Ethical Considerations When Using Social Media

For GOLD Group

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I. Questions to be Discussed

- Are social media postings and/or solicitation advertisements?
  - If primary purpose is for the retention of the lawyer, a posting is an advertisement.
  - If a posting is an advertisement, what Rules apply to it?
  - When is a social media posting that is an advertisement also a solicitation?
  - If a posting is a solicitation, what Rules apply to it?
- What other restrictions are there on a lawyer's use of social media?
  - Can a lawyer research the social media postings of a party? A juror? A judge?
  - Can a lawyer communicate with a client via social media?
  - Can lawyers interact with judges or opposing counsel via social media?
  - What advice can a lawyer give a client about his/her social media use?

II. Relevant New York Rules of Professional Conduct ("Rules")

Rule 1.0(a)	Terminology ("Advertisement")
Rule 1.1	Competence
Rule 3.5	Maintaining and Preserving the Impartiality of Tribunals and Jurors
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	Communicating with Unrepresented Persons
Rule 7.1	Advertising

Rule 7.3	Solicitation and Recommendation of Professional Employment
Rule 7.4	Identification of Practice and Specialty
Rule 7.5	Professional Notices, Letterheads and Signs

See Appendix A

III. Relevant Ethics Opinions

A. New York State Bar Association, Committee on Professional Ethics opinions

1. NYSBA Op. 843 (9/10/2010)

   Lawyer may search social media posts of opposing party, but may not "friend."

2. NYSBA Op. 873 (6/9/2011)

   Lawyer may offer a prize to join social network, but such offer may constitute an advertisement or solicitation, and thus subject to Rules governing them.

3. NYSBA Op. 899 (2011)

   Lawyer may answer general legal questions on internet forums but may not give individualized advice. Lawyer must also be careful not to "solicit" clients in such forums.

4. NYSBA Op. 972 (6/26/2013)

   Law firm may not list "specialties" on social media site.

5. NYSBA Op. 977 (8/1/2013)

   Under certain circumstances, lawyers may utilize online petition and survey via social media to develop information on behalf of client's cause.

6. NYSBA Op. 1031 (10/30/2014)

   Lawyer may not list specialty on LinkedIn page.

7. NYSBA Op. 1032 (10/30/2014)

   Lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted online.

8. NYSBA Op. 1039 (12/8/2014)

   Lawyer may write blog on legal topics, and ask for subscribers' contact information. Information sent to the subscribers may constitute a solicitation.

9. NYSBA Op. 1049 (3/2/2015)

   Deals with the rules regarding solicitation of clients via social media.

10. NYSBA Op. 1110 (11/23/2016)

    Lawyer may conduct online webinars for non-lawyers, publicize them on social media, and discuss representation with participants.

11. NYSBA Op. 1132 (8/8/2017)

    Lawyer may not pay a "marketing fee" to an attorney rating service when that service recommends attorneys to users.

12. NYCLA Prof. Ethics Comm. Op. 750 (2017)

    Lawyer may not seek to gain access to a restricted social media account – such as by sending a "friend request" – of a represented party.

B. American Bar Association, Standing Committee on Ethics and Professional Responsibility

ABA Formal Opinion 466 (2014)

Lawyer may passively review a juror's public presence on the Internet, but may not communicate with juror directly or through another.

C. Other Opinions

1. Association of the Bar of the City of New York (NYCBA) Committee on Professional and Judicial Ethics, NYCBA Formal Opinion 2008-1

Lawyer's duty to preserve electronic communications.

2. NYCBA Formal Opinion 2010-2

Lawyer may not attempt to gain access to social media site under false pretenses, directly or through an agent.

3. NYCLA Formal Opinion 745 (7/2/2013)

Attorneys may advise clients regarding proper social media usage, and may advise clients to take down postings as long as there is no violation to preserve.

4. New York County Lawyers Association (NYCLA) Professional Ethics Committee, NYCLA Formal Opinion 748 (3/10/15)

Lawyer profiles on LinkedIn may constitute advertising.

See Appendix B

IV. Social Media Ethics Guidelines

Published by the NYSBA Commercial and Federal Litigation Section, adopted by the NYSBA House of Delegates, 2019.

See Appendix C

V. Best Practices for Professional Electronic Communication

Published by the Florida Bar Association, November 2019.

See Appendix D

APPENDIX A

RULE 1.0
Terminology

(a) "Advertisement" means 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.

(b) "Belief" or "believes" denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Computer-accessed communication" 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.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) "Informed consent" denotes the agreement by a person to a proposed

RULE 1.1

Competence

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

(b) 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.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 3.5

Maintaining and Preserving the Impartiality of Tribunals and Jurors

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) 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 his or her family of which the lawyer has knowledge.

RULE 3.6
Trial Publicity

(a) A lawyer who is participating in or has participated in a criminal or civil 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.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 4.1

Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2

Communication With Person Represented by Counsel

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

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, 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.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3

Communicating With Unrepresented Persons

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

RULE 7.1
Advertising

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and *bona fide* professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

(1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(3) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(4) be made to resemble legal documents.

(d) An advertisement that complies with paragraph (e) may contain the following:

(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, and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome"; and

(4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any websites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a website. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize meta-tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed

communication shall be retained for a period of not less than one year. A copy of the contents of any website covered by this Rule shall be preserved upon the initial publication of the website, any major website redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

RULE 7.3

Solicitation and Recommendation of Professional Employment

Authors' note: *The Appellate Divisions amended Rule 7.3(b) and (c) effective January 1, 2017. The amendments appear in legislative style in the 2017 edition of this book.*

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

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

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial

department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at person affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

RULE 7.4

Identification of Practice and Specialty

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

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: This certification is not granted by any governmental authority.";

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "This certification is not granted by any governmental authority within the State of New York."

(3) A statement is prominently made if:

(i) when written, it is clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification; and

(ii) when spoken aloud, it is intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification.

RULE 7.5

Professional Notices, Letterheads, and Signs

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of

that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

APPENDIX B

NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 843

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion # 843 (09/10/2010)

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

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

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

QUESTION

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

OPINION

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

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

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

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace

profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

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

(76-09)

[1]One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* - and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented* party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented* party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios

Related Files

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ETHICS OPINION 873

New York State Bar Association
Committee on Professional Ethics

Opinion #873 (06/09/2011)

Topic: Offering a prize to join attorney's social networking sites

Digest: The Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney's social network as long as the prize offer is not illegal, but if the primary purpose of the prize offer is the retention of the attorney, then it will constitute an "advertisement" and will be subject to the rules governing lawyer advertising. If the prize offer is an advertisement, and if it is targeted to specific recipients, and if a significant motive is pecuniary gain, it will also constitute a "solicitation" and will be subject to additional requirements and restrictions.

Rules: 1.0(a) & (c), 7.1, 7.2, 7.3, and 8.4(c).

QUESTION

1. May a lawyer offer a prize as an incentive to connect to the inquirer on social networking sites?

OPINION

1. The inquirer currently uses various social networking sites, including Facebook, LinkedIn and MySpace. The inquirer is considering offering the chance to win a prize (to be determined) for connecting to the inquirer on one of those sites. By building the inquirer's social network this way, the inquirer hopes to market the inquirer's legal services more effectively.

1. The Committee assumes that the proposed "prize" will be awarded randomly to someone simply for agreeing to connect to the inquirer on one of the inquirer's social networking sites (*e.g.*, for agreeing to become a new "friend" or "contact"). The Committee also assumes that a person will not be required or expressly invited to retain the inquirer as an attorney in order to be eligible for the prize.

1. Preliminarily, we note that there may be laws or regulations governing sweepstakes and games of chance that could apply to the inquirer's proposal. The Committee does not address these issues because the Committee does not opine on questions of law. The Committee has considered solely whether, assuming that the proposal is legal, it is also permissible under the New York Rules of Professional Conduct (the "Rules"). The Committee likewise has not considered whether a prize offer would violate the Terms of Use of any particular social network. The Terms of Use are a matter of contract between the inquirer and the social networking sites and are not within the Committee's jurisdiction.

A. New York Rules of Professional Conduct Relevant to a Prize Offer

1. We begin by setting forth various provisions in the New York Rules of Professional Conduct that are relevant to the question posed.

1. New York Rule 7.1 ("Advertising") governs advertisements by lawyers and law firms. Rule 1.0(a) defines the term "advertisement":

> "Advertisement" means 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.

1. Rule 7.2 ("Payment for Referrals") governs various types of compensation for marketing. Rule 7.2(a) of provides as follows:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . .

1. Rule 7.3 ("Solicitation and Recommendation of Professional Employment") governs advertisements directed at particular potential clients. Rule 7.3(a) provides:

> A lawyer shall not engage in solicitation:
>
> > (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client . . . .

1. Rule 7.3(a)(1) uses the term "computer-accessed communication," which is defined in Rule 1.0(c) as follows:

> "Computer-accessed communication" 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.

1. Rule 7.3(b) defines "solicitation":

> For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

1. Finally, Rule 8.4 ("Misconduct") contains the general prohibition, in Rule 8.4(c), that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

B. Applying the Rules of Professional Conduct to the Prize Offer

1. A "solicitation" in Rule 7.3(b) is by definition an "advertisement" that meets additional criteria, so something cannot be a "solicitation" unless it is first found to be an "advertisement." *See* Rule 7.3, cmt. [1] ("Not all advertisements are solicitations .... All solicitations, however, are advertisements with certain additional characteristics."). If the proposed prize offer is not an advertisement as defined by the Rules, it will not fall under the strictures that apply to advertising or solicitation. Therefore, we must first determine whether the offer is an advertisement. If so, we must then determine if it is also a "solicitation" under Rule 7.3(b).

Is the prize offer an "advertisement"?

1. To fall within the definition of "advertisement," the communication offering the prize must be for the "primary purpose" of the inquirer's retention. The fact that business development might be the inquirer's ultimate goal in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer's personal social circle, with the aim of meeting potential new clients. As stated in Comment [6] to Rule 7.1:

Not all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by lawyers consists of communications made in any forum 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. ...

See also Rule 7.1, cmts. [7] - [9] (regarding various communications that may or may not be advertisements, depending on the circumstances).

1. If the prize offer is merely posted on the inquirer's own social networking sites and people gain a chance to win the prize simply by connecting with the inquirer - not for retaining the inquirer - it is not likely to be an "advertisement" even if the site elsewhere identifies the inquirer as an attorney. If, however, the prize offer itself describes the inquirer as an attorney or describes the inquirer's legal services or law firm (or both), the prize offer would be an "advertisement" subject to all of the strictures of Rule 7.1, such as the mandatory use of the label "Attorney Advertising."

1. Whether or not the prize offer is an advertisement, the inquirer must be honest. As observed in Comment [6] to Rule 7.1:

> [A]ll communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. ...

Is the prize offer a "solicitation"?

1. If posting the prize offer is considered an "advertisement," we must also ask whether it will also be considered a "solicitation" within the meaning of the Rules. Under Rule 7.3(b), the advertisement for a prize offer will be a solicitation if is "directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives" and a "significant motive" is "pecuniary gain." If the prize offer is a solicitation, it will be subject to the special requirements of Rule 7.3.

1. *e.g.*, posting the offer on a social networking site or sending it via email -would fall within the rubric of a "computer-accessed communication." However, the closing sentence of Comment [9] to Rule 7.3 states: "Ordinary email and websites are not considered to be real-time or interactive communication." Thus, if the inquirer merely posts the prize offer on his Facebook or other social networking site, or sends the offer to recipients by email, then the offer will not be considered a prohibited "real-time or interactive computer-accessed communication" under Rule 7.3(a)

1. The policy reasons underlying the general prohibition against in-person solicitation, telephone contact, and real-time or interactive computer-accessed communications are set out in Comment [9] to Rule 7.3, which provides:

> Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner. ...

1. In sum, the prize offer will be an "advertisement" and must comply with Rule 7.1 only if the inquirer's "primary purpose" is the "retention" of the inquirer or his law firm." Furthermore, the prize offer will be a "solicitation" only if it is an "advertisement" *and* is "directed to, or targeted at, a specific recipient or group of recipients" (whether the recipients are already part of the offeror's own social network contacts or are outside the offeror's social network contacts). If the prize offer is a "solicitation," it will be subject to the strictures of both Rules 7.1 and 7.3. No matter how the communication of the prize offer is labeled, it must be truthful per Rule 8.4(c).

1. Finally, the proposed prize offer does not violate Rule 7.2(a)'s ban against compensating or giving "anything of value" to a person "to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client ...." The inquirer is offering the chance to win a prize merely for connecting to the inquirer on a social networking site, not for recommending or employing the inquirer as a lawyer.

CONCLUSION

1. Offering a prize offer to join an attorney's social network is not prohibited by the Rules of Professional Conduct as long as the offer does not constitute illegal conduct. If the primary purpose of the prize offer is to promote retention of the attorney's legal services (which is a factual question), then it is an "advertisement" and is subject to Rule 7.1 and other Rules governing lawyer advertising. If it is an advertisement that also meets the definition of a "solicitation," then it is subject to Rule 7.3 as well. If the attorney communicates the prize offer by posting it on a social networking site or sending it by mail, and if the attorney does not communicate the offer in person, by telephone, or by a real-time or interactive computer-assisted communication (other than to recipients who are close friends, relatives, former clients, or existing clients), then the communications about the prize offer are not prohibited by Rule 7.3(a).

1. If the prize offer is not an advertisement, it also cannot be a solicitation and will therefore be subject neither to Rule 7.1 nor to Rule 7.3. However, like every communication by a lawyer - advertisement, solicitation, or neither - it will be subject to the general prohibition in Rule 8.4(c) against conduct involving dishonesty, fraud, deceit or misrepresentation.

(70-09)

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Offering a prize to join attorney's social networking sites(PDF File)

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ETHICS OPINION 899

New York State Bar Association
Committee on Professional Ethics

Opinion 899 (12/21/11)

Topic: Solicitation; answering legal questions on the Internet

Digest: A lawyer may provide general answers to legal questions from laymen on real-time or interactive Internet sites such as chat rooms, but the lawyer may not engage in "solicitation" in violation of Rule 7.3. If a person initiates a request on the site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that those who did not request it cannot see it.

Rules: 1.0(a) & (c), 7.1(a), (q) & (r), 7.3(a) & (b)

QUESTIONS

1. May a lawyer answer legal questions in chat rooms or on other social media sites on the Internet?

2. If so, may the lawyer also offer his or her legal services in the course of answering questions?

OPINION

3. A lawyer asks whether he may visit real-time interactive internet or social media sites on which individuals post legal questions and, if so, whether he may answer questions and advise individuals of his availability as a lawyer. For example, if a layperson in an Internet chat room asks how long a person can wait to sue a lawyer for legal malpractice, may the lawyer respond by saying, "The statute of limitations in New York is three years"? May the lawyer also say, "Please call me at the following number as soon as possible for a free evaluation of your case"?

