connection: a two-way connection between users. That is, for one user to connect with a second, the second user must expressly accept or deny the first user's access.

Block: refers to a user's option to restrict another's ability to interact with the user and/or the user's content on a given platform.

Connections: term used on LinkedIn to describe the relationship between two users, indicated by varying degrees.

- **1st Degree Connection**: those who have bilaterally agreed to share and receive exclusive content from one another beyond those available to the LinkedIn community at large.
- **2nd Degree Connection**: those who share a mutual 1st degree connection but are not themselves directly connected.
- **3rd Degree Connection**: those who share a mutual 2nd degree connection but are not themselves directly connected.

Cover Photo: a large, horizontal image at the top of a user's Facebook profile. Similar to a profile photo, a cover photo is public.

Direct Message: private conversations that occur on Twitter. Both parties must be following one another in order to send or receive messages.

Facebook Live: a feature on Facebook that allows users to stream live video and interact with viewers in real-time.

Fan: a user who follows and receives updates from a particular Facebook page. The user must "like" the page in order to become a fan of it.

Favorite: an indication that someone "likes" a user's post on Twitter, given by clicking the star icon.

Filter: an aesthetic overlay that can be applied to a photo or video.

Follow: process of subscribing to another user in order to receive access to their content. This is a unilateral connection as it does not provide access to one's own content.

Follower: refers to a user who subscribes to another user's account and thereby receives access to the latter's content.

Following: refers to those accounts that a particular user has subscribed to in order to view and/or receive updates about the content of those accounts.

Friend: refers to those users on Facebook who bilaterally agreed to provide access to each other's account beyond those privileges afforded to the Facebook community at large. "Friend" may also create a publicly viewable identification of the relationship between the two users. "Friending" is the term used by Facebook, but other social media networks use analogous concepts such as "Follower" on Twitter or "Connections" on LinkedIn.

Friending: The process through which the member of a social media network designates another person as a "friend" in response to a request to access Restricted Information. "Friending" may enable a member's "friends" to view the member's restricted content.

Geofilter: a type of Snapchat filter that is specific to a certain location or event and is only available to users within a certain proximity to said location or event.

Handle: a unique name used to refer to a user's account on a given platform.

Hashtag: mechanism used to group posts under the same topic by using a specific word preceded by the # symbol.

Home Page: section of Instagram users' accounts where they can see all the latest updates from those who they are following.

Lenses: used on Snapchat to allow users to add animated masks to their postings and stories.

Like: an understood expression of support for content. The amount of likes received is generally tied to the popularity of a given post.

News Feed: section of Facebook users' accounts where they can see all the latest updates from those accounts which they are subscribed to, e.g., their friends.

Notification: a message sent by a given platform to a user to indicate the presence of new social media activity.

Pinboard: the term used on Pinterest for a collection of "pins" that can be organized by any theme of a user's choosing.

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

Privacy Settings: allow a user to determine what content other users are able to view and who is able to contact them.

Private: state of a social media account (or a particular post) that, because of heightened privacy settings, is hidden from the general public.

Profile: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person's ability to view specified aspects of a member's account or profile. A profile

contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.

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

Repin: on Pinterest, where a user saves another's pin to their own board. Similar to a "retweet" on Twitter.

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

Retweet: a Twitter user sharing another's "tweet" with their own followers.

Snap: the term used to describe an image posted to the Snapchat platform.

Social Media (also called a social network): An Internet-based service allowing people to share content and respond to postings by others. Social media may be viewed via websites, mobile or desktop applications, text messaging or other electronic means.

Social Network: online space consisting of those who personally know one another or otherwise have agreed to provide them with access to their content.

Social Profile: a personal page within a social network that generally displays posts from that person as well as the person's interests, education, and employment, and identifies those accounts that have access to their content.

Status: the term for a user posting to the user's own page which is simultaneously published on the home page of a particular site, e.g., Facebook's News Feed.

Story: the term used on Snapchat and Instagram for a designated string of images or videos that only are accessible for a period of 24 hours.

Subreddit: a smaller sub-category within Reddit that is dedicated to a specific topic or theme. These are defined by the symbol "/r/".

Tag: a keyword added to a social media post with the original purpose of categorizing related content. A tag can also refer to the act of tagging someone in a post, which creates a link to that person's social media profile and associates the person with the content.

Timeline: section of Twitter users' accounts where they can see all the latest updates from those whom they are following.

Tweet: the term for a user's post on Twitter that can contain up to 140 characters of text, as well as photos, videos, and links.

Unfollow: the action of unsubscribing from receiving updates from another user.

Unfriending: the action of terminating access privileges as and between two users.

Unilateral connection: a one-way connection between users. That is, a user may connect with a second without the second user connecting with the first or requiring the second to expressly approve or deny the first's request.

Verified: this refers to a social media account that a platform has confirmed to be authentic. This is indicated by a blue checkmark and is generally reserved for brands and public figures as a way of preventing fraud and protecting the integrity of the person or company behind the account.

Views: this simply refers to the amount of people who have watched a certain video or story.

Wall: the space on a Facebook profile or fan page where users can share posts, photos and links.