General principles of advertising and solicitation by lawyers

4. Rule 7.1 of the New York Rules of Professional Conduct (the "Rules") governs attorney advertisements, and Rule 7.3 governs a special form of advertising called

"solicitation." We begin our analysis with the definitions of "advertisement" and "solicitation."

5. An "advertisement" is defined under Rule 1.0(a) 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."

6. "Solicitation" is defined in Rule 7.3(b) as follows:

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

7. Thus, Rule 7.3(a) excludes from solicitation a response in writing to a specific request of a potential client.

8. In general, Rule 7.1(a)(1) regulates the content of an advertisement by prohibiting any lawyer advertisement that "contains statements or claims that are false, deceptive or misleading." Rule 7.3(a)(1) regulates the manner of advertising by expressly prohibiting a lawyer from engaging in solicitation "by in-person or telephone contact or ***by real-time or interactive computer-accessed communication*** unless the recipient is a close friend, relative, former client or existing client . . ." (Emphasis added.)

9. The term "computer-accessed communication," which is used in Rule 7.3(a)(1), is defined in Rule 1.0(c) as follows:

"Computer-accessed communication" 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.

10. Comment [9] to Rule 7.3 sets forth the rationale for prohibiting solicitation by in-person or telephone contact or by real-time or interactive computer-accessed communication:

[I]n-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner. . . .

11. Comment [9] also explains that "[o]rdinary email and web sites are not considered to be real-time and interactive communications," but "[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication." Thus, the lawyer must not engage in solicitation in those forums. With that background in place, we turn to the specific questions before us.

Question 1: May the lawyer answer legal questions in chat rooms?

12. The first question is whether the lawyer may answer legal questions posted by laymen in chat rooms or on other social media sites on the Internet. Answering questions on the Internet is analogous to writing for publication on legal topics. As set forth in Rule 7.1(r), a lawyer may write for publication on legal topics without affecting the right to accept employment, as long as the lawyer does not undertake to give individual advice.[1] Comment [9] to Rule 7.1 echoes Rule 7.1(r) by cautioning that, in the course of educating members of the public to recognize their legal problems a lawyer "should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised." Comment [9] adds that talks and writings by a lawyer aimed at the public "should caution them not to attempt to solve individual problems" on the basis of the information conveyed by the lawyer. A lawyer who adheres to those guidelines may answer legal questions posted by laymen on the Internet.

13. Comment [9] to Rule 7.1 also says that lawyers "should encourage and participate in educational and public relations programs concerning the legal system, with particular reference to legal problems that frequently arise." A lawyer's participation in an educational program "is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients." If a communication is not advertising, then it also cannot be solicitation - see Rule 7.3, cmt. [1]. But Comment [9] to Rule 7.1 also notes that an educational program "might be considered advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm." In that case, the communications would have to comply with Rules 7.1 and 7.3. *See, e.g.*, N.Y. State 830 (2009) (a lawyer may ethically contact lay organizations to inform them that he or she is available to speak on legal topics, but "must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm"). We therefore turn to Question 2.

Question 2: May the lawyer offer his or her legal services in chat rooms?

14. The second question is whether the lawyer may offer his or her legal services in the course of answering legal questions on the Internet. As already noted, Rule 7.3(a) prohibits solicitation in chat rooms and other similar types of conversational computer-accessed sites because they are considered to be "real-time" or "interactive" communications. However, the definition of "solicitation" in Rule 7.3(b) expressly excludes "a proposal or other writing prepared and delivered in responds to a ***specific request*** of a prospective client." (Emphasis added.)

15. Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a "specific request" to retain the lawyer. Thus, encouraging a layperson to retain the lawyer in response to such a question is prohibited by Rule 7.3(a)(1). On the other hand, if a lawyer's primary purpose in answering a question is not to encourage his own retention but rather is to educate the public by providing general answers to legal questions, then Rule 7.3(a)(l) does not prohibit the lawyer's responses.

16. Moreover, Rule 7.1(q) generally allows a lawyer to accept employment resulting from educational activities. Rule 7.1(q) provides as follows:

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

17. Thus, if a potential client initiates a specific request to retain the lawyer during the course of permissible real-time cyberspace communications, then the lawyer's response to that person does not constitute impermissible solicitation. Yet because the lawyer's response in a chat room or interactive social media site would constitute a solicitation to everyone on the site who did not specifically request the lawyer's services, the lawyer may not post a response that encourages everyone on the site to retain the lawyer. Therefore, if the person making the request includes contact information, the lawyer may respond only to that person.

18. If the person making the request does not include contact information, however, then the lawyer's response must be in two stages. The first stage is to ask the layperson to communicate directly with the lawyer off the site, by email, phone, or otherwise. For example, if the person whose question the lawyer answered in a chat room says, "Can you represent me in my case?" the lawyer may post a response such as, "My communications on this site are for the purpose of educating the general public about legal issues. If you are seeking an individual consultation, please visit my website at *www.jones.com*." Alternatively, the lawyer may provide an office phone number, email address, and/or mailing address, without giving any information about the lawyer's services. If the person who requested the lawyer's services then uses one of these methods to contact the lawyer directly outside the real-time or interactive site, then the lawyer will not violate the restrictions on solicitation by preparing and delivering a proposal or other writing that responds to the specific request made by that prospective client. (Because advertising includes both public and private communications for the purpose of seeking retention, these communications must comply with Rule 7.1.)

19. However, the lawyer may not post a proposal offering his or her legal services on the real-time interactive Internet or social media site, because posting that information would be a real-time and interactive computer-accessed solicitation to people who did not request it, in violation of Rule 7.3(a)(1).

20. This Committee cannot answer questions of law. Accordingly, we cannot determine whether private responses to a layperson's specific request on a real-time or interactive computer-accessed site would violate § 479 of the New York Judiciary Law, which prohibits solicitation by attorneys. Nor can we determine whether § 479 or the Rules regulating advertising and solicitation are constitutional in light of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny.

CONCLUSION

21. A lawyer may provide general answers (not individual advice) in response to legal questions from laypersons on real-time or interactive social sites on the Internet, but the lawyer may not engage in "solicitation" absent compliance with Rule 7.3. If a person initiates a request on the site to retain the lawyer, the lawyer may respond with a private written proposal outside the site so that persons who did not request the proposal cannot see it.

(20-11)

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[1] We add that a lawyer who gives individual advice in a chat room or on a public social media site might also be establishing an attorney-client relationship without undertaking the conflict check required by Rule 1.10(e) and would be revealing privileged legal advice in a public place in violation of Rule 1.6(a).

Related Files

Ethics Opinion 899(PDF File)

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ETHICS OPINION 972

New York State Bar Association
Committee on Professional Ethics

Opinion 972 (6/26/13)

Topic: Listing in social media

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

Rule: 7.4

FACTS

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

QUESTION

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

OPINION

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

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

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

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

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

CONCLUSION

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

(22-13)

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

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

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ETHICS OPINION 977

New York State Bar Association

Committee on Professional Ethics

Opinion 977 (8/1/13)

Topic: Trial publicity in administrative proceeding; distributing via social media a petition and survey in support of client's pending case

Digest: A lawyer who represents a client in an administrative proceeding may distribute an online petition and survey in support of the client's case unless there is reason to believe that distributing those statements would have a substantial likelihood of materially prejudicing the adjudication.

Rule: 3.6

FACTS

1. The inquiring lawyer is defending a client in a cancellation proceeding before the U.S. Trademark Trial and Appeal Board ("TTAB"). In the pending TTAB proceeding, a third-party petitioner has alleged that the client's registered mark is confusingly similar to the petitioner's registered mark and is seeking cancellation of the client's registration.

2. The client has created an online petition to garner opposition to cancellation. The petition presents the proceeding as a contest between a family business and a big corporation, and asks readers to sign in order to demonstrate that there is no likelihood of confusion between the petitioner's mark and the client's mark. The lawyer asks if there is any ethical prohibition of distributing a link to the client's online petition via social media (specifically, using Facebook and Twitter) if the lawyer will merely tell readers it is there but not ask them to sign it.

3. In addition, the lawyer asks if it is ethically permissible to post online a survey asking questions along the lines of the following: "Do you think Mark X is confusingly similar to Mark Y? Click here to express your opinion."

4. The lawyer does not indicate what he intends to do with the petition or the survey results (*e.g.*, whether he intends to try to present the results as evidence in the proceeding).

QUESTIONS

5. If a client has set up an online petition in support of his case in a trademark cancellation proceeding, may the client's lawyer distribute a link to the petition via social media?

6. May a lawyer in a trademark cancellation proceeding post an online survey asking readers whether they find two trademarks confusingly similar?

OPINION

7. Rule 3.6(a) of New York's Rules of Professional Conduct (the "Rules") provides that a lawyer who is participating (or has participated) in a criminal or civil 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 provision attempts to balance the public value of informed commentary with a party's right to a fair proceeding.[1] We note that such provisions have been the subject of constitutional challenge,[2] but we are limited to interpreting the rules of legal ethics and do not undertake to assess their validity.

8. The prohibition in Rule 3.6(a) can be divided into a few components: (i) it applies to a lawyer who is participating in "a criminal or civil matter" in which there is or will be an adjudicative proceeding; (ii) it applies when the lawyer "make[s] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication"; and (iii) it applies to statements "that the lawyer knows or reasonably should know ... will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." We consider how each of these components applies to the communications proposed in the inquiry.

9. The first component is clearly satisfied. "Matter" is defined by Rule 1.0(*l*) to include "any ... administrative proceeding." A trademark cancellation proceeding is an administrative and adjudicative proceeding.[3] The inquiring lawyer is therefore subject to Rule 3.6(a).

10. As to the second component we start by considering whether distributing a link to the petition would constitute making extrajudicial statements. The petition itself includes extrajudicial statements, as it is a document that is being distributed online and it characterizes the nature and merits of the dispute in particular ways. The fact that it was the client who created and posted the petition does not make the rule inapplicable. The lawyer, by distributing the link, is effectively disseminating the petition – and thus "mak[ing]" the statements it contains – over the internet as a means of public communication.

11. Whether the proposed survey meets this second component is less clear and may depend on a more detailed description of its contents. It may not make any "statement" subject to the Rule if it is limited to posing questions in neutral terms and giving readers the opportunity to express opinions. But if it includes leading questions, they could constitute implied statements subject to the Rule.

12. The final and central element of the prohibition is that the lawyer knows or reasonably should know that the statement "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

13. The rule provides some guidance on this final element by identifying certain kinds of statements that are presumptively permissible and other kinds that are presumptively impermissible. *See* Rule 3.6(b) (1) – (6) (listing kinds of statements "ordinarily" deemed likely to be prejudicial; Rule 3.6(c) (1) – (7) (listing kinds of information a lawyer may state, without elaboration, if the statement does not violate the basic prohibition in Rule 3.6(a)). As to the communications in question, however, the rule's presumptions do not apply. Neither the petition nor the survey would be within any of the presumptively permissible categories of information listed in Rule 3.6(c). Nor would either of those communications be presumptively prohibited, because Rule 3.6(b) applies only to certain statements that refer "to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration." A trademark cancellation proceeding is not triable to a jury.[4] For this inquiry, therefore, the rule's lists of categories give no presumptive answer to the question of likely prejudice.

14. However, the presumptions described above do not exhaust the content of Rule 3.6. Whether or not one of the presumptions applies, the governing standard remains the one found in Rule 3.6(a). We turn to some factors that bear on whether the communications would have a substantial likelihood of materially prejudicing the cancellation proceeding.

15. One factor is the nature of the adjudicative proceeding. Its relevance may be inferred from Rule 3.6(b), because as noted above, the presumptive prohibitions do not apply to civil matters not triable to a jury. Here is a more direct statement of this factor's importance:

Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Rule 3.6, Cmt. [6]. Indeed, it has been said that the concern about improperly influencing a factfinder's decisions

is largely irrelevant in matters to be decided by judges. Judicial officers are expected to be immune from the influences of inadmissible evidence and similar sources of information and from the potentially distorting effects of inflamed public opinion. Thus, media comments by a lawyer outside a nonjury proceeding will pose a significant and direct threat to the administration of justice ... only in extreme situations.[5]

16. Another factor is the content of the extrajudicial statements. For example, statements on peripheral issues may carry little risk of prejudice. Statements may be more likely to be prejudicial if they address crucial issues committed to the finder of fact or are expressed in an inflammatory way.

17. The likelihood of prejudice will depend in part on the likelihood that the statements will come to the attention of the finder of fact. Thus the method of disseminating extrajudicial statements may be a relevant factor, and another related one is the statements' timing.[6] Other relevant factors may include the purpose with which the statements were made[7] and whether the information in the statements is otherwise available from public sources.[8] Having listed some of the factors relevant to likely prejudice (but without any claim that the list is comprehensive), we consider their application to the inquiry.

18. The nonjury nature of the TTAB proceeding is a consideration counting strongly against likely prejudice. On the other hand, while the inquiry does not fully describe the proposed communications, it appears at least that the statements in the petition, and implied ones in the survey if any, would directly address the merits of the dispute. The inquiry does not reveal the amount of time that would be expected to pass from the making of the statements until the trial.

19. A factor that may assume particular significance on these facts is motive. In this connection it is useful to distinguish between the mere making of the statements and their ultimate intended uses. The inquiry does not specify those uses.

20. It is possible that the lawyer's intent is to use the survey results as evidence that the two marks are not confusingly similar. If so, then the question arises whether such survey evidence would be permissible in a cancellation proceeding. If conducting the survey were an appropriate means of seeking competent evidence, then it would not have a substantial likelihood of "prejudicing" the proceeding. On the other hand, if the survey results would not constitute proper evidence, their dissemination could give rise to additional concerns. *Cf.* Rule 3.6(b)(5) (in jury or criminal context, statement ordinarily likely to be prejudicial if it relates to information the lawyer knows or reasonably should know is "likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial"). Similar questions would apply to possible intended use of the petition in evidence.

21. However, the petition was created by the client and there is no indication of intent to use is as evidence. In the absence of some other explanation, the inquiring lawyer should consider whether the client's goal is to disseminate the petition so broadly as to influence the finders of fact other than through the tribunal's processes. Of course in that instance it would be improper for the lawyer to participate in its dissemination.

22. We have mentioned various relevant facts not contained in the inquiry, and their absence limits our ability to balance the above factors. Even without those facts, however, we can identify an outline of the analysis. The dominant factor in this case may be the nature of the adjudicative proceeding. The fact that the adjudication will be by an administrative tribunal like the TTAB counts heavily in favor of the inquiring lawyer being permitted to disseminate the proposed communications. There could be a different answer if the inquiring lawyer were aware of additional facts indicating that the client seeks to use the petition to exert improper influence, or that prejudice is otherwise likely. But in the absence of such additional facts, it seems unlikely that distribution of the petition or the survey would materially prejudice an adjudicative proceeding to be conducted by a panel of specialized trademark judges.

23. We have addressed only such constraints on the proposed communications as might be imposed by the rules of legal ethics. There could also be legal constraints, but issues of law are beyond the scope of this Committee. The inquiring lawyer may be well advised to review TTAB rules and other applicable laws and rules before distributing the petition or survey.

CONCLUSION

24. A lawyer representing a client in a trademark cancellation proceeding may use social media to distribute a link to an online petition in support of the client's case, and may post an online survey, where there is no substantial likelihood that the petition or survey would materially prejudice the upcoming administrative adjudication. If the lawyer knew that the client were trying to use the petition to pressure the trademark judges, or the lawyer had other information indicating a likelihood of materially prejudicing the proceeding, then the lawyer should not participate in disseminating those statements. But in the absence of such information, such statements may fairly be considered unlikely to prejudice a proceeding conducted by a panel of administrative judges.

(14-13)

[1] *See* Rule 3.6, Cmt. [1] (discussing "balance between protecting the right to a fair trial and safeguarding the right of free expression," and noting "vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves").

[2] *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1063, 1075 (1991) (holding in criminal case that "'substantial likelihood of material prejudice' standard ... satisfies the First Amendment" as "it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech"); *Hirschkop v. Snead*, 594 F.2d 356, 373-74 (4th Cir. 1979) (concluding that a rule limiting lawyers' speech on matters pending before administrative tribunals, more restrictive than Rule 3.6, was unconstitutional because overbroad, and noting lack of record evidence "that any administrative decision has been set aside because the comments of lawyers impaired the fairness of the proceedings").

[3] *See* Trademark Trial and Appeal Board Manual of Procedure §102.02 (3d ed., rev. 2, June 2013) (describing proceedings within jurisdiction of TTAB, including cancellation proceedings); *id.* §102.03 (cancellation proceedings include pleadings, motions and trial). This TTAB Manual is available at http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp.

[4] TTAB Manual, note 2 *supra*, §102.03 (decisions on merits of cases are rendered by panels of TTAB judges).

[5] Restatement (Third) of The Law Governing Lawyers §109, cmt. b (2000). *But cf., e.g., United States v. Khan*, 538 F.Supp.2d. 929, 932-35 (S.D.N.Y. 2007) (interpreting analogous local rule against statements likely to "prejudice the due administration of justice" to prohibit not only lawyer's statements likely to taint jury pool but also those likely to threaten safety of witnesses).

[6] *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991) (citing case law and ABA source for proposition that timing of a statement is significant factor in the assessment of the possible threatened prejudice, and giving as problematic example a statement "which reaches the attention of the venire on the eve of *voir dire*"); Restatement (Third) of The Law Governing Lawyers §109, cmt. c (2000) ("statement made long before a jury is to be selected presents less risk than the same statement made in the heat of intense media publicity about an imminent or ongoing proceeding").

[7] *See Gentile v. State Bar of Nevada*, 501 U.S. at 1064-65, 1080 (disciplinary authority considered purpose of statements in assessing likelihood of prejudice); *id.* at 1079 (minority finding it persuasive that lawyer admitted having called press conference to influence venire, because it was "difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would succeed").

[8] *See id.* at 1046 (minority portion of opinion noting that "[m]uch of the information provided by petitioner had been published in one form or another, obviating any potential for prejudice"); Restatement (Third) of The Law Governing Lawyers §109, cmt. c (2000) (if same information "is available to the media from other sources, the lawyer's out-of-court statement alone ordinarily will not cause prejudice," but this factor is not "controlling" and "the information must be both available and likely in the circumstances to be reported by the media"); *In re Sullivan*, 185 A.D.2d 440, 445 (3d Dept. 1992) (dismissing disciplinary charges against criminal defense lawyer whose "television interview was a mere drop in the ocean of publicity" surrounding the trial, when the matters discussed "had been otherwise publicized prior to the interview").

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ETHICS OPINION 1031

New York State Bar Association
Committee on Professional Ethics

Opinion 1031 (10/30/14)

Topic: Specialization; Use of term "specialist" in the title of a job held by a lawyer that a nonlawyer may lawfully perform

Digest: A lawyer may use the title "immigration specialist" in a job previously and lawfully held by nonlawyers where the lawyer does not publicly associate the title with his or her status as a lawyer. The lawyer may disclose the status as a lawyer to persons interacting with the lawyer as long as the lawyer does not do so "publicly." Disclosure of the lawyer's status as a lawyer and "specialist" title on a resume ordinarily would not be prohibited by Rule 7.4, but disclosure of this title on a LinkedIn site would be prohibited.

Rules: Rules 5.7(a) & (c), 7.4(a) & (c).

FACTS

1. The inquirer is a lawyer who has been hired as an "immigration specialist" in the Human Resources Department of an educational institution in New York. In that role, the inquirer will prepare filings on behalf of the institution and devise immigration visa strategies, but she will not make any appearance on behalf of the institution and her status as an attorney will not generally be visible to the public. The position was previously held by a nonlawyer. The inquirer's email signature would identify her as "Immigration Specialist, Human Resources Department," with no indication that she is a lawyer.

QUESTION

2. May a lawyer use the title of "specialist" when working in a position in which the lawyer's status as a lawyer is not disclosed to the public?

3. If so, may the lawyer include the title in a resume and LinkedIn profile?

OPINION

4. This inquiry arises at the intersection of two provisions of the New York Rules of Professional Conduct (the "Rules"). First, Rule 7.4 prohibits a lawyer from □□□publicly" identifying himself or herself as a "specialist" in an area of law unless he or she has been certified by certain approved organizations. See N.Y. State 757 (2002).[1]

5. Second, Rule 5.7 addresses the provision of nonlegal services by lawyers and the circumstances in which the Rules apply to the rendition of such services. Among other things, Rule 5.7(a) provides that where a lawyer renders both legal and nonlegal services to a person in circumstances in which the services are not kept "distinct," the Rules apply to the provision of both legal and nonlegal services. The services at issue here appear potentially to encompass both nonlegal and legal services. "Nonlegal services" means "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Rule 5.7 (c). We assume that the immigration-related services at issue here are such a nonlegal service – that is, that they could lawfully be provided by a nonlawyer.[2] We have observed, however, that there are services that may be legally undertaken by both lawyers and nonlawyers but "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 557 (1984). Some of the services that the inquirer provides – such as the development of immigration visa strategies for her employer and preparation of immigration filings – are services that, if provided by a lawyer "who holds himself out as a lawyer," would be governed by the Rules. See N.Y. State 832 ¶ 6 (2009) ("despite the fact that a nonlawyer might be entitled to provide some advice about a shelf corporation without committing the unauthorized practice of law, when a lawyer provides such advice it becomes the provision of legal services").

6. As indicated in ¶5, in our opinions addressing the services that may be provided by both lawyers and nonlawyers, we looked to whether the lawyer was "holding himself out as a lawyer." N.Y. State 557; see also N.Y. State 636 (1992) (lawyer could conduct business of selling will forms where lawyer does not identify himself as a lawyer); N.Y. State 832 ¶ 10 (noting that identifying person selling shelf corporations as a lawyer creates risk of confusion that the lawyer has a lawyer-client relationship with buyers); N.Y. State 951 ¶ 12 (2012) (same as to lawyer offering letter-writing service where the letters address legal subjects). Obscuring the fact that the person providing the service in question is a lawyer is not always effective to avoid the application of the Rules. See N.Y. State 662 (1994) (lawyer

assisting nonlawyer in representing homeowners challenging real estate taxes must disclose status to avoid misleading the tribunal and opposing party). Nevertheless, in this circumstance we see no reason why the bar on use of the term "specialist" would apply to a lawyer who does not hold him- or herself out as a lawyer.

7. In short, whether the prohibition on use of the term "specialist" in Rule 7.4(a) applies here depends, first, on whether the inquirer is holding herself out as a lawyer, and second, whether she "publicly" uses the term "specialist." Combining these two provisions, we conclude that the use of the term "specialist" for a lawyer rendering immigration services that can lawfully be provided by a nonlawyer does not offend Rule 7.4 if the lawyer does not publicly associate the services with his or her status as a lawyer.

8. This conclusion is supported by substantial policy. The prohibition on the term "specialist" is derived from concerns that the term implies a statement as to the quality of services being provided by lawyers that may be difficult for laymen to assess and therefore particularly likely to be misleading. See, e.g., Bates v. State Bar of Arizona, 433 U.S. 350, 383-84 (1977) ("misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising"). It makes little sense to bar a term that might be used by nonlawyers providing the same services if the lay public does not know that the person providing the services is in fact a lawyer. Second, the inquirer has taken a job with a title assigned by her employer for reasons apparently unrelated to her status as a lawyer. It would be unfair and counterproductive to bar her from taking the job, or to condition her ability to take the job on the extent of her ability to persuade her employer to change the title, because of her status as a lawyer.

9. This does not necessarily mean that the inquirer must hide her status from those within the institution with whom she interacts – the institution itself and the individual employees whose immigration status is at issue. Even if that might in some circumstances constitute "holding herself out as a lawyer," Rule 7.4 would not prohibit the use of the term "specialist," because disclosure to this relatively limited universe of persons would not constitute a "public" statement.

10. Turning to the second question, an accurate statement of the inquirer's title on her resume does not constitute a "public" statement for purposes of Rule 7.4, as long as the inquirer does not post or distribute the resume beyond specific potential employers. A notation on the inquirer's LinkedIn page, however, must be construed as "public." See N.Y. State 757 (letterhead and business cards are forms of public communications for purposes of DR 2-105 (now Rule 7.4)). If the LinkedIn page notes the inquirer's status as an attorney, it cannot also note a title including the word "specialist." We have considered whether a notation on the site that the job does not entail the rendering of legal services might be sufficient to avoid the prohibition. The difficulty is that, as noted above, it appears that the inquirer does in fact render services that are "legal services" if rendered by a lawyer, so that the disclaimer would not be accurate. Cf. N.Y. State 832 ¶ 11 (a disclaimer that no legal services are being rendered and the protections of the attorney-client relationship do not exist "would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business").

CONCLUSION

11. The inquirer may use the title "immigration specialist" as long as she does not publicly associate her status as an attorney with her title. Noting the title on her resume would not ordinarily be prohibited by Rule 7.4, but noting it on her LinkedIn page together with her status as a lawyer would be prohibited.

(40-14)

[1]Rule 7.4(a) states: "A lawyer or law firm 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, except as provided in Rule 7.4(c)." (Emphasis added.) Rule 7.4(c), the exception referred to, provides that a lawyer may state that the lawyer has been recognized or certified as a specialist only if certified by certain organizations and only if the statement is accompanied by certain disclosures.

[2]Whether a particular service would be the unauthorized practice of law if rendered by a nonlawyer is a question of law that is beyond the jurisdiction of this Committee. See, e.g., N.Y. State 863 ¶¶ 4-5 (2011) (whether lawyer admitted in another state is engaging in the unauthorized practice of law if he practices exclusively immigration law is a question of law beyond the Committee's jurisdiction).

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ETHICS OPINION 1032

New York State Bar Association
Committee on Professional Ethics

Opinion 1032 (10/30/2014)

Topic: Responding to a former client's critical commentary on a website

Digest: A lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a lawyer-rating website.

Rules: 1.6(a); 1.6(b); 1.9(c)

FACTS

1. The inquirer, a New York law firm, believes that a "disgruntled" former client has unfairly characterized the firm's representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client's goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief.

2. The law firm disagrees with its erstwhile client's depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client's criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client's confidential information.

QUESTION

3. When a lawyer's former client posts accusations about the lawyer's services on a website, may the lawyer post a response on the website that tends to rebut the accusations by including confidential information relating to that client?

OPINION

4. The Internet and social media today provide a number of sites that ask visitors to state their views of and experiences with lawyers, presumably to provide other visitors with information on which to base their choice of counsel. Our survey of a few of these sites did not reveal any protocols to monitor the accuracy of the commentary, except to assure that the very lawyers being reviewed are not the source. In this respect, the sites differ from other lawyer-rating agencies – Chambers, Super Lawyers, Best Lawyers in America, Martindale-Hubbell and the like – which claim to base their ratings on a canvass of clients and other members of the bar.

5. The inquiry concerns a negative posting on such a site by a former client. The inquiring firm believes that certain information about its representation of that client would tend to rebut the posted allegations. The information in question constitutes "Confidential information" as defined by Rule 1.6(a) of the Rules of Professional Conduct (the "Rules"). Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client.

6. 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) says 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." When applicable, this exception permits, but does not require, disclosure of confidential information, and only to the extent the lawyer reasonably believes necessary to serve the purpose of self-defense. See Rule 1.6, Cmts. [12] & [14].

7. The inquiry raises the question whether a lawyer may rely on this exception to disclose a former client's confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so.

8. The language of the exception suggests that it does not apply to informal complaints such as this website posting. The key word is "accusation," which has been defined as "[a] formal charge against a person, to the effect that he is guilty of a punishable offense," Black's Law Dictionary 21 (5th ed. 1979), or a "charge of wrongdoing, delinquency, or fault," Webster's Third International Dictionary Unabridged 22 (2002). See Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 230 (2013 ed.) ("An accusation means something more than just casual venting.")

9. Comment [10] to Rule 1.6 supports this conclusion. It says that "[w]here a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense." In the context of a set of legal standards, the words "claim" and "charge" typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction. Comment [10] continues by saying: "Such a claim may arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone." Each of these examples involves a formal proceeding in which the lawyer's conduct has been placed in issue.

10. Case law supports our conclusion. New York cases permitting disclosure of confidential information under Rule 1.6(b)(5)(i) and its nearly identical predecessor DR 4-101(C)(4) have invariably involved allegations of lawyer wrongdoing in formal proceedings such as legal malpractice or other civil actions, disqualification proceedings, or sanctions motions.[1] Those cases stand in contrast to those in which lawyers have not been permitted to use a client's confidential information to initiate actions against former clients (other than lawsuits to collect legal fees, for which Rule 1.6(b)(5)(ii) provides a different exception to confidentiality).[2] Thus under the case law, a lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.[3]

11. In at least one case, discipline has been imposed for the kind of conduct in question here. In re Tsamis, Joint Stipulation and Recommendation ¶¶ 4-10 & Reprimand ¶ 1, No. 2013PR00095 (Hearing Board, Ill. Att'y Reg. & Disc. Comm. 2014) (reprimanding lawyer for revealing confidential information about her former client in response to client's negative review on AVVO legal referral website). Ethics opinions from other jurisdictions have reached varying results on the question facing us, but their relevance is limited by differences in the ethical rules in force in those jurisdictions.[4]

12. We note a New York opinion that addressed the predecessor to Rule 1.6(b)(5)(i), though in a different context. In N.Y. County 732 (2004), a client threatened to file a disciplinary complaint against a lawyer if the lawyer did not release funds in an IOLA account, the proper disposition of which was a part of the lawyer's inquiry to the Committee. The Committee opined that in the event of such a complaint, "the law firm would be entitled to disclose confidences or secrets necessary to defend itself against the client's accusations." The Committee concluded that the "rules permitting disclosure of client confidences should be read restrictively" but that the law firm may disclose protected client information "if the client files a complaint or claim against the law firm."