New York County Lawyers Association Professional Ethics Committee

Formal Opinion 748

March 10, 2015

TOPIC: The ethical implications of attorney profiles on LinkedIn

DIGEST: Attorneys may maintain profiles on LinkedIn, containing information such as education, work history, areas of practice, skills, and recommendations written by other LinkedIn users. A LinkedIn profile that contains only one's education and current and past employment does not constitute Attorney Advertising. If an attorney includes additional information in his or her profile, such as a description of areas of practice or certain skills or endorsements, the profile may be considered Attorney Advertising, and should contain the disclaimers set forth in Rule 7.1. Categorizing certain information under the heading "Skills" or "Endorsements" does not, however, constitute a claim to be a "Specialist" under Rule 7.4, and is accordingly not barred, provided that the information is truthful and accurate.

Attorneys must ensure that all information in their LinkedIn profiles is truthful and not misleading, including endorsements and recommendations written by other LinkedIn users. If an attorney believes an endorsement or recommendation is not accurate, the attorney should exclude it from his or her profile. New York lawyers should periodically monitor and review the content of their LinkedIn profiles for accuracy.

RULES OF PROFESSIONAL CONDUCT: 7.1 and 7.4

OPINION

LinkedIn, the business-oriented social networking service, has grown in popularity in recent years, and is now commonly used by lawyers. The site provides a platform for users to create a profile containing background information, such as work history and education, and links to other users they may know based on their experience or connections. Lawyers may use the site in several ways, including to communicate with acquaintances, to locate someone with a particular skill or background—such as a law school classmate who practices in a certain jurisdiction for assistance on a matter—or to keep up-to-date on colleagues' professional activities and job changes.

The site also allows users and their connections to list certain skills, interests, and accomplishments, creating a profile similar to a resume or law firm biography. Users can list their own experience, education, skills, and interests, including descriptions of their practice areas and prior matters. Other users may also "endorse" a lawyer for certain skills—such as litigation or matrimonial law—as well as write a recommendation as to the user's professional skills. [1]

[1] This opinion addresses the fields, headings, and protocols of LinkedIn as they exist on the date of this opinion. The committee cannot anticipate changes or additions to this or other social networking sites, and limits this analysis to the site as of the date of this opinion.

This opinion addresses the ethical implications of LinkedIn profiles: specifically, whether a LinkedIn Profile is considered "Attorney Advertising," when it is appropriate for an attorney to accept endorsements and recommendations, and what information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct.[2]

***

LinkedIn allows a user to provide objective, biographical information such as one's "Education" and "Experience," as well as subjective information, such as "Skills," "Endorsements," and "Recommendations." LinkedIn users can control the fields they choose to populate. Some users may only list education and work experience, while other users may include more extensive information, such as skills, endorsements, and recommendations. Furthermore, the information in one's profile visible to others may vary depending on the whether the viewer located the profile through an external search engine such as Google, whether the viewer is logged in to LinkedIn on the computer being used, or whether the viewer is "connected" on LinkedIn to the person whose profile he or she is viewing.

In light of the varied information an attorney may provide on his or her profile, and which information is visible to online users, the use of LinkedIn raises concerns about what aspects of an attorney's profile constitute "Attorney Advertising," which is subject to specific ethical rules, and what aspects do not. The New York Rules of Professional Conduct define attorney advertising as "communications made in any form about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. RPC 7.1. The rules further delineate what information an attorney may include in an advertisement—such as education, past experience, fee arrangements, testimonials or endorsements (NYRPC 7.1(b), (d))—and what information an attorney may not include in an advertisement—such as undisclosed paid endorsements or certain trade names. RPC 7.1(c). Online advertisements must be labeled "Attorney Advertising" "on the first page, or on the home page in the case of a website" (*Id*. at 7.1(f)) and any advertisement containing statements about the lawyer's services, testimonials, or endorsements must include the disclaimer "[p]rior results do not guarantee a similar outcome." *Id.* at 7.1(e)(3).

The comments to the rules make clear that "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising" as the advertising rules do not encompass communications with current clients or former clients germane to the client's earlier representation. RPC 7.1, Cmt. [6]. Likewise, communications to "other lawyers . . . are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm." *Id*. Cmt. [7].

[2] This opinion is limited to the committee's analysis of the New York Rules of Professional Conduct. Attorneys should be aware that other jurisdictions may have different ethical rules, and should consult those rules where appropriate.

Applying these rules to LinkedIn profiles, it is the opinion of this Committee that a LinkedIn profile that contains only biographical information, such as a lawyer's education and work history, does not constitute an attorney advertisement. An attorney with certain experience such as a Supreme Court clerkship or government service may attract clients simply because the experience is impressive, or knowledge gained during that position may be useful for a particular matter. As the comments to the New York Rules of Professional Conduct make clear, however, not all communications, including communications that may have the ultimate purpose of attracting clients, constitute attorney advertising. Thus, the Committee concludes that a LinkedIn profile containing *only* one's education and a list of one's current and past employment falls within this exclusion and does not constitute attorney advertising.[3]

The additional information that LinkedIn allows users to provide beyond one's education and work history, however, implicates more complicated ethical considerations. First, do LinkedIn fields such as "Skills" and "Endorsements" constitute a claim that the attorney is a specialist, which is ethically permissible only where the attorney has certain certifications set forth in RPC 7.4? Second, even if certain statements do not constitute a claim that the attorney is a specialist, do such statements nonetheless constitute attorney advertising, which may require the disclaimers set forth in RPC 7.1?