13. We do not mean to say that a formal proceeding must be actually commenced to trigger the authorization of disclosure by Rule 1.6(b)(5)(i). There may be circumstances in which the material threat of a proceeding would give rise to that right. See N.Y. City 1986-7 (in-house lawyer may disclose confidential information to government prosecutors who have identified the lawyer as the subject of a grand jury investigation in which other witnesses have made incriminating statements about the lawyer). We do not need to reach that question here because no material threat of a proceeding has been made on the website posting that is the subject of this inquiry.

14. Nor do we consider the question of whether and when a negative website posting may effect a waiver of a client's right to confidentiality, because that question is not raised by the facts as presented in the inquiry. If there were facts raising the question of waiver, it would be necessary to consider separately the possible waivers of attorney-client privilege and of other kinds of confidentiality under Rule 1.6(a). Waiver of attorney-client privilege turns on questions of law beyond our jurisdiction. See, e.g., 1050 Tenants Corp. v. Lapidus, 12 Misc. 3d 1118, 1123-25 (Civ. Ct. N.Y.C. 2006). Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information.

15. This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client – or others – being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion.

CONCLUSION

16. A lawyer may not disclose client confidential information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers.

(1-14)

[1] See, e.g., Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190, 1195 (2nd Cir.), cert. denied, 419 U.S. 998 (1974); First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986); Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP, 39 A.D.3d 201, 201 (1st Dep't 2007); Nesenoff v. Dinerstein & Lesser, P.C., 12 A.D.3d 427, 429 (2nd Dep't 2004); In the Matter of Koeppel, 32 Misc.3d 1245(A) (Surr. Co. N.Y. Co. 2011); General Realty Assoc. v. Walters, 136 Misc. 2d 1027, 1029 (Civ. Ct. N.Y.C. 1987).

[2] See, e.g., Eckhaus v. Alfa-Laval, Inc., 764 F. Supp. 34, 37-38 (S.D.N.Y. 1991) (defamation); Wise v. Con. Edison Co. of N.Y., Inc., 282 A.D.2d 335, 336 (1st Dep't 2001) (wrongful discharge). See also D.C. Opinion 363 (2012) (in-house lawyer may not disclose confidential information in retaliatory discharge claim).

[3] See N.Y. City 2005-03 (noting recognition by courts that "an attorney may use client confidences or secrets to defend himself or herself from a claim or counterclaim brought by the client, or as evidence in a fee collection dispute, but may not necessarily be permitted to use that same information affirmatively in a different type of claim against a client"); Restatement (Third) of the Law Governing Lawyers § 64, comment (c) (2000) (noting that a lawyer may act under the Restatement's self-defense provision "only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification").

[4] In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer "to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver." San Francisco Opinion 2014-1; see Los Angeles County Opinion 525 (2012) (attorney may respond to former client's internet posting if (1) "response does not disclose confidential information"; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right

to disclose was not limited to "a pending or imminent legal proceeding," relying on a provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense "in a controversy" between the lawyer and the client, would include cases not covered by another category within the exception, for "allegations in any proceedings").

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ETHICS OPINION 1039

New York State Bar Association
Committee on Professional Ethics

Opinion 1039 (12/8/14)

Topic: Advertising; solicitation

Digest: An attorney may operate a blog containing an opt-in box where a person who subscribes can receive a free written report about copyrights in return for providing contact information that the attorney will later use to offer subscribers the attorney's products and services, provided that such later offers comply with applicable law and ethics rules. The blog does not itself constitute a solicitation. If the attorney later uses the contact information obtained through the opt-in box to send advertisements to subscribers, those communications would be subject to the rule on advertising and might also be subject to the rule governing solicitation.

Rules: 1.0(a), 7.1(a), (f) & (h), 7.3(b)

FACTS

1. The inquirer is a member of the New York and California bars[1] and operates a blog (available on the internet) that provides legal and publishing information to authors. She wants to build a list of subscribers who are interested in her blog posts and to whom she might send alerts about changes in publishing matters and copyright law. She also wishes to periodically survey these same subscribers about what they regard as their legal and publishing needs in order to create products that suit those needs. Finally, she wishes to advertise those legal products to the subscribers and others in the future.

2. The entire blog is marked as an "attorney advertisement" and contains an opt-in box where the inquirer offers a free written report about copyrights in exchange for readers' names and legal addresses. Those subscribers that check the opt-in box will be broken down based on the state in which they live so the inquirer can determine what she "might offer as an attorney licensed in those states vs. general publishing information."

QUESTION

3. May an attorney operate a blog containing an opt-in box whereby a person who subscribes can receive a written report about copyrights in return for providing contact information, which the attorney may later use to offer subscribers her products and services?

4. Does the above activity constitute "solicitation" within the meaning of Rule 7.3(b) of the New York Rules of Professional Conduct (the "Rules")?

OPINION

5. Our jurisdiction extends only to questions of legal ethics. We note that the use of email for commercial purposes is covered by the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (commonly known as the "CAN-SPAM Act"), and by rules promulgated by the Federal Trade Commission, see 16 C.F.R. 316. The inquirer should therefore determine whether the use of email addresses gathered for one purpose may be used for another purpose and what disclosures or disclaimers are legally required. Those are questions of law beyond our jurisdiction.

6. Rule 1.0(a) defines the term "advertisement" for purposes of the Rules as: "any public or private communication made by or on behalf of a lawyer or law firm about the 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."

7. If a communication constitutes an "advertisement," it is subject to numerous requirements in Rule 7.1. See N.Y. State 848 (2010). Primary among those is the requirement that the advertisement not contain any "statements or claims that are false, deceptive or misleading." Rule 7.1(a)(1). In addition Rule 7.1 requires that each advertisement (with certain listed exceptions) be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. An advertisement must include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered. Rule 7.1(h). It must be pre-approved by the lawyer or law firm, and a copy must be retained for a period of not less than three years following its initial dissemination. (Advertisements contained in a computer-accessed communication must be retained for a period of not less than one year.) Rule 7.1(k).

8. Not all blogs operated by attorneys constitute advertisements under the Rules. See Rule 7.1, Comment [7] ("Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising."); N.Y. State 967 (2013) (blog written by an attorney that does not discuss legal topics and whose primary purpose is not the retention of the lawyer is not an advertisement). However, as Rule 7.1, Cmt. [7] points out, "a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising." See also Hunter v. Virginia State Bar ex rel. Third Dist. Committee, 285 Va. 485, 744 S.E.2d 611(Va. 2013) (attorney's blog posts, while containing some political commentary, were deemed commercial speech subject to attorney advertising rules).

9. The inquirer states that her blog is labeled an "attorney advertisement" because a primary purpose of the blog is to advertise her services. The definition of "advertisement" quoted in ¶6 above requires that the primary purpose must be the retention of the lawyer or law firm. We do not opine on whether the label is actually required here, but we recognize that many lawyers take a conservative approach to whether educational material prepared for clients is an advertisement and thus should bear the label "attorney advertisement" as required by Rule 7.1(f). Whether a given communication is an "advertisement" is not always clear. See N.Y. State 848 (discussing factors to be considered in determining if attorney communication constitutes an "advertisement," including: (i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication). The fact that the lawyer decides as a precautionary matter to use the "advertising" label is not dispositive.

10. In N.Y. State 873 (2011), we noted that the Rules do not prohibit an attorney from offering a prize to those who join the attorney's social networking sites, so long as the offer does not constitute illegal conduct. Similarly, we see no ethical bar prohibiting the inquirer here from offering a written report about copyrights in exchange for readers' names and email addresses.

11. The inquirer also asks whether her communications constitute a "solicitation," thereby subjecting them to the special requirements of Rule 7.3. The blog and opt-in box do not, standing alone, constitute a solicitation. Rule 7.3(b) defines a "solicitation" as an "advertisement" that meets other criteria. Thus, if the blog is not an "advertisement" under Rule 1.0(a), by definition it cannot be a solicitation under Rule 7.3(b). However, if the blog is in fact an "advertisement," the lawyer needs to consider whether it is also a solicitation.

12. Under 7.3(b), a "solicitation" is "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 . . . the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Comment [3] to Rule 7.3 states that one way that an advertisement may be considered to be "directed to, or targeted at, a specific recipient or group of recipients" within the meaning of Rule 7.3(b) is if it is made by "in-person or telephone contact or by real time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents." The blog and opt-in box here are not transmitted by real time or interactive computer-accessed communication and are not delivered to any specific recipients. See N.Y. State 1016 (2014) ("A non-interactive commercial post to members of [a] message group would not constitute an interactive computer-accessed communication.").

13. Furthermore, the blog does not make "reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." Rule 7.3(b), Comment 3; see also Rule 7.3(b), Comment [4] ("an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at 'a specific recipient or group of recipients' simply because it is intended to attract potential clients with needs in a specified area of law.") Thus, even if the blog were an "advertisement" under the Rules, it is not a solicitation.

14. If the attorney (or someone on the attorney's behalf) later uses the email addresses obtained through the opt-in box to send the inquirer's advertisements, these communications would quality as "advertisements" and, in addition, may very well fall within the definition of "solicitation" in Rule 7.3(b) and would be subject to the rules governing solicitation in Rule 7.3.

CONCLUSION

15. An attorney may operate a blog containing an opt-in box where a person who subscribes can receive a written report about copyrights in return for providing contact information that the attorney will later use to offer subscribers the attorney's products and services, provided that such later offers comply with applicable law and ethics rules. The blog does not itself constitute a solicitation. If the attorney uses the contact information obtained through the opt-in box to forward advertisements to subscribers, those communications would be subject to the rule governing advertising and might also be subject to the rule governing solicitation.

(42-14)

[1]Whenever a lawyer is licensed in more than one jurisdiction, there is a question of choice of law under Rule 8.5(b)(2). We have assumed for purposes of this opinion that the inquirer principally practices in New York and that her conduct will have its predominant effect here.

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NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 1049

New York State Bar Association
Committee on Professional Ethics

Opinion 1049 (3/2/15)

Topic: Solicitation

Digest: A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising." B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

Rules: 1.0(a) & (c), 7.1, 7.1(f), (h) & (k), 7.3(a), (b), (c) & (e)

FACTS

1. An attorney frequents internet websites, such as Reddit and Twitter, which allow members to post questions about a variety of issues. A non-lawyer has posted a message on such a website describing a legal problem, and asking to be contacted by a lawyer who can help with the problem.

2. Our understanding of such social networking sites is that they are forums where registered community members can submit content, such as text posts. For example, in the case of Reddit, content is divided into categories, including a subcategory called "discussion based" that enables members to submit questions to other community members. Members can post comments about the submission, and respond back and forth in a thread or conversation-tree of written comments. Similarly, in the case of Twitter, users may post and read short messages posted by users, but members receive messages directly only from those they are "following," that is, from those with whom they have signed up to receive such messages.

QUESTIONS

3. A. May an attorney respond by email or through a social media website to an individual who posts about a specific problem on an internet forum or other similar website and who asks to be contacted by a lawyer about that problem to discuss undertaking a representation?

B. May an attorney who wishes to find plaintiffs for a potential case post an invitation on a third-party website, such as Reddit or Twitter, for individuals to contact him if they experienced a particular problem? If so, what requirements must be followed?

OPINION

Responding to a Request from a Potential Client Seeking Counsel

4. The first question asks whether an attorney may contact an individual by email or through a social media website, such as on Twitter or Reddit, to discuss undertaking a representation, based on the individual's posting on the internet site, which includes a request to be contacted by a lawyer about the individual's problem.

5. The threshold issue is whether such a contact would constitute "solicitation" of, or "advertising" directed to, the potential client by the lawyer. If the contact constitutes an "advertisement" as defined in Rule 1.0(a), then the contents must comply with Rule 7.1 of the New York Rules of Professional Conduct (the "Rules"), including the requirements for labeling as "advertising," retention of copies for specified periods and inclusion of the address and telephone number of the lawyer's "principal law office." See Rule 7.1(f), (h), (k). If the advertisement has additional characteristics that transform it into a "solicitation" as defined in Rule 7.3(b), then (1) the lawyer may not solicit the potential client by in-person or telephone contact, or by "real-time or interactive computer-accessed communication,"[1] unless the recipient is a close friend, relative, former client or existing client, see Rule 7.3(a)(1), and (2) the solicitation must comply with Rule 7.3

(c), including the restrictions on communications relating to a specific incident involving potential claims for personal injury or wrongful death. Moreover, the lawyer must file a copy of the solicitation at the time of its dissemination with the attorney disciplinary committee of the judicial district or department where the lawyer or law firm maintains its principal office, see Rule 7.3(c)(1).

6. Rule 7.3(b) defines "solicitation" for purposes of Rule 7.3 as:

> [A]ny 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 . . . 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.

Thus, in order to constitute a solicitation, the communication must first be an advertisement.

7. The term "advertisement" is defined in Rule 1.0(a) as:

> [A]ny 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.

A communication to discuss the lawyer or law firm's services (as opposed to merely discussing the client's legal problem, as set forth below in paragraphs 12 and 13) is advertising, as long as the primary purpose of the communication is to secure retention of the lawyer or law firm and the potential client is not an existing client of the lawyer or law firm. Since we have been told that the purpose of contacting the potential client would be to secure retention, any discussion of the lawyer or law firm's services would constitute an "advertisement." But would it also constitute "solicitation" as defined in Rule 7.3(b), quoted above?[2]

8. The definition of "solicitation" in Rule 7.3(b) makes an important distinction between communications initiated by the lawyer and those initiated by a potential client. That is, solicitation is an advertisement directed at a specific recipient that is initiated by or on behalf of a lawyer or law firm. Where a potential client contacts the lawyer to discuss a possible engagement, any response the lawyer makes to the contact does not constitute "solicitation." This distinction is made clear in Comment [2] to Rule 7.3, which says: "A 'solicitation' means any advertisement . . . that is initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client)". This distinction also existed in the former Code of Professional Responsibility between 1970 and 1999. See DR 2-103 (prohibiting a lawyer from seeking professional employment from a person who has not sought advice regarding employment of the lawyer).

9. We note that the final sentence of Rule 7.3(b) states that a lawyer's proposal or other writing in response to a specific request of a prospective client does not constitute "solicitation." We believe the reference to written responses to "requests for proposals" provides a safe harbor, and is not the exclusive means of responding to a request for communication initiated by the client.

10. 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).[3] Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute "solicitation."

11. In N.Y. State 1014, the inquirer was contacted by a current client (a detainee in a detention center), was given the name and telephone number of a potential client (another detainee), and was told that the potential client would like the lawyer to contact him to discuss his defense. We opined that the prohibition of Rule 7.3 against in-person or telephone solicitation was not applicable, since the contact had been initiated by the potential client. We said:

> The provisions of Rule 7.3(a)(1) which prohibit "in-person or telephone" solicitation (with exceptions not here pertinent) are also inapplicable. Solicitation is advertising initiated by or on behalf of a lawyer. Comment 2 to Rule 7.3 further emphasizes the point that to be solicitation the contact must be initiated by the lawyer. The Comment provides that solicitation means an advertisement "that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client.)" . . . . If upon the initial contact with the potential client it is apparent that the potential client did not request to be contacted by the lawyer, the lawyer must cease the conversation as further contact would constitute proscribed solicitation under Rule 7.3(a)(1).