a. Specialization

New York Rule of Professional Conduct 7.4 prohibits an attorney from identifying herself as a "specialist" or "specializ[ing] in a particular field of law" unless the attorney has been certified by an appropriate organization or jurisdiction. RPC 7.4(a)–(c). The New York State Bar Association (NYSBA), interpreting the New York Rules of Professional Conduct, concluded in a 2013 opinion that "a lawyer or law firm listed on a social media site may . . . identify one or more areas of law practice [but] to list those areas under a heading of 'Specialties' would constitute a claim that the lawyer or law firm 'is a specialist or specializes in a particular filed of law,'" and would likely run afoul of Rule 7.4, unless the attorney's certifications meet the requirements of that Rule. *See* NYSBA Ethics Opinion 972 (June 26, 2013).

While NYSBA has addressed the ethical implications of the heading "Specialties," the applicability of these guidelines to LinkedIn fields such as "Skills," "Endorsements," and "Recommendations" has not been previously addressed in New York. Further complicating this question is the fact that LinkedIn profile headings are not chosen by users. The LinkedIn website provides certain default fields, from which users can choose to add to their profiles. NYSBA advises users who are concerned about these headings to consider avoiding them entirely, by "includ[ing] information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included." Social Media Ethics Guidelines of the

[3] Of course, as with all statements made by an attorney, either to a client, an adversary, or a judge, the biographical information must be truthful and not misleading. *See* RPC 7.1, Cmt. [6].

Commercial Federal Litigation Section of the New York State Bar Association at 4 (Mar. 18, 2014) *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547.

With respect to skills or practice areas on lawyers' profiles under a heading, such as "Experience" or "Skills," this Committee is of the opinion that such information does not constitute a claim to be a specialist under Rule 7.4. The rule contemplates advertising regarding an attorney's practice areas, noting that an attorney may "publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c)." RPC 7.4(a). This provision contemplates the distinction between claims that an attorney has certain experience or skills and an attorney's claim to be a "specialist" under Rule 7.4. Categorizing one's practice areas or experience under a heading such as "Skills" or "Experience" therefore, does not run afoul of RPC 7.4, provided that the word "specialist" is not used or endorsed by the attorney, directly or indirectly. Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists.

b. Endorsements and Recommendations

Endorsements and recommendations written by other LinkedIn users raise additional ethical considerations. While these endorsements and recommendations originate from other users, they nonetheless appear on the attorney's LinkedIn profile. The ethical treatment of endorsements and recommendations depends on who is considered to "own" the endorsement and recommendation: the author of the endorsement or recommendation or the person whose profile is enhanced by it.

Because LinkedIn gives users control over the entire content of their profiles, including "Endorsements" and "Recommendations" by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals. To that end, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to Rule 7.1. For example, if a distant acquaintance endorses a matrimonial lawyer for international transactional law, and the attorney has no actual experience in that area, the attorney should remove the endorsement from his or her profile within a reasonable period of time, once the attorney becomes aware of the inaccurate posting. If a colleague or former client, however, endorses that attorney for matrimonial law, a field in which the attorney has actual experience, the endorsement would not be considered misleading. The Pennsylvania Bar Association, interpreting the Pennsylvania Rules of Professional Conduct, reached a similar conclusion in a 2014 opinion, emphasizing that an attorney must "monitor his or her social networking websites, [] verify the accuracy of any information posted, [and] remove or correct any inaccurate endorsements. . . . This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party."

Pennsylvania Bar Association Formal Op. 2014-300, "Ethical Obligations for Attorneys Using Social Media," at 12. While we do not believe that attorneys are ethically obligated to review, monitor and revise their LinkedIn sites on a daily or even a weekly basis, there is a duty to review social networking sites and confirm their accuracy periodically, at reasonable intervals.

c. LinkedIn Profiles as "Attorney Advertising" and Appropriate Disclaimers

Finally, if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1. As discussed above, not all communications are advertising, and a LinkedIn profile containing nothing more than biographical information would not ordinarily be considered an advertisement. But a LinkedIn profile that includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues is likely to be considered advertising.

Attorneys who wish to include this information should review Rule 7.1 to determine the appropriate language to include in their profiles. While the Committee declines to provide guidelines for all potential profile content, the Committee provides the following recommendations for attorneys' consideration and directs attorneys to review Rule 7.1 before creating or significantly amending their LinkedIn profiles.

If an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." *See* RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's [] services" under Rule 7.1(d).

Conclusion

Attorneys may maintain profiles on LinkedIn, containing information such as education, work history, areas of practice, skills, and recommendations written by other LinkedIn users. A LinkedIn profile that contains only one's education and current and past employment does not constitute Attorney Advertising. If an attorney includes additional information in his or her profile, such as a description of areas of practice or certain skills

or endorsements, the profile may be considered Attorney Advertising and should contain the disclaimers set forth in Rule 7.1. Categorizing certain information under the heading "Skills" or "Endorsements" does not, however, constitute a claim to be a "Specialist" under Rule 7.4, and is accordingly not barred, provided that the information is truthful and accurate.