12. Here, since the potential client initiated the communication through a posting on the internet, any response by the inquirer in the manner invited by the potential client would not constitute "solicitation." 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).

13. The definition of "advertising" must be applied with some measure of common sense. In a strict sense, every communication between a lawyer and a potential client prior to actual retention is for the "primary purpose" of being retained. But not every email in the back-and- forth between the potential client and the lawyer, such as a discussion of the steps the lawyer would take in a particular case, a response to a particular question from the potential client about the lawyer's experience or the negotiation of the fees that the lawyer would charge in that case, needs to be labeled "Attorney Advertising" and contain the lawyer's law office address. For example, Comment [7] to Rule 7.1 states:

> Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

In this case, however, we believe that the initial communication between lawyer and client in which the lawyer describes his or her capabilities and experience in response to a broadly disseminated request by the potential client meets both the express terms and the purpose of the definition.

14. Since the inquiry here asks whether the lawyer may reply using the internet website or email, the reply would be in writing and thus compliance with the labeling, retention and address requirements described above in paragraph 12 would be straight-forward. We do not address how those requirements might be applied to a permitted non-written reply in response to the client's request.

Soliciting Clients on Twitter or Reddit

15. The second question asks whether the inquirer may post an invitation on a third-party website, such as Twitter or Reddit, for individuals to contact the lawyer if they have experienced a particular problem. In N.Y. State 1009 we held that a post on a third-party website, such as Twitter or Reddit, is not a real-time or interactive computer-accessed communication. Since that type of invitation does not generally constitute solicitation, the issue is whether the content of the attorney's post could transform it into a solicitation under Rule 7.3(b), thus subjecting the post to the requirements of Rule 7.3.

16. As noted above, Rule 7.3(b) defines "solicitation" as an "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 . . . the primary purpose of which is the retention of the lawyer or law firm." Comment [4] to Rule 7.3 explains that an advertisement in a public medium, seeking retention and pecuniary gain, does not become a solicitation simply because it is intended to attract potential clients with needs in a specified area of law. But it does become a solicitation if it "makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers."

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

CONCLUSION

18. A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising." B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

(31-14)

The term "computer-accessed communication" is defined in Rule 1.0(c) as:

[A]ny 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.

The terms "real time" and "interactive" are explained in Rule 7.3, Comment [9], which states that "[o]rdinary email and web sites are not considered to be real-time and interactive communication," but "[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

The rules of lawyer ethics have long disfavored certain types of solicitation, because they pose serious dangers to potential clients. As Comment [9] to Rule 7.3 explains:

[I]n person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner.

See N.Y. City 2000-1, which involved an internet-based system in which law firms could respond to requests for proposals of representation, and which concluded that, since the request had been initiated by the potential client, not the lawyer, the lawyer's response would constitute neither advertising nor solicitation. That opinion predates the issuance of the current rules on advertising and solicitation that were promulgated in 2007 and that are discussed in this opinion.

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ETHICS OPINION 1110

New York State Bar Association
Committee on Professional Ethics

Opinion 1110 (11/23/16)

Topic: Advertising; solicitation; educating lay persons

Digest: Lawyer may (i) organize and participate in online webinars and live seminars for non-lawyers on topics within lawyer's fields of competence, (ii) publicize the same by individual invitation, social media or other lawful means, and, (iii) following a webinar/seminar, discuss representation with participants, all subject to compliance with applicable rules on advertising and solicitation.

Rules: 1.0(a); 7.1; 7.3

FACTS

1. The inquirer, an intellectual property lawyer practicing in New York, plans to conduct online webinars and live seminars on topics within his principal fields of practice for persons who may have a business interest in those topics and a need for legal services. Inquirer contemplates identifying persons fitting that description by use of commercially available business listings, including such listings on government agency web sites, such as business entity lists. Admission to the webinars and seminars may be free or may be for a fee.

QUESTIONS

2. The inquirer asks a number of questions:

A. May the lawyer attract possible attendees to seminars and webinars by sending invitations to addresses found on commercially available business entity lists?

B. May the lawyer advertise the seminars on social media using social media-provided filters to target a specific audience?

C. Does it matter whether the lawyer charges a fee for the seminars and webinars?

D. May the lawyer solicit prospective clients to register for the seminars?

E. May the lawyer notify webinar/seminar participants of future webinars/seminars?

F. May the lawyer solicit webinar/seminar participants for legal representation after the program ends?

OPINION

Sponsoring Seminars for Non-lawyers

3. This Committee has explained that, under both the current Rules of Professional Conduct (the "Rules") and the former Code of Professional Responsibility (the "Code"), lawyers may participate in legal seminars designed for non-lawyers. *See* N.Y. State 918 (2012), *citing* N.Y. State 830 (2009) (under the Rules) and N.Y. State 508 (1979) (under the Code). We noted in N.Y. State 918 that "participation in such programs is not only permitted but encouraged." Id. *See* Rule 7.1, Cmt. [9]. Under the Rules, there is no difference in this regard between seminars conducted in person and those conducted over a website. Consequently, in this opinion, we will refer generically to "seminars" to include both live programs and web-based programs.

4. Before the Supreme Court's holding in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which extended First Amendment protection to lawyer advertising, the Code prohibited lawyers and law firms from organizing legal seminars for nonlawyers. Rather, sponsorship was allowed only by a "bar association, school or other responsible public or private organization." N.Y. State 508, *supra*. The post-*Bates* amendments to the Code removed restrictions on lawyer sponsorship of such seminars and programs. *Id.*

5. If such seminars were to be available and useful to significant numbers of people, lawyers needed to publicize them. Therefore, we held that a lawyer may ethically mail notices of such seminars. *See* N.Y. State 508 (1979) (absent a judicial holding that mailing of advertisements violates §479 of the Judiciary Law, law firm may organize and promote by mail a legal seminar designed for non-lawyers).

Publicizing the Seminars – Does the Seminar or the Publicity for the Seminar Constitute Advertising?

6. The inquirer's questions regarding the means a lawyer may use to publicize proposed seminars involve more than just the mail. Under the Rules, the answers to the inquirer's questions depend on whether the seminar itself (or the advertising for the seminar) would constitute "advertising" within the meaning of Rule 1.0(a) that is subject to Rule 7.1 or "solicitation" within the meaning of Rule 7.3(b) that is subject to Rule 7.3. If the seminar (or the publicity for the seminar) does not constitute advertising, then the provisions of Rule 7.1 will not apply (and, since solicitation is a subset of advertising, neither will the prohibitions of Rule 7.3). If the seminars (or the publicity for the seminars) do constitute advertising, the inquirer must adhere to Rule 7.1. If the seminar constitutes solicitation, then the provisions of Rule 7.3 will apply, and if it also involves in-person or telephone contact or interactive computer-accessed communication, then the seminar will be prohibited unless it is advertised only to current and former clients and close friends or relatives of the inquirer.

7. We begin with what constitutes advertising and what constitutes solicitation under the Rules. Rule 1.0(a) defines an "advertisement" as follows:

> "Advertisement" means 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. [Emphasis added.]

8. A solicitation is a particular kind of advertisement defined in Rule 7.3(b) as follows:

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

Significantly, under this definition, what differentiates a solicitation from a garden variety advertisement is that a solicitation is "directed to, or targeted at, a specific recipient or group of recipients." Furthermore, if a communication is not an advertisement, it is not a solicitation. Thus the first issue to resolve here is whether the inquirer's proposed publicity constitutes advertising subject to Rule 7.1.

9. In order to answer the questions posed, we must address whether the proposed seminars constitute advertising. In N.Y. State 848 (2010), which considered whether an educational newsletter constituted advertising, we weighed three factors: (1) the intent of the communication, i.e., whether it is primarily educational or whether instead a substantial or significant purpose is to secure the retention of the lawyer or law firm publishing the newsletter; (2) the content of the communication; and (3) the targeted audience of the communication.

10. Scholars have suggested that, in determining the primary purpose of publicity, courts are likely to interpret the "primary purpose" to mean "substantial" or "significant." Roy Simon & Nicole Hyland, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 23 (Thompson Reuters 2016 ed). The determination of the "primary purpose" of publicity is subjective and judged in light of all the circumstances. *See* N.Y. State 1009 (2014), *citing* N.Y. State 873 (2011); *see also* N.Y. City 2015-7 (2015) ("We conclude that the 'primary purpose' standard refers to the subjective intent of the lawyer who makes the communication, but that this intent may be inferred – at least in certain instances – from other factors, including the content of the communication and the audience for the communication.").

11. To determine whether retention of the lawyer is the primary purpose of a communication, we must consider what other purpose the lawyer might have. The comments to Rule 7.1 address the application of the primary-purpose test to educational programs:

> A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. Rule 7.1, Cmt. [9].

12. In N.Y. State 918 (2012), we discussed the primary purpose test in the context of educational programs as follows:

> [I]f a program goes beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire that lawyer, then the lawyer may need to comply with the rules on advertising. But absent the inclusion of some such hiring pitch, a legal seminar will generally not be considered advertising as long as it is a bona fide educational program. N.Y. State 918, ¶5.

On the other hand, in N.Y. State 848 ¶9 we said, "Contact or biographical information about the lawyers or the law firm . . . does not, without more, transform an otherwise educational communication into advertising." *See* Rule 7.1, Cmt. [8]; cf., Rule 7.1, Cmt. [10]. The same reasoning would apply to publicity about a legal seminar or webinar.

13. The second factor considered in N.Y. State 848 is the "content" of the communication. The Committee pointed to Comment [7] to Rule 7.1, to the effect that newsletters or blogs focused on current developments in the law generally are not considered advertising, but that one that discusses developments in the law primarily as a vector for delivering information about the lawyer or law firm's personnel, clients, skills and achievements "would be considered advertising."

14. The third factor considered in N.Y. State 848 is the "audience." Communications that might otherwise be considered advertising subject to Rule 7.1 are excluded from the ambit of that Rule if directed to a close friend, a relative, an existing or former client, or a lawyer.

15. Assuming that the seminar and the communications used to publicize the seminar do not go beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire the inquirer, we believe they would not constitute advertising, and, therefore, would not involve solicitation. In that case, the inquirer could use any of the methods proposed in questions to publicize the seminar.

16. The remainder of this Opinion, however, assumes that the seminar and the publicity for the seminar is not so limited, but that a substantial or significant purpose of the seminar or the publicity for the seminar is to encourage prospective participants to retain the inquirer. They therefore would constitute advertising.

Publicizing the Seminars for Non-Lawyers – Does the Seminar or the Publicity for the Seminar Constitute Solicitation?

17. If a communication constitutes an "advertisement" subject to the requirements set forth in Rule 7.1, the question then arises whether it also constitutes a "solicitation" subject to Rule 7.3.

18. As noted above, an advertisement constitutes "solicitation" under Rule 7.3(b) if it "is directed to, or targeted at, a specific recipient or group of recipients". Two Comments to Rule 7.3 – Comments [3] and [4] – provide gloss on the interpretation of the phrase "directed to, or targeted at, a specific recipient or group of recipients."

19. Comment [3] states that an advertisement may be considered to be "directed to, or targeted at, a specific recipient or group of recipients" in two different ways: (1) if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication, or (2) if it is addressed so that it will be delivered to the specific recipient or recipients, as in the case of letters, emails and express packages. The Comment points out that advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements not delivered by those means, but addressed so that they will be delivered to a specific recipient or recipients, may be sent to a broader group of recipients, but they are subject to additional rules, including a filing requirement, to make them more easily subject to disciplinary oversight and review.

20. Comment [4] makes clear that, unless an advertisement falls within Comment [3], if it appears in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or group of recipients, simply because it is intended to attract potential clients with needs in a specified area of the law. For example, the Comment notes that an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine where it is placed is geared toward inventors.

21. With this background, we now turn to the inquirer's questions on the method of conducting and publicizing the seminars, assuming that the seminar and the materials used to publicize it are advertising.

Seminars and Webinars

22. A seminar is conducted in person. A webinar is usually conducted via real-time or interactive computer-accessed media. In each case, if the inquirer included a pitch for his own services, it would constitute solicitation that is in-person or using real-time or interactive computer-accessed media. *See* Rule 7.3(a); Comment [3] to Rule 7.3. For guidance on what constitutes real-time or interactive computer-accessed communication, *see* Rule 1.0(c); Simon and Hyland, *supra* at 1769-1770. Thus, Rule 7.3(a) would limit participants to close friends, relatives and former or existing clients of the inquirer.

23. If the webinar were not real-time or interactive, then the inquirer would not be limited in the invitees, but the seminar would be considered solicitation and subject to the filing and other requirements of Rule 7.3(c).

Invitations Addressed to Particular Persons

24. The inquirer proposes to send seminar invitations to prospective attendees whose contact information appears on government lists.[1] Simon and Hyland state:

> As a quick rule of thumb, letters and emails are always "directed to, or targeted at" specific recipients — they have an address on them . . . . Likewise, every advertisement delivered in-person to an individual known in advance, and every telephone call (live or recorded), is to a "specific recipient."

Simon and Hyland, *supra* at 1791. Thus, if the communications contain a "hiring pitch" or other advertising, they constitute solicitation and must comply with Rule 7.3.

Soliciting Prospective Participants by Other Means

25. The inquirer asks about "soliciting" prospective clients to register for the seminars, without defining "soliciting." As in the case of sending communications to prospective attendees on commercially available mailing lists, if the communication constitutes an advertisement, any form of solicitation must comply with Rule 7.3.

Communications to Former Seminar Participants

26. The answer does not differ where the recipients are former seminar participants, whether the inquirer wishes (i) to send notices of future seminars that constitute advertising or (ii) to offer former participants legal representation on IP matters. Thus, the inquirer may not solicit in person or by real-time or interactive computer-accessed communications unless the recipient is a close friend, relative, former client or existing client – and the fact that a person participated in a webinar does not turn the participant into a client or close friend. And any solicitation not involving personal or real-time or interactive computer-access communications would have to comply with Rule 7.3.

Charging for Seminars

27. The inquirer asks if it makes a difference if the lawyer charges those who attend the seminars. There is nothing inherently unethical about charging for educational seminars. However, when a lawyer charges for seminars targeted at lay people, the lawyer should make clear that the seminar cannot give individualized legal advice. As expressed in Rule 7.1, Cmt. [9]:

> A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

Otherwise, the attendees may believe that their payments entitle them to receive legal advice.