Attorneys must ensure that all information in their LinkedIn profiles, including endorsements and recommendations written by other LinkedIn users, is truthful and not misleading. If an attorney believes an endorsement or recommendation is not accurate, the attorney should exclude it from his or her profile. New York lawyers should periodically monitor and review the content of their LinkedIn profiles for accuracy.

FORMAL OPINION 2014-300

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

I. Introduction and Summary

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

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

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

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

[1] http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/

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

This Committee concludes that:

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

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

II. Background

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

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

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

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

III. Discussion

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

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

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

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

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

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

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

Rule 1.1 provides:

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

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

Comment [8] to Rule 1.1 further explains that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…." Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

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

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

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

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

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

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

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

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

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

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

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

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

Rule 3.3 states:

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

[2] "Girl costs father $80,000 with 'SUCK IT' Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

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

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

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

Rule 3.4 states:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

Rule 4.1 states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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

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

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

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information.
- Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject

> to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises [5]

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

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

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

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

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

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

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

---

[5] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted).
[6] http://www.ncbar.com/ethics/printopinion.asp?id=894

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

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

Rule 4.2 states:

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

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

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

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

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

---

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

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

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

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

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

4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information[11]

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

Rule 4.3 states in relevant part:

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

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

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony[12]. He was fired for "unethical behavior," which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

---

[10] New York State Bar Assn., Comm. on Prof'l Ethics, Op. 843 (2010).
[11] Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.
[12] "Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook," June 7, 2013. http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee[13] concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, "[t]he underlying principles of fairness and honesty are the same, regardless of context."[14] The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

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

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

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

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

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

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

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

[13] Kentucky Bar Assn., Ethics Comm., Formal Op. KBA E-434 (2012).
[14] *Id.* at 2.
[15] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).
[16] New Hampshire Bar Assn., Ethics Comm., Op. 2012-13/05 (2012).
[17] Oregon State Bar, Legal Ethics Comm., Op. 2013-189 (2013).

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

For example, in 2011, a New York[18] court ruled against a wife's claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife's postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

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

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

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

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

[18] *B.M. v D.M.,* 31 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).
[19] *McMillen v. Hummingbird Speedway, Inc.,* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).
[20] *Romano v Steelcase Inc.,* 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).
[21] *Largent v. Reed*, No. 2009-1823 (Pa.Ct.Com.Pl. Franklin Cty. 2011).
[22] *McCann v. Harleysville Ins. Co. of N.Y.,* 78 A.D.3d 1524 (N.Y. App. Div. 4th Dep't 2010).
[23] *Trail v. Lesko,* 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Pa. County Ct. 2012).

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

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

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

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

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

Rule 7.2 states, in relevant part:

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

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

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

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

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

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

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

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

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

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

[25] North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).
[26] Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.
[27] Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-200 (2014).

certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client
> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
> (e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

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

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

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO[30]. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

[28] *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).
[29] *Id.* at 59.
[30] *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

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

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

Also relevant is Rule 3.6, which states:

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

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

For example, the Supreme Court of Illinois suspended an attorney for 60 days[31] for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

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

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

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

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

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

9. Attorneys May Review a Juror's Internet Presence

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

Rule 3.5 states:

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

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

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2012-186

ISSUE: Under what circumstances would an attorney's postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?

DIGEST: Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a "communication" within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting.

AUTHORITIES INTERPRETED: Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6106, 6151, and 6152.

Business and Professions Code sections 6157 through 6159.2.

STATEMENT OF FACTS

Attorney has a personal profile page on a social media website. Attorney regularly posts comments about both her personal life and professional practice on her personal profile page. Only individuals whom the Attorney has approved to view her personal page may view this content (in Facebook parlance, whom she has "friended").[2/] Attorney has about 500 approved contacts or "friends," who are a mix of personal and professional acquaintances, including some persons whom Attorney does not even know.

In the past month, Attorney has posted the following remarks on her profile page:

- "Case finally over. Unanimous verdict! Celebrating tonight."
- "Another great victory in court today! My client is delighted. Who wants to be next?"
- "Won a million dollar verdict. Tell your friends and check out my website."
- "Won another personal injury case. Call me for a free consultation."
- "Just published an article on wage and hour breaks. Let me know if you would like a copy."

[1/] Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[2/] References to Facebook and "friending" should not be construed as limiting this opinion to that particular social media website. For example, Attorney could post the same language on Twitter, which would be viewed by all of her followers. Guidance to attorneys in this area has not kept pace with all forms of social media usage. Rather than discussing each form of social media, which forms likely will change over time, this opinion sets forth the general analysis that an attorney should undertake when considering use of any particular form of social media.

DISCUSSION

Although attorneys are permitted to advertise, any such advertisements must comply with a number of restrictions in both the Rules of Professional Conduct and the Business and Professions Code.[3/] For example, Business and Professions Code section 6157.1 prohibits any "false, misleading or deceptive statement" in an advertisement, while section 6157.2 prohibits including in an advertisement any "guarantee or warranty regarding the outcome of a legal matter." Bus. & Prof. Code, §§ 6157.1 and 6157.2; see also rule 1-400, Std. 1.[4/] Rule 1-400 provides even more detailed requirements with which attorney advertising must comply. Specifically, rule 1-400(D) provides rules that must be followed to ensure that a communication is not false or misleading, or made in a coercive manner. Rule 1-400 also provides sixteen enumerated "Standards"[5/] listing examples of communications which are presumed to be in violation of rule 1-400.

In the above hypothetical, Attorney must determine whether her postings constitute advertisements that must comply with these various advertising rules.[6/] Rule 1-400, however, speaks in terms of "communications" rather than "advertisements." Thus, it is important to look at how both terms are defined.

Business and Professions Code section 6157(c) defines "advertise" or "advertisement" as:

> [A]ny ***communication***, disseminated by television or radio, by any print medium, including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.

Bus. & Prof. Code, § 6157(c) (emphasis added). Although section 6157(c) does not refer to computer-based communications like Facebook or Twitter postings, there is little doubt that the restrictions of sections 6157.1 and 6157.2 indeed apply to computer-based communications. See, e.g., Bus. & Prof. Code, §§ 6158 (referring to "advertising by electronic media" in the context of Sections 6157.1 and 6157.2); 6157(d) (defining "electronic medium" as including "computer networks"). What may be less clear is whether a posting on Facebook or Twitter, like that described in the hypothetical, is considered "directed generally to members of the public and not to a specific person," as required under section 6157(c)'s definition of an advertisement. This opinion does not take a position on this point because, whether or not the hypothetical posting constitutes an "advertisement" as defined in section 6157(c), it nonetheless will be subject to the same requirements as any other advertisement by virtue of rule 1-400 – provided it is a "communication," as specified in section 6157(c) and rule 1-400(A).[7/]

[3/] This Formal Opinion interprets such rules and statutes under a number of factual scenarios. Questions of legal constitutionality of those rules or statutes (even as applied) are outside of the scope of this Formal Opinion.

[4/] Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[5/] The Standards actually go through No. 16, but Standard 11 has been repealed, thereby leaving 15.

[6/] In California State Bar Formal Opinion No. 2001-155, this Committee concluded that a law firm website is subject to professional responsibility standards governing attorney advertising. The website considered was a commercial website that included, among other promotional content: a description of the law firm and its history and practice; and the education, professional experience, and activities of the firm's attorneys. Specifically, this Committee found that a commercial law firm website is governed by rule 1-400 because the website's content concerns a lawyer's availability for professional employment. This Committee similarly found that such websites are subject to the State Bar Act provisions governing electronic media advertising in Article 9 of the Business and Professions Code.

[7/] Each of the restrictions and requirements included in Business and Professions Code sections 6157.1 and 6157.2 can be found – in a substantially similar form – in rule 1-400. For example, section 6157 prohibits false or deceptive statements; this same concept is captured, among other places, in rule 1-400(D). Section 6157.2 (a) through (c) prohibits guarantees and misleading testimonials; these concepts are captured in rule 1-400, Standards 1, 2, and 13. Section 6157(d) requires disclosure about whether the client will be responsible for certain costs; this concept is captured in rule 1-400, Standard 14.

Rule 1-400, which is entitled "Advertising and Solicitation," applies to any "communication," without concerning itself with whether such communication also constitutes an "advertisement." Indeed, rule 1-400(A) provides four non-exclusive examples of "communications" subject to the rule, only one of which is based on the communication being an "advertisement . . . directed to the general public or any substantial portion thereof." Rule 1-400(A)(3). Thus, in our hypothetical, Attorney primarily must determine whether any of her postings constitute "communications" under rule 1-400(A). If they do, then those postings that constitute "communications" must comply with several significant requirements imposed elsewhere in rule 1-400 and the accompanying standards.

Communications under Rule 1-400

Rule 1-400(A) defines "communications" for purposes of that rule as: "any message or offer made by or on behalf of a member ***concerning the availability for professional employment*** of a member or a law firm directed to any former, present, or prospective client…" (emphasis added). Rule 1-400(A) then goes on to provide non-exclusive examples of types of messages or offers that are covered by the rule, provided that they are "concerning the availability for professional employment." This includes, without limitation:

> (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

Rule 1-400 does not expressly refer to electronic communications, like those occurring on Facebook, Twitter, or other internet-based social media websites. Nonetheless, just as there is little doubt that a Facebook or Twitter posting that otherwise meets the definition of "advertising" in Business and Professions Code section 6157(c) would be considered an advertisement, there is little doubt that a social media posting that otherwise meets the criteria described in rule 1-400(A) would be a communication for purposes of that rule. Thus, the pertinent question for determining whether a posting constitutes a "communication" under rule 1-400(A) is whether it "concern[s] the availability for professional employment" of Attorney.[8/]

If a posting is found to be a communication subject to rule 1-400, the result is that the posting must comply with the mandates of Rule 1-400(D); it also should avoid falling within one of the sixteen enumerated types of communications presumed to be in violation of rule 1-400, as set forth in the Standards. Rule 1-400(D) generally provides that a communication must not be untrue or misleading (rule 1-400(D)(1), (2) & (3)), must disclose that it is a communication (rule 1-400(D)(4)), and must not be transmitted in a coercive or intrusive manner (rule 1-400(D)(5)).[9/] As discussed above, the sixteen Standards provide various types of communications (such as, for

---

[8/] This opinion does not address whether the initial "friend" or "connection" request, if motivated primarily by business development purposes, can itself constitute a communication subject to rule 1-400.