Communications Using Social Media with Target Filters

28. The inquirer asks whether it is ethically permissible "to advertise the webinars/seminars on social media, using social media provided filters to target a specific audience." In N.Y. State 1016 (2014), we discussed a lawyer's sending advertisements through internet message boards for specific groups, such as parenting groups, neighborhood specific groups and parents of children with special needs and concluded that advertisements sent through such message boards would not constitute solicitation. We assumed that such messages would not be individually addressed, but rather would be posted on the message board. We therefore concluded that the advertisements were akin to public media and would not be deemed to be directed to or targeted at a specific recipient. We also concluded that the internet message boards did not involve real time or interactive computer-accessed communications. Because the proposed advertisement was not directed to, or targeted at, a specific recipient or group of recipients, and was not sent using real time or interactive computer communications, we concluded it would not be a solicitation.

29. Here, the inquirer has not provided information on the nature of the social media that the inquirer would use in the proposed communications. Consequently, we cannot determine whether the advertisements would be individually addressed or sent using real time or interactive computer-accessed media.

CONCLUSION

30. A lawyer may organize and participate in online webinars and live seminars for non-lawyers on topics within the lawyer's fields of competence, publicize the same by individual invitation, social media or other lawful means, and following a webinar or seminar discuss representation with webinar/seminar participants, all subject to compliance with applicable rules on advertising and solicitation as discussed in the body of this opinion.

(22-16)

[1]Questions of law are outside our jurisdiction, so we do not opine on whether using government agency or commercial business lists to develop a list of invitees may violate any federal or state law, e.g., with respect to privacy. Cf., Driver's Privacy Protection Act 18 U.S.C.A. §§2721-2725; Maracich v. Spears, 133 Sup. Ct. 2191 (2013).

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NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 1132

New York State Bar Association
Committee on Professional Ethics

Opinion 1132 (8/8/17)

Topic: Paying nonlawyers for a recommendation or referral

Digest: A lawyer may not pay the current marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a).

Rules: 1.0(a), 5.4(a), 7.1(a), 7.1(b)(1), 7.1(f). 7.1(h), 7.2(a)

FACTS

1. The inquirer is a lawyer who wishes to participate in Avvo Legal Services, which is a service of Avvo, Inc. Avvo, Inc. is a privately-owned corporation that describes itself as an online legal services marketplace. (Avvo, Inc. and Avvo Legal Services are sometimes each referred to in this opinion as "Avvo" and lawyers who offer Avvo Legal Services are referred to as "participating lawyers"). The inquirer would offer legal services through Avvo's website and pay the marketing fees that Avvo charges to lawyers who obtain clients via the Avvo website. The inquirer asks whether the New York Rules of Professional Conduct (the "Rules") permit New York lawyers to pay Avvo's marketing fees. Because Avvo's method of operation is crucial to our response, we will devote several paragraphs to describing the Avvo Legal Services product.

2. Avvo allows potential clients to choose participating lawyers in various practice areas for a fixed (*i.e.,* flat) fee. The Avvo website (*www.avvo.com*) says: "Experienced lawyers on demand. Hire yours" and "Work with highly rated, local lawyers near you," and it contains a guide called "How to find and hire a great lawyer."

Avvo Ratings

3. Avvo assigns every lawyer in a jurisdiction an "Avvo rating." The rating is calculated based on information Avvo collects from lawyer websites and other public sources (such as the type of work the lawyer does and the number of years the lawyer has been engaged in that work), as well as on information the lawyer has chosen to add to the lawyer's Avvo profile (such as publications, CLE presentations, speaking engagements and positions with bar associations and their committees). Avvo's website says that each attorney's rating "is calculated using a mathematical model, and all lawyers are evaluated on the same set of standards. ... At Avvo, all lawyers are treated equally." Avvo does not seek or accept any payment for an Avvo rating. However, lawyers who supply more information may receive higher ratings than lawyers who supply less information. Avvo says it scores all information objectively, and does not use subjective data such as client reviews. Although Avvo assigns a rating to all lawyers in a jurisdiction, lawyers cannot offer their services through Avvo unless they meet Avvo's minimum criteria and sign up with Avvo to be listed on the site and agree to Avvo's pricing schedule and marketing fees. According to Avvo, the criteria for participation include a minimum Avvo Rating, a minimum client review score, and a clean disciplinary history.

How a Prospective Client Chooses a Lawyer and Service

3. A prospective client seeking legal services through Avvo first chooses an area of law practice and a state or city. (Avvo lists all 50 states and the District of Columbia, and separately lists about 50 major cities.) The Avvo site says: "Choose an area of law to find top-rated attorneys near you." The site lists numerous areas of law practice, such as Business, Family, Government, Immigration, Bankruptcy and Debt, Criminal Defense, Landlord & Tenant, Employment & Labor, Real Estate, and Estate Planning.

5. Next, the prospective client chooses a type of legal service or "package." The Avvo website says: "Packages include advice sessions, document reviews, and start-to-finish support." Advice sessions (called "Avvo Advisor") come in two varieties – the prospective client may either (i) click on a specific lawyer, who is required by Avvo to call back within one business day, or (ii) click on "have a lawyer call me now," in which case Avvo sends a text message to all lawyers in the selected practice area and locale, and the first available lawyer calls the prospective client. When using the first of these varieties of advice session, the client is free to choose from the entire list of lawyers who are licensed in the client's state and who offer the service the client seeks to purchase.

6. Avvo's website does not say, "We recommend that you choose this lawyer," or "This lawyer is the best fit for your situation." Rather, Avvo furnishes information about lawyers (including client reviews, peer reviews, and Avvo ratings) and allows clients to choose the lawyer. Avvo describes its service as simply "facilitating a marketplace" where consumers can choose from among all of Avvo's participating lawyers.

7. Once the prospective client has chosen a lawyer (or opted for "have a lawyer contact me now") and selected a specified legal service, the client clicks on a button that says "Buy now." The lawyer then contacts the client. (Phone calls from a participating lawyer to a client initially go through an automated Avvo "switchboard" so that Avvo can time the calls, but Avvo asserts that it cannot listen to the calls.) Once the lawyer and client have completed a phone call of at least eight minutes, Avvo charges the client's credit card for the full amount of the fee for the selected legal service.

Avvo's Satisfaction Guarantee

8. Part of the Avvo product is that Avvo gives a "satisfaction guarantee" and will refund the fee to the client (or allow the client to choose a different participating lawyer at no additional charge) if (a) the lawyer does not deliver the services for which the client has paid, or (b) the client is not satisfied with the lawyer's services. Avvo's website describes the satisfaction guarantee as follows:

If you're not 100% happy with the service you purchased, we'll make it right.

We stand behind our services and expect our clients to be 100% satisfied with their experience. If you are unhappy with the service you purchased, we'll make it right. We will help you switch lawyers or services to make sure you get the legal help you need, at no cost to you. If you don't want to continue to solve your issue through Avvo Legal Services, we will fully refund your purchase.

What if I don't get the results I expect?

We guarantee the services listed on our website, but we can't guarantee any specific outcome. Every legal case is unique. The success of your case depends on many different factors.

How do I request a refund or file a complaint?

To file a complaint or seek a refund, contact customer care . . . . Depending on your situation, documentation may be needed. Your customer care rep will work with you to fix the situation to your satisfaction.

Avvo considers this satisfaction guarantee to be part of its marketing costs, reasoning that the satisfaction guarantee makes participating lawyers more attractive than lawyers who do not offer a satisfaction guarantee.

Avvo's Marketing Fee

9. At the beginning of each month, Avvo pays each participating attorney all of the legal fees generated through Avvo by that attorney in the previous month, and separately charges each attorney a "marketing fee" for each legal service the attorney has completed during the prior month (unless Avvo has refunded the client's payment). As an example, Avvo's website tells lawyers that "if a client purchases a $149 document review service with you, you will be paid the full $149 client payment into your deposits account. As a separate transaction, you will be charged a $40 marketing fee from your withdrawals account." *See* http://bit.ly/2fIlOxM ("Attorney FAQ for Avvo Legal Services").

10. The amount of Avvo's marketing fee depends on the service. For more expensive legal services, Avvo generally charges lawyers a higher marketing fee. An FAQ on Avvo's website explains the marketing fee as follows: "The amount depends on the service, and ranges from a $10 marketing fee for a $39 service, to $40 marketing fee for a $149 service, up to a $400 marketing fee for a $2,995 service." As these examples show, the marketing fee is not directly proportional to the price of the legal service – a $10 marketing fee is 25.6% of a $39 service and a $40 marketing fee is 26.8% of a $149 service, but a $400 marketing fee is only 13.4% of a $2995 service.[1] Thus, the marketing fee is not a fixed percentage of the legal fees, but it is generally greater for higher-priced services than for lower-priced services.

11. To understand Avvo's rationale in setting its marketing fees, this Committee posed various questions directly to Avvo. Avvo explained that the correlation between its marketing fees and the price of Avvo legal services reflects two interrelated concepts.

12. First, Avvo says that more expensive legal services cost more to market. For example, Avvo says that its ad placements on Google and on online advertising networks cost more for more expensive services, and cost more for more competitive keywords. Also, Avvo's marketing fee covers the credit card processing fee, which is a fixed percentage of the total legal fee, so a higher legal fee necessarily entails a higher credit card processing fee.

13. Second, Avvo says that its customer service costs are higher for more expensive services. For example, Avvo says that its "platform usage" and "customer care" expenses are higher for more expensive services, because clients raise more questions about more expensive services. Avvo employs a team of live customer care representatives who handle client inquiries via phone, email, and electronic chat – see https://support.avvo.com/hc/en-us/requests/new. In addition, Avvo says that requests for refunds, voids, chargebacks, and other forms of what it calls "breakage" are higher for more expensive services. We have not verified any of Avvo's facts or claims regarding its marketing expenses, but we accept them as true for purposes of our analysis in this opinion.

QUESTION

14. May a New York lawyer pay Avvo's current marketing fee to participate in Avvo Legal Services?

OPINION

Issues Not Decided Here

15. Avvo's mode of operation raises many questions under the Rules in addition to the marketing fee issue. For example:

•Avvo markets the services of participating lawyers. Rule 7.1(a) prohibits a lawyer from participating in an advertisement that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule." Rule 7.1(a) also requires that certain ads contain prescribed disclosures, such as the label "Attorney Advertising," and information about the lawyer whose services are advertised. *See* Rules 7.1(f), 7.1(h). Rule 1.0(a) defines an "advertisement" to mean "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 layer or law firm." As we said in N.Y. State 1131 (2017):

Even though the Service, not the lawyer, creates and disseminates the Service's website, each participating lawyer is "participat[ing] in the use and dissemination of" this advertisement within the meaning of Rule 7.1(a) and therefore has a duty to assure that the website is consistent with Rule 7.1. This means that a participating lawyer must determine that the website does not make false, misleading or deceptive statements or claims, or otherwise violate the Rules.

•Under Rule 7.1(b)(1) and Comment [13] to Rule 7.1, lawyers may not use Avvo ratings (or any other ratings) in their advertising unless those ratings are "bona fide professional ratings." As noted in ¶ 19, the Avvo website constitutes advertising of lawyers who participate in Avvo Legal Services. Consequently, participating lawyers must determine whether the ratings provided by the service are bona fide. Comment [13] to Rule 7.1, headed "Bona Fide Professional Ratings," provides guidance, saying that ratings are not "bona fide" unless (among other things) the ratings "evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests," and are "not subject to improper influence by lawyers who are being evaluated." If the rating is not bona fide, it would be false and misleading in violation of Rule 7.1(a)(1). We lack sufficient facts to determine (and do not decide) whether Avvo's rating system meets the criteria for a bona fide professional rating.

•Many of the services under the Avvo Legal Services program involve limited services, such as a 15-minute advice session or review of a document and a 30-minute advice session but not revision of the document. Both the Rules and our opinions have approved limited scope representations under certain conditions that we do not repeat here. *See* Rule 1.2(c) and Cmts. [6] and [7], N.Y. State 856 (2011), N.Y. State 604 (1989).

•The fact that Avvo sets the amount of the legal fee for each service raises questions about whether a participating lawyer can deliver competent legal services for Avvo's chosen price and whether a lawyer is allowing Avvo to interfere in the lawyer's independent professional judgment regarding how much time to spend on a matter.

•The marketing fee raises questions about whether lawyers who participate in Avvo Legal Services are improperly sharing legal fees with a nonlawyer.[2]

•Avvo's satisfaction guarantee raises questions about confidentiality. If clients call Avvo to complain, does the "documentation" that Avvo asks for or receives include "confidential information" within the meaning of Rule 1.6(a)? How does Avvo avoid receiving confidential information when evaluating whether to refund the legal fee a client has paid through Avvo?

16. In this opinion, we do not address or answer any of those additional issues, because we believe our answer to the question posed by the inquirer is dispositive. Similarly, we express no opinion as to whether Avvo's operations implicate § 495(1)(d) of the Judiciary Law, which provides that "[n]o corporation . . . shall . . . furnish attorneys or counsel". That is a question of law beyond our jurisdiction. Instead, we focus in this opinion only on whether the marketing fee that Avvo charges to participating lawyers constitutes an improper payment for a recommendation (*i.e.*, an improper referral fee) within the meaning of Rule 7.2(a) of the Rules.

Does the marketing fee constitute an improper payment for a recommendation?

17. Rule 7.2(a) sets forth the following general rule:

A lawyer shall not compensate or give anything of value to a person or organization to *recommend* or obtain employment by a client, or as a reward for having made a *recommendation* resulting in employment by a client .... [Emphasis added.]

(Rule 7.2(a) also states two exceptions not relevant here.)

18. Whether paying Avvo's marketing fee complies with Rule 7.2(a) depends primarily on what a lawyer is purchasing when the lawyer pays Avvo's marketing fee. If the lawyer is paying the marketing fee solely to obtain advertising and marketing services from Avvo, then the lawyer is not giving Avvo something "of value" to recommend the lawyer, but is instead paying Avvo for marketing services, which does not violate Rule 7.2(a). If, however, the marketing fee also includes a payment to Avvo for recommending the lawyer, then the payment constitutes giving something "of value" for a recommendation, which does violate Rule 7.2(a).

1. *Is the marketing fee solely a payment for advertising and marketing services?*

19. A marketing fee is not *per se* prohibited by Rule 7.2(a). A lawyer may pay nonlawyers to advertise or market the lawyer's services. Comment [1] to Rule 7.2 says explicitly that Rule 7.2(a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules," and that a lawyer "may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff, and web site designers." We believe Avvo's website is an "advertisement" within the meaning of Rule 1.0(a). The Avvo website is a public communication on behalf of each participating lawyer, about that lawyer, for the primary purpose of helping the participating lawyers obtain employment by potential clients who use the Avvo website. And the participating lawyers "use or . . . participate in use" of the advertisement within the meaning of Rule 7.1(a) because they must take action to participate in Avvo Legal Services.