[9/] Specifically, rule 1-400(D) provides, in pertinent part:

> (D) A communication or a solicitation (as defined herein) shall not:
>
> (1) Contain any untrue statement; or
>
> (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
>
> (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
>
> (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
>
> (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
>
> . . .

example, communications using font size smaller than 12 point, Std. 5, or testimonials or guarantees of results without appropriate disclaimers, Stds. 1 & 2), which are presumed to be in violation of rule 1-400.

In our scenario, Attorney posts two types of professional information: (1) general legal information, such as recommendations of good articles; and (2) information about her legal practice, such as complaints she has filed and victories in court. With respect to the first type of information (*e.g.*, Example Number 5, below), we conclude that this does not constitute information concerning availability for employment. When Attorney posts information about her practice, however, rule 1-400 may apply.

Specific Examples

Consider the following examples[10/] of Attorney's use of personal social media sites for status postings which are visible to all of her "friends," "connections," or "followers" (although not to the public at large):

Example Number 1: "Case finally over. Unanimous verdict! Celebrating tonight."

In the Committee's opinion, this statement, standing alone, is not a communication under rule 1-400(a) because it is not a message or offer "concerning the availability for professional employment," whatever Attorney's subjective motive for sending it.[11/] Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication.

Example Number 2: "Another great victory in court today! My client is delighted. Who wants to be next?"

Similarly, the statement "Another great victory in court today!" standing alone is not a communication under rule 1-400(a) because it is not a message or offer "concerning the availability for professional employment." However, the addition of the text, "[w]ho wants to be next?" meets the definition of a "communication" because it suggests availability for professional employment. Thus, it is subject to rule 1-400(D) and rule 1-400's Standards.

Having concluded this status posting is a communication, the post violates the prohibition on client testimonials. An attorney cannot disseminate "communications" that contain testimonials about or endorsements of a member unless the communication also contains an express disclaimer. See Rules Prof. Conduct, rule 1-400(E), Std. 2; see also *Belli v. State Bar* (1974) 10 Cal.3d 824 [112 Cal.Rptr. 527] (holding that suggesting clients are "dazzled by the services they have received from the attorney" is prohibited, and consequently an attorney "cannot advertise that he has performed his services so well that his clients consequently praise him"). Attorney has not included a disclaimer, so her status posting is presumed to violate rule 1-400.

Similarly, the post may be presumed to violate rule 1-400 because it includes "guarantees, warranties, or predictions regarding the result of the representation." See Rules Prof. Conduct, rule 1-400(E), Std. 1. The post expressly relates to a "victory," and could be interpreted as asking who wants to be the next victorious client.

The Committee further concludes that "Who wants to be next?" when viewed in context, seeks professional employment for pecuniary gain. Accordingly, Attorney's post runs afoul of rule 1-400(E), Std. 5, because it does not bear the word "Advertisement," "Newsletter," or words to that effect.[12/] Attorneys may argue that including this

---

[10/] To the extent a status posting invites further discussions between the poster and the reader, this opinion does not address whether those further discussions themselves may constitute communications subject to rule 1-400.

[11/] If, in fact, the statement is not true, then Attorney may be violating other rules not addressed in this opinion – for example, Business and Professions Code section 6106.

[12/] Rule 1-400, Standard 5 states that the word "Advertisement," "Newsletter," or similar words appear in "12-point print on the first page." The Committee recognizes that certain social media postings may not allow for the user to choose the font size of postings, and thus technical compliance with Standard 5 may be impossible. It may be that the State Bar needs to review such standards to bring them current in the face of the prevalence of electronic communications. Until any changes are made to this language, however, the Committee cannot express an opinion to the effect that the use of font size of less than 12-point is acceptable.

wording for each "communication" posting would be overly burdensome, and destroy the conversational and impromptu nature of a social media status posting. The Committee is of the view, however, that an attorney has an obligation to advertise in a manner that complies with applicable ethical rules. If compliance makes the advertisement seem awkward, the solution is to change the form of advertisement so that compliance is possible.[13/]

Finally, the Committee notes that a true and correct copy of any "communication" must be retained by Attorney for two years. Rule 1-400(F) expressly extends this requirement to communications made by "electronic media." If Attorney discovers that a social media website does not archive postings automatically, then Attorney will need to employ a manual method of preservation, such as printing or saving a copy of the screen.

Example Number 3: "Won a million dollar verdict. Tell your friends to check out my website."

In the Committee's opinion, this language also qualifies as a "communication" because the words "tell your friends to check out my website," in this context, convey a message or offer "concerning the availability for professional employment." It appears that Attorney is asking the reader to tell others to look at her website so that they may consider hiring her. This language therefore is subject to the adverse presumption in rule 1-400(E), Standard 5 (*e.g.*, it must contain the word "Advertisement" or a similar word) and the preservation requirement in rule 1-400(F).[14/]

Example Number 4: "Won another personal injury case. Call me for a free consultation."

Again, the Committee concludes that this posting is a "communication" under rule 1-400(A), due primarily to the second sentence.

A communication has to include an offer about availability for professional employment so the "free" consultation language at first might indicate the posting is not a communication. Yet the rule does not limit "communications" to messages seeking financial compensation for services. To the contrary, a communication includes any "message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm." See Rules Prof. Conduct, rule 1-400(A).[15] Given that the rule does not require that all communications are for pecuniary gain, we conclude that an offer to perform a professional service for free can constitute a communication. An offer of a free consultation is a step toward securing potential employment, and the offer of a

---

[13/] For example, Facebook offers businesses the opportunity of creating a "Fan Page," on which statements of "Advertisement" or "Newsletter" might be considered less awkward, provided that the "Fan Page" complies with Business and Professions Code sections 6157 and 6158.

[14/] The posting in this example is distinct from running and capping as described in the California Business and Professions Code. A "runner" or "capper" is defined in California Business and Professions Code section 6151 as "any person, firm, association or corporation acting for consideration" as an agent for a lawyer or law firm, in soliciting business. In contrast to prohibited running and capping activities identified in Business and Professions Code section 6152, Attorney's posting does not establish or seek to establish an agency relationship for profit with anyone who views her postings, nor does it imply that Attorney is seeking to do so. Nonetheless, because it is a communication subject to rule 1-400, Attorney must comply with rule 1-400(D) and the Standards set forth in rule 1-400.

[15/] In contrast, solicitations – an express subset of communications subject to further restrictions – are defined to be communications "[c]oncerning the availability for professional employment of a member or law firm in which a significant motive is pecuniary gain," and which "is delivered in person or by telephone, or directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication." Rule 1-400(B). Because Attorney is not reaching out in person or on the telephone, her postings cannot be solicitations, regardless of whether she seeks pecuniary gain. See Cal. State Bar Formal Opn. 2001-155 (describing the "delivered in person or by telephone" requirement for a solicitation as very specific and thus intended as an easy-to-understand "bright line" test); see also Cal. State Bar Formal Opn. 2004-166 (lawyer's communication with a prospective fee-paying client in an internet chat room for victims of mass disaster not a prohibited solicitation, but an improper communication, because it is delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel).

free consultation indicates that the lawyer is available to be hired. On balance, this example in the Committee's opinion constitutes a "communication."

Example Number 5: "Just published an article on wage and hour breaks. Let me know if you would like a copy."

In this instance, we believe the statement does not concern "availability for professional employment." The attorney is merely relaying information regarding an article that she has published, and is offering to provide copies. See *Belli v. State Bar, supra*, 10 Cal.3d 824, 839 [112 Cal.Rptr. 527] (holding that "[e]xposition of an attorney's accomplishments in an effort to interest persons" in an event involving an attorney did not violate restrictions on attorney advertising); see also Los Angeles County Bar Assn. Formal Opn. 494 ("Communications or solicitations solely relating to the availability of seminars or educational programs, or the mailing of bulletins or briefs where there is no solicitation of business, are also constitutionally protected under the State Constitution and First Amendment as noncommercial speech."). Accordingly, this posting does not fall under rule 1-400, and need not comply with any of the Standards of rule 1-400(E).

CONCLUSION

Attorney may post information about her practice on Facebook, Twitter, or other social media websites, but those postings may be subject to compliance with rule 1-400 if their content can be considered to be "concerning the availability for professional employment." Such communications also may be subject to the relevant sections of California Business and Professions Code sections 6157 *et seq*.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

South Carolina Bar

ETHICS ADVISORY OPINION

09-10

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Company X offers a free website that provides information about attorneys nationwide. Lawyers need not actively sign up to have their names listed on the website. Instead, Company X uses information obtained through requests to state courts and bar associations under the Freedom of Information Act and creates web site entries for the lawyers whose information is retrieved through these FOIA requests.

Company X collects information about attorneys and generates an internal rating for each listed attorney. Individual attorneys can "claim" their profiles and update their information. Company X has already created listings and ratings for a number of South Carolina attorneys regardless of each lawyer's knowledge of the listings.

The website also features peer endorsements. Attorneys are able to write comments about one another that are then displayed on the attorney's profile. It is possible to remove these endorsements from public view. Peer endorsements help raise an individual's rating.

The website also features "client ratings." Anyone can submit a client rating about any lawyer, and the lawyer may invite current and former clients to submit ratings. Client ratings do not impact an attorney's internal rating by Company X, but the client comments are prominently posted on the attorney's listing. While Company X monitors and inspects the client ratings and peer reviews, attorneys are unable to control who endorses or rates them.

Questions Presented:

1. May a South Carolina lawyer claim his or her Company X website listing, including peer endorsements, client ratings, and Company X ratings?
2. May a South Carolina lawyer invite peers, clients, or former clients to post comments and/or rate the lawyer?

Summary:

1. Yes, a lawyer may claim the website listing, but all information contained therein (including peer endorsements, client ratings, and Company X ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing.
2. A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but all such comments are governed by the Rules of Professional Conduct, and the lawyer is responsible for their content.

Opinion:

Lawyers are responsible for all communications they place or disseminate, or ask to be placed or disseminated for them, regarding their law practice, and all such communications are governed by Rule 7.1 of the Rules of Professional Conduct. *See* Cmt. 1 ("This Rule governs *all communications about a lawyer's services*…. *Whatever means are used* to make known a lawyer's services, statements about them must be truthful.")(emphasis added). However, a lawyer is not responsible for statements about the lawyer or the lawyer's practice that are not placed or disseminated by the lawyer. Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer's behalf.