20. We addressed payments to nonlawyers for advertising in N.Y. State 897 (2011), which addressed a "deal-of-the-day" service similar to Groupon or Living Social. There, the deal-of-the-day service negotiated with lawyers to obtain a discounted legal fee. Potential clients who wanted the lawyer's discounted services used a credit card on the deal-of-the-day website to purchase a voucher for the lawyer's services. The website then deducted "a percentage of the gross receipts as its compensation" and paid the balance to the lawyer. (Opinion 897 does not specify the percentage.) We asked "whether the money retained by the website is merely an appropriate payment for a novel form of advertising or is a compensation for the referral of a client." We concluded that the deal-of-the-day arrangement was an appropriate payment for advertising, and was not payment for a referral, and therefore did not violate Rule 7.2(a). To explain our rationale, we said (in ¶12):

> We note that the website has no individual contact with the coupon buyers other than collecting the cost of the coupon. The website has not taken any action to refer a potential client to a particular lawyer – instead it has carried a particular lawyer's advertising message to interested consumers and has charged a fee for that service.

21. Opinion 897 did not reach a categorical conclusion, however, because we were "not privy to the percentage amount retained by these various websites...." We said: "[A]ssuming that it is a reasonable payment for this form of advertising, we conclude that there is no violation of Rule 7.2." We then qualified our opinion by saying: "Different arrangements between the lawyer and the website could lead to the opposite conclusion, *i.e.,* that the lawyer is paying for a referral in violation of Rule 7.2."

22. Here, we again lack sufficient information to determine whether Avvo's marketing fee is "a reasonable payment for this form of advertising." We therefore do not decide this question.[3]

2. Is the marketing fee a payment for a recommendation?

23. Under Rule 7.2, although lawyers may ethically pay nonlawyers for advertising and marketing services, they may not pay for a "recommendation." Therefore, we must determine whether the marketing fee is or includes a payment to Avvo to recommend the participating lawyers.

24. The term "recommendation" is not defined in the text of the Rules. However, in March 2015, after we issued N.Y. State 897 (2011), the New York State Bar Association amended Comment [1] to Rule 7.2 to address, among other things, whether a third party that connects lawyers with clients or potential clients is "recommending" the lawyer, and to define a "recommendation." Comment [1] now states, in part:

[1] ... A communication contains a recommendation *if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.* [Emphasis added.]

See also N.Y. State 1131 ¶ 19 (2017), (to "recommend" includes identifying a particular lawyer or lawyers to a potential client as "a right" or "the right" lawyer for the client's situation after an analysis of either the potential client's legal problem or the lawyer's qualifications to address that problem, which implies a qualitative, comparative assessment of the lawyers available to perform the services the potential client requires).

25. Comment [1] to Rule 7.2 adds that recommendations by so-called "lead generators" are improper:

... [A] lawyer may pay others for generating client leads, such as Internet-based client leads, as long as *(i) the lead generator does not recommend the lawyer,* (ii) any payment to the lead generator is consistent with Rule[] ... 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (advertising) and 7.3 (solicitation and recommendation of professional employment). ... [Emphasis added.]

Indeed, Comment [1] prohibits a lead generator not only from *stating* that it is recommending a lawyer, but also from *implying or creating a reasonable impression* that it is making such a recommendation:

... To comply with Rule 7.1, a lawyer must not pay a lead generator that *states, implies, or creates a reasonable impression that it is recommending the lawyer,* is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. ... [Emphasis added.]

We must therefore determine whether Avvo is "recommending" a lawyer or "implying or creating a reasonable impression" that it is making a recommendation.

26. As noted earlier, Avvo allows clients to choose from among all of the lawyers in a geographic area who have listed themselves as practicing the field of law in which the client wants legal services. (Avvo says lawyers are displayed randomly and the list is reshuffled at least once every hour.) Avvo says that it does not analyze (or even inquire about) a client's individual situation. No human being at Avvo talks directly to any prospective client to find out the facts or studies the prospective client's documents and then picks out a particular lawyer who is "right" for that client. Nor does Avvo's website suggest that a client hire any particular lawyer. Avvo is not "recommending" lawyers in that sense.

27. But Avvo does more than merely list lawyers, their profiles, and their contact information. Avvo also gives each lawyer an Avvo rating, on a scale from 1 to 10. As Avvo explains on its website, "It's as simple as counting to 10. Ratings fall on a scale of 1 (Extreme Caution) to 10 (Superb), helping you quickly assess a lawyer's background based on our rating." (Emphasis in original.) The Avvo ratings suggest mathematical precision – the rating for each lawyer is calculated to a decimal place (*e.g.,* a rating of 6.7 or 8.4).

28. Moreover, some Avvo ads expressly state that the Avvo Rating enables a potential client to find "the right" lawyer, and Avvo's website claims that its ratings enable potential clients to choose the right lawyer for their needs:

Why the Avvo Rating can help you find the right attorney:

The model used to calculate the rating was developed with input from hundreds of attorneys, thousands of consumers, and many other legal professionals who deeply understand the work attorneys do. We created the Avvo Rating to reflect the type of information people have identified as important when looking to hire an attorney.

29. Even if Avvo ratings are "bona fide," within the meaning of Rule 7.1(b)(1), we must determine whether (i) Avvo's inclusion of Avvo Ratings in Avvo's advertising on behalf of participating lawyers, or (ii) Avvo's description of its ratings in its advertising, is or implies a "recommendation," i.e. whether the rating "endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

30. Avvo's website never describes a rating as a recommendation, and it contains several warnings about the limitations of its ratings. The website says:

•"A rating is not an endorsement of any particular lawyer, and is not a guarantee of a lawyer's quality, competency, or character. . . . Rather, the Avvo Rating is intended to be a starting point to gather information about lawyers who may be suitable for your legal needs."
•"Keep in mind that these ratings speak to a lawyer's background, but do not evaluate their knowledge of the law, past performance on individual cases, personality, or communication skills. These are elements that the Avvo Rating cannot evaluate, but can be better described in the client reviews and peer

endorsements found on an attorney's profile."
•"[W]e don't recommend the Avvo Rating as the only piece of information you use to evaluate whether an attorney is right for you. The rating is a tool that provides a snapshot assessment of a lawyer's background, and should be considered alongside other information such as client reviews and peer endorsements."

31. Nevertheless, the Avvo website also extols the benefits of being able to work with highly-rated lawyers:

•"Work with highly rated, local lawyers near you."
•"Search top-rated lawyers near you."
•"We only work with highly qualified attorneys who are licensed to practice in your state."

Through these statements and through Avvo's description of its rating system, Avvo is giving potential clients the impression that a lawyer with a rating of "10" is "superb," and is thus a better lawyer for the client's matter than a lawyer with a lower rating. Avvo is also giving potential clients the impression that Avvo's eligibility requirements for lawyers who participate in Avvo Legal Services assure that participating lawyers are "highly qualified."

32. We do not believe that a bona fide professional rating alone is a recommendation. But, even assuming that Avvo ratings are "bona fide professional ratings," we believe the way Avvo describes in its advertising material the ratings of participating lawyers either expressly states or at least implies or creates the reasonable impression that Avvo is "recommending" those lawyers.

33. In N.Y. State 799 (2011), in discussing the difference between an internet-based directory and a recommendation, we said that the line between the two was crossed when a website purports to recommend a *particular lawyer or lawyers* based on an analysis of the potential client's problem. Other jurisdictions also focus on the "particular lawyer" distinction. *See, e.g.*, South Carolina 01-03 (lawyer may pay internet advertising service fee determined by the number of "hits" that the service produces for the lawyer provided that the service does not steer business to any particular lawyer and the payments are not based on whether user ultimately becomes a client); Virginia Advertising Op. A-0117 (2006) (lawyer may participate in online lawyer directory in which publisher does not recommend or steer business to particular lawyers). We believe Avvo's advertising of its ratings, in combination with its statements about the high qualifications of lawyers who participate in Avvo Legal Services, constitutes a recommendation of all of the participating lawyers.

34. Our conclusion is bolstered by Avvo's satisfaction guarantee, by which the full amount of the client's payment (including Avvo's portion of the fee) is refunded if the client is not satisfied. This guarantee contributes to the impression that Avvo is "recommending" the lawyers on its service because it stands behind them to the extent of refunding payment if the client is not satisfied.

35. This opinion does not preclude a lawyer from advertising bona fide professional ratings generated by third parties in advertisements, and we recognize that a lawyer may pay another party (such as a magazine or website) to include those bona fide ratings in the lawyer's advertisements. But Avvo Legal Services is different. It is not a third party, but rather the very party that will benefit financially if potential clients hire the lawyers rated by Avvo. Avvo markets the lawyers participating in the service offered under the Avvo brand, generates Avvo ratings that it uses in the advertising for the lawyers who participate in Avvo Legal Services, and effectively "vouches for" each participating lawyer's credentials, abilities, and competence by offering a full refund if the client is not satisfied. As noted earlier, Avvo says: "We stand behind our services and expect our clients to be 100% satisfied with their experience." Accordingly, we conclude that lawyers who pay Avvo's marketing fee are paying for a recommendation, and are thus violating Rule 7.2(a).

36. The questions we have addressed here have generated vigorous debate both within and outside the legal profession. The numbers of lawyers and clients who are using Avvo Legal Services suggest that the company fills a need that more traditional methods of marketing and providing legal services are not meeting. But it is not this Committee's job to decide policy issues regarding access to justice, affordability of legal fees, or lawyer quality. Our job is to interpret the New York Rules of Professional Conduct. Future changes to Avvo's mode of operation – or future changes to the Rules of Professional Conduct – could lead us to alter our conclusions, but at this point we conclude that, under Avvo's current structure, lawyers may not pay Avvo's marketing fee for participating in Avvo Legal Services.

CONCLUSION

37. A lawyer paying Avvo's current marketing fee for Avvo Legal Services is making an improper payment for a recommendation in violation of Rule 7.2(a).

(29-16)

[1]Avvo also provided this Committee with a list of many additional services, prices, and marketing fees. For example, marketing fees are generally $30 for a $99 service (33.3%); $50 for a $199 service (25.1%); $80 for a $295 service (27.1%); $125 for a $595 service (21%); and $150 for a $495 service (30.3%); and $200 for a $995 service (20%). Thus, while the marketing fee increases in absolute dollars as the price of the service increases, the marketing fee generally decreases in percentage terms as the price increases. But in a few instances, Avvo charges the same marketing fee for services of different prices – for example, filing for an uncontested divorce is $995, and creating an estate plan bundle for an individual is $795, but Avvo charges a $200 marketing fee for both. Also, Avvo charges a different marketing fee for some services of the same price – for example, Avvo charges $199 to review a non-compete agreement, to petition for an alien relative, or to create an employment offer letter, but Avvo charges $50, $55, and $60 respectively as a marketing fee for those services.

[2]Several ethics opinions from other jurisdictions have concluded that lawyers working with Avvo or similar entities are engaged in improper fee sharing or are violating other Rules of Professional Conduct. For example, NJ ACPE 732 (2017) concluded that New Jersey lawyers "may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer," and Pennsylvania 2016-200 (2016) concluded that a hypothetical program similar to Avvo was engaged in "impermissible fee sharing under RPC 5.4(a)." Noting that the "primary policy underlying RPC 5.4(a) is the preservation of the lawyer's professional independence," Opinion 2016-200 said: "[T]he assumption that the lawyer's payment to a non-lawyer of marketing fees amounting to 20% to 30% of legal fees earned does not interfere with the lawyer's professional independence is, at a minimum, of questionable validity." *See also* Ohio 2016-3 (2016) ("A lawyer's participation in an online, nonlawyer-owned legal referral service, where the

lawyer is required to pay a 'marketing fee' to a nonlawyer for each service completed for a client, is unethical," citing Rule 5.4). We express no opinion on whether those opinions reach the correct conclusions. *Compare* N.Y. State 1131 (2017), in which we determined that a flat fee constituted a payment for advertising and not a sharing of legal fees.

[3]A deal-of-the-day service differs in at least one significant respect from Avvo Legal Services. A lawyer participating in a deal-of-the-day program negotiates a discounted fee, but the fee is ultimately set by the lawyer. A lawyer who participates in Avvo, in contrast, must agree to charge the fee set by Avvo for each particular service.

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New York County Lawyers Association Professional Ethics Committee

Formal Opinion 750

March 29, 2017

TOPIC: Whether a lawyer "adding" an adverse party or witness on Snapchat constitutes an ethical violation.

DIGEST: A lawyer is prohibited, either directly or indirectly, from using deceptive means to access the restricted electronic social media maintained by an adverse party or witness. A lawyer is prohibited, directly or through his or her agent, from seeking to add the adverse party or witness as a "friend" because there is no ability simultaneously to inform the Snapchat user of the lawyer's role in the pending adverse proceeding and the reason the lawyer is seeking access, such that seeking to add the adverse party or witness would result in deception by omission.

RULES OF PROFESSIONAL CONDUCT: 4.1; 4.2, 3.5, 5.3(b)(1), 8.4(c).

OPINION: Social media has become a significant factor in U.S. litigation. Publicly available social media can provide important information in various stages of a litigation, including the pre-filing investigation, discovery, jury selection and trial. As of August 2016, there were an estimated 3,532,000,000 unique visits to the top 15 social media sites.[1] Some commentators have suggested that a lawyer's failure to review publicly available information about an adversary, witness or juror may constitute a violation of the lawyer's duty of competence under Rule 1.1. *See, e.g.*, Hope A. Comisky & William M. Taylor, "Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas – Discovery, Communications with Judges and Jurors, and Marketing, 20 Temp. Pol. & Civ. Rts. L. Rev., 302 (observing that "an attorney's ethical obligation to thoroughly research the facts of a case dictates that he should investigate whether a party or witness's public pages contain useful information"); *see also* New York State Bar Association Social Media Guidelines, http://www.nysba.org/socialmediaguidelines/ (stating that a "lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as . . . as a means to research and investigate matters").

Since at least 2009, lawyers have been cautioned that there are ethical limits to their ability to access and use information posted on electronic social media by adverse parties, adverse witnesses, and jurors. *See, e.g.*, NYCLA Formal Op. 743 (2011) (ethical for lawyer to conduct pretrial search of prospective juror's social networking site, and post-voir dire searches on social networking sites, provided there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts or otherwise communicate with the juror); N.Y. City Formal Op. 2010-2 (lawyer may not gain access to a social networking website, directly or through an agent, by using false pretenses, but may use truthful information to gain access); N.Y. State Op. 843 (2010) (lawyer representing a client in pending litigation may access public pages of another party's social networking website to obtain possible impeachment material, but is prohibited from employing deception to "friend" another party, directly or indirectly, to access private pages); Philadelphia Bar Op. 2009-02 (March 2009) (allowing the inquiring lawyer to cause a third party to "friend" a witness to access a witness's Facebook and MySpace pages that were not publicly available in order to obtain impeachment material would constitute deception in violation of Pennsylvania Rules 8.4(c) and 4.1). Critical in each of those ethics opinions is the prohibition of a lawyer from engaging in a range of prohibited conduct in the course of conducting informal discovery using electronic social media. Proscriptions include Rule 4.1

[1] Lisa Hainla, "Most Popular Social Media Sites," Dreamgrow (August 26, 2016) http://www.dreamgrow.com/top-15-most-popular-social-networking-sites/.