In the Committee's view, to "claim" one's website listing is to "place or disseminate" all communications made at or through that listing after the time the listing is claimed. For example, in Advisory Opinion 99-09, this Committee addressed a client's website that advertised the lawyer's services but was created without the lawyer's knowledge. The Committee advised that, once the lawyer became aware of the advertisement, the lawyer should counsel the client to conform the advertisement to the Rules of Professional Conduct and that, if the client refused, the lawyer's continued representation of the client may imply the lawyer's authorization or adoption of the advertisement. Similarly, we advised in Advisory Opinion 00-10 that a lawyer who participates in an internet service for locating attorneys should review, for compliance with Rules 7.1 and 7.2, all information about the lawyer provided through the service. By claiming a website listing, a lawyer takes responsibility for its content and is then ethically required to conform the listing to all applicable rules.

Likewise, a lawyer who adopts or endorses information on any similar web site becomes responsible for conforming all information in the lawyer's listing to the Rules of Professional Conduct. Martindale-Hubbell, SuperLawyers, LinkedIn, Avvo, and other such websites may place their own informational listing about a lawyer on their websites without the lawyer's knowledge or consent, and allow lawyers to take over their listings. The language employed by the website for claiming a listing is irrelevant. (Martindale.com, for example, uses an "update this listing" link for lawyers to claim their listings). Regardless of the terminology, by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing.

Information on business advertising and networking websites are both communications and advertisements; therefore, they are governed by Rules 7.1 and 7.2. While mere participation in these websites is not unethical, all content in a claimed listing must conform to the detailed requirements of Rule 7.2(b)-(i) and must not be false, misleading, deceptive, or unfair. In order to be exempt from the filing requirement of Rule 7.2(b), an advertisement must be limited to

directory information only and must not be disseminated through a public medium. Comment 5 to Rule 7.2 specifically excludes from the filing requirement "basic telephone directory listings, law directories such as 'Martindale Hubbell' or a desk book created by a bar association." The Comment does not address online versions of such directories; however, to require lawyers to file copies of online directory listings would be to require them to file copies of not only Martindale.com listings, but the South Carolina Bar's online directory listing as well. The Committee does not believe the Court intended the rules to require such filing and therefore does not believe that an online listing containing only directory information must be filed pursuant to Rule 7.2(b). However, if an online listing is updated to include anything beyond directory information (which includes "the name of the lawyer or law firm, a lawyer's job title, jurisdictions in which the lawyer is admitted to practice, the lawyer's mailing and electronic addresses, and the lawyer's telephone and facsimile numbers," according to Comment 5), then 7.2(b) requires that a copy be filed with the Commission.

Soliciting peer ratings does not violate the Rules of Professional Conduct. Martindale-Hubbell has employed a lawyer rating system for more than 100 years, and federal courts have held that advertising factual information about such verifiable, independent ratings does not violate state advertising prohibitions against statements likely to mislead or create unjustified expectations about results. *See*, *e.g.*, *Mason v. Florida Bar*, 208 F.2d 952 (11th Cir. 2000). More recently, advertisements about newer ratings organizations, such as SuperLawyers, have been given the same regulatory berth by state agencies. *See*, *e.g.*, *In re Opinion 39 of the Committee on Attorney Advertising*, 961 A.2d 722 (N.J. 2008)(per curiam)(vacating the court's own committee's 2006 advisory opinion prohibiting advertising of "SuperLawyers" and "Best Lawyers in America" designations, on the grounds that the prohibition is likely unconstitutional because such designations are factually verifiable). Therefore, provided that the rating is presented in a non-misleading way and is independently verifiable, including one's rating in an online listing or elsewhere appears permissible.

Client comments may violate Rule 7.1 depending on their content. 7.1(d) prohibits testimonials, and 7.1(d) and (b) ordinarily also prohibit client endorsements. *See* Cmt. 1. In the Committee's view, a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation or statement of approval of the lawyer. A lawyer should not solicit, nor allow publication of, testimonials. A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations. "The inclusion of an appropriate disclaimer or qualifying language *may* preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client." Cmt. 3 (emphasis added).

Lawyers soliciting client comments on web-based business listings are also cautioned to adhere to Rule 8.4(a), which prohibits lawyers from violating the Rules of Professional Conduct through the acts of another. Even absent a specific prohibition against testimonials, several states have concluded that client comments contained in lawyer advertising violate the prohibition against misleading communications if the comments include comparative language such as "the best" or statements about results obtained. *See*, *e.g.*, Virginia State Bar Lawyer Advertising Opinion A-0113 (2000). Rule 7.1(c) prohibits comparative language in all communications, Rule 7.1(b) prohibits statements that are likely to create unjust expectations about results, and Rule 7.2(f) prohibits self-laudatory language in advertisements. Therefore, a lawyer should monitor a "claimed" listing to keep all comments in conformity with the Rules. If any part of the listing cannot be conformed to the Rules (e.g., if an improper comment cannot be removed), the lawyer should remove his or her entire listing and discontinue participation in the service.

This opinion does not take into consideration any constitutional-law issues regarding lawyer advertising.