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(prohibiting knowingly making a false statement of fact or law to a third person); Rule 4.2 (prohibiting lawyer from communicating, or causing a communication, with a represented party about the subject of a representation absent prior consent or legal authority); Rule 3.5 (prohibiting communications with a member of the jury venire or a selected juror); Rule 5.3(b)(1) (making a lawyer responsible for conduct of nonlawyers acting under the lawyer's direction that would violate the Rules if engaged in by the lawyer); and Rule 8.4(c) (prohibiting engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) in the New York Rules of Professional Conduct. The opinions have been consistent in prohibiting lawyers – by deception or omission – from misleading adverse parties and witnesses in order to mine their social media for useful impeachment material.

ABA Formal Op. 466 (2014) sheds further light on when a lawyer's access of a subscriber's electronic social media constitutes an impermissible communication in violation of the Model Rules, but in the context of mining a juror's electronic social media. Opinion 466 concludes that a lawyer may not, either personally or through someone else, send an access request to a juror's electronic social media in order to gain access to information the juror has not made public because doing so would violate Model Rule 3.5, which prohibits a lawyer from communicating with a member of the jury venire or with a juror post-voir dire. The opinion observes that public access to electronic social media or websites will vary, and makes clear that the prohibition against a lawyer making access requests applies to information on a juror-subscriber's social media service that is restricted to other subscribers to whom the juror has granted permission. In addition, Opinion 466 concludes that "a lawyer who uses a shared [electronic social media platform] to *passively* view juror [electronic social media] . . . does not communicate with the juror" (emphasis added). For example, a lawyer who views a LinkedIn subscriber's profile, which is publicly available, has not caused an improper communication with the subscriber by passively viewing the subscriber's LinkedIn profile and generating a notification to the person who maintains the profile. Moreover, passive review of a LinkedIn profile is distinguishable from "friend" requests on Facebook; "friend" requests were deemed to be impermissible communications in the New York ethics opinions cited in this opinion because the lawyers making the "friend" requests did not reveal their true identity or purpose in seeking access to the Facebook subscriber's restricted communications.

In addition, if the act of a lawyer accessing an adverse party or witness via social media constitutes a communication with the witness or adversary (as distinguished from viewing a LinkedIn profile maintained by a witness or adversary), the lawyer will have additional ethical proscriptions to consider. Rule 4.2 (a) prohibits a lawyer from communicating or causing another to communicate about the subject of the representation with someone the lawyer knows to be represented by another lawyer in the matter absent the prior consent of the other lawyer or authorization under the law. Therefore, where a lawyer wishes to access the social media of a represented party or witness and such access constitutes a communication with that person, the lawyer seeking access must first contact the lawyer representing the party or witness to seek permission.

Determining what is or is not permissible when lawyers wish to mine the social media of an adverse party or witness has become more complicated with the increasing number of social media platforms and changes in the way that each platform is accessed by users. Early ethics opinions focused on Facebook and Myspace, but since that time social media subscribers have moved on to other social media platforms where the means of accessing or retaining posted information varies.[2] The variability in the

[2] *See, e.g.*, Lisa Hainla, "Most Popular Social Media Sites," Dreamgrow (August 26, 2016) http://www.dreamgrow.com/top-15-most-popular-social-networking-sites/ (listing Facebook, YouTube, Twitter, LinkedIn, Pinterest, Google Plus+, Tumblr, Instagram, Reddit, Vine and Classmates, among others); Anthony Maina, "Popular Social Media Sites," Small Business Trends (May 4, 2016), https://smallbiztrends.com/2016/05/popular-social-media-sites.html (including Facebook, Twitter, LinkedIn, Google+, Instagram, Snapchat and WhatsApp among its list of the 20 most popular social media websites, and noting differences

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way that each of these platforms is accessed may have implications for when a lawyer may ethically mine social media in the course of a representation; the constant is that lawyers continue to be prohibited from using deceptive means to access this information. It follows that lawyers are prohibited, directly or through an agent, from obtaining even temporary access to a social media user's restricted information if this access was obtained through deception or omission.

This opinion responds to a specific request for guidance regarding a lawyer's permissible use of Snapchat to obtain information about an adversary. The inquirer asks whether "adding" an adverse party on Snapchat constitutes a *per se* ethical violation. By way of background, Snapchat is a photo and video messaging application that was launched in 2011.[3] A Snapchat subscriber can also post multiple snaps to his or her story in a day in order to creative a narrative, and Snapchat also has a messaging feature. Snapchat permits subscribers to send photos and videos ("snaps") without leaving a permanent record in cyberspace because the messages disappear after a pre-determined period of time. It is possible, however, to take a screenshot of "snaps" in order to save them in picture form. When preserved by screenshots, individual snaps and snaps that are broadcast to a Snapchat subscriber's followers ("stories"), which normally are available for viewing by other Snapchat users only for a 24 hour period, may be preserved indefinitely.

Particularly pertinent is the manner in which Snapchat subscribers are able to view other subscribers' snaps and stories. Swiping down on the main Snapchat screen or tapping on the Snapchat logo allows a Snapchat subscriber to access the contacts screen. From the contacts screen, a subscriber can add friends, view who has added the subscriber, and browse a friend's snaps. A Snapchat subscriber makes a request to add a new friend by using the other subscriber's username or snapcode, or identifying a Snapchat user who is nearby, and sending an "add friend" request. After making a friend request, the first subscriber can begin viewing the second subscriber's public stories, but only if the second subscriber has set his or her profile to permit stories to be visible by "Everyone." The second subscriber will have received a notification that he or she has been added as a friend, but will not be connected to the first subscriber unless and until the second subscriber accepts the first subscriber by clicking the "+" icon. If the second subscriber only permits his or her Snapchat "friends" to view the subscriber's snaps or stories – and thus restricts all of his or her Snapchat communications – the second subscriber will not have any content that is publicly available.

Here, the inquirer seeks to "add" an adverse party on Snapchat in order to view that party's publicly available stories. The inquirer argues that although the "add" feature sends a notification to the subscriber, it only permits the lawyer to obtain access to any publicly available material, so it is more akin to accessing the electronic social media platform rather than a direct communication with the subscriber. It is also true, however, that the "add friend" notification in Snapchat prompts the Snapchat subscriber to add the lawyer as a friend or take no action on the request; if the second subscriber adds the lawyer as a Snapchat friend, the lawyer will have gained access to the adverse party's or witness's restricted postings without having revealed the reason he or she sought out the Snapchat subscriber, resulting in a prohibited deception by omission. Accordingly, because Snapchat is a social media platform that, at least as currently configured, does not provide a means for the lawyer to make the requisite disclosure when seeking to access restricted information maintained by a Snapchat user, lawyers are ethically prohibited from sending an "add friend" request to an adverse party or witness. The same prohibition would apply to any social media platform that similarly does not provide a means for a lawyer to make an adequate disclosure prior to gaining access to restricted information maintained on the platform.

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in the manner in which social media platforms are used, the format of its content, and how it is accessed and retained).

[3] As of 2015, Snapchat averaged 100 milion daily active subscribers generating well over 700 million snaps a day, and more than 18% of social media subscribers use Snapchat. Anthony Maina, "Popular Social Media Sites," Small Business Trends (May 4, 2016), https://smallbiztrends.com/2016/05/popular-social-media-sites.html.

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CONCLUSION: A lawyer is prohibited from using deception to access the restricted electronic social media maintained by an adverse party or witness, regardless of whether the lawyer personally seeks the information or asks someone else to retrieve the restricted information. Applying this general principal to Snapchat as currently configured, lawyers are prohibited, either directly or through an agent, from sending an "add friend" request to an adverse party or witness because there is no means to disclose the lawyer's role in the pending adversarial proceeding prior to the Snapchat user acting on the request.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

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

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

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

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

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, 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 review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

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

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g., In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

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4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This 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.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This 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.

Discussion 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.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by 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 ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

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

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

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13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3.*[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal.*[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

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14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror....").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

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

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

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

Formal Opinion 2008-1: A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation

QUESTIONS

What ethical obligations does a lawyer have to retain e-mails and other electronic documents relating to a representation? Does a lawyer need client permission before deleting e-mails or other electronic documents relating to the representation? When a client requests that a lawyer provide documents relating to the representation, may the lawyer charge the client for the costs associated with retrieving e-mails and other electronic documents from accessible and inaccessible storage media?

OPINION

I. Background

We live in the digital era. Lawyers routinely use e-mail to formally convey important information and documents to clients, colleagues, and other counsel. Just as routinely, lawyers use e-mail to conduct informal conversations. In many law practices, lawyers are as likely to send an e-mail as to pick up the telephone or walk down the hall to a colleague's office.

The growing reliance by lawyers on digital technology, of course, is not limited to e-mails. Virtually all correspondence, transactional documents, and court filings originate as electronic documents. Many of these electronic documents are never converted into paper format, and lawyers have become increasingly comfortable in drafting, editing, and commenting on these documents. Emblematic of the growing reliance on electronic documents, courts and administrative agencies now increasingly insist that lawyers make filings electronically. In addition, many lawyers and law firms, taking advantage of widely available document imaging technology, convert their paper records into electronic documents for organizational and storage purposes.

Given this reality, we believe that it would be useful to address some of the ethical issues implicated by a lawyer's reliance on e-mails and other electronic documents. Specifically, this Opinion addresses (i) a lawyer's ethical obligation to retain e-mails and other electronic documents relating to a representation; (ii) the ethical limitations on a lawyer's ability to delete e-mails and other electronic documents; (iii) the extent to which a client has a presumptive right to e-mails and other electronic documents in a lawyer's possession; and (iv) the extent to which a lawyer may charge a client for producing e-mails and other electronic documents at the client's request.1

II. A Lawyer's Obligation to Retain E-mails and Other Electronic Documents

A lawyer's file relating to a representation includes both paper and electronic documents.2 The ABA Model Rules of Professional Conduct (the "Model Rules") define a "writing" as "a tangible or electronic record of a communication or representation ...." Rule 1.0(n), Terminology.

The Code of Professional Responsibility (the "Code") does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation. The only Code provision that specifically requires a lawyer to retain client records is DR 9-102. That disciplinary rule imposes mandatory record-retention requirements with respect to a small number of discrete documents, such as retainer agreements, bills to clients, bank statements, and records of transactions in escrow accounts. *See* DR 9-102(D)(1)-(10).

The Code, however, contains several provisions that implicitly impose on lawyers an obligation to retain documents. For instance, under DR 6-101, a lawyer has an obligation to represent a client competently. *See also* EC 6-1 ("Because of the lawyer's vital role in the legal process, the lawyer should act with competence and proper care in representing clients."). Similarly, DR 7-101(A)(3) states that "[a] lawyer shall not intentionally . . . [p]rejudice or

damage the client during the course of the professional relationship," subject to certain defined exceptions in DR 2-110 and DR 7-102.

In 1986, before the explosive growth in electronic documents, this Committee addressed a lawyer's obligations regarding the retention and disposition of documents in the lawyer's file at the end of a representation. Endorsing several guidelines adopted by the American Bar Association,3 we recognized as a starting point that certain documents in a lawyer's file might belong to the client and should be returned at the client's request.4 ABCNY Formal Op. 1986-4. This Committee further opined, without significant elaboration, that before destroying any documents that belong to the client, the lawyer should contact the client and ask whether the client wants delivery of those documents.5

As to documents "that belong to the lawyer" or "as to which no clear ownership decision can be made," this Committee opined that the questions whether and how long to retain these documents were "primarily a matter of good judgment." *Id.* We noted that with respect to these documents, the lawyer should use care not to destroy or discard documents (i) that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired; or (ii) that the client has not previously been given but which the client may need and may reasonably expect that the lawyer will preserve. *Id.*

In any given representation, a number of documents will likely fall into one of these two categories. Among those documents are legal pleadings, transactional documents, and substantive correspondence. Other documents regularly generated during a representation, such as draft memoranda or internal e-mails that do not address substantive issues, are unlikely to fall into these categories. Often a lawyer will need to exercise good judgment, document by document, to determine whether specific documents should be retained.

To be sure, our 1986 Opinion does not require a lawyer to retain every paper document that bears any relationship, no matter how attenuated, to a representation. For instance, consistently with the guidelines described above, a lawyer does not have an ethical obligation to keep every handwritten note of every conversation relating to a representation. The same conclusion will often be reached with respect to drafts of correspondence, of pleadings, and of legal memoranda, among other types of paper documents.

Because many e-mails and other electronic documents now serve the same function that paper documents have served in the representation of a client, we believe that the retention guidelines articulated in our 1986 Opinion should also apply to e-mails and other electronic documents.

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 our 1986 Opinion. No ethical rule prevents a lawyer from deleting those e-mails.6

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under our 1986 Opinion. 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.

III. A Lawyer's Obligations to Organize and Store E-mails and Other Electronic Documents

We next consider whether a lawyer has any ethical obligation to organize in any particular manner those e-mails and other electronic documents that the lawyer retains, or to store those documents in any particular storage medium.

We do not believe, as a general matter, that a lawyer has any ethical obligation to organize electronic documents in any particular manner, or to store those documents in any particular storage medium. In determining how to organize and store electronic documents, a lawyer should take into consideration the nature, scope, and length of the representation, and the client's likely need for ready access to particular documents. From an ethical standpoint, a

lawyer should ensure that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve.

This is more of an issue for e-mails than for other electronic documents. Law firms frequently store electronic documents other than e-mails, such as transactional documents and court filings, in a document management system. In such a system, electronic documents are typically coded with several identifying characteristics, including by client and matter. Many document management systems permit documents to be located by using those identifying characteristics, making it much easier to assemble them.

E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time. With such a system, a lawyer will have to take affirmative steps to preserve those e-mails that the lawyer decides to save. Furthermore, unless a lawyer organizes the saved e-mails to facilitate their later retrieval, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as explained in Part V below, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided.

Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by moving those e-mails to an electronic file devoted to a specific representation, or by coding those e-mails with specific identifying characteristics, such as a client and matter number, when the e-mails are first sent or received.

IV. A Lawyer's Obligation to Provide the Client with E-mails and Other Electronic Documents in the Lawyer's Possession

A related, but distinct, issue is the scope of a lawyer's obligation to provide the client with e-mails and other electronic documents retained by the lawyer. Put differently, once a lawyer decides to retain an e-mail or other electronic document — even when that electronic document does not have to be retained under our 1986 Opinion — does the lawyer have an obligation to provide the client with that electronic document upon request?

The Code does not explicitly address this issue. The Code recognizes that a client has a right to certain "papers and property" in the possession of the lawyer, but does not spell out what those "papers and property" consist of. *See, e.g.*, DR 2-110(2) (providing that, upon withdrawing from a representation, a lawyer shall "deliver[] to the client all papers and property to which the client is entitled"); DR 9-102(C)(4) (providing that lawyer shall "[p]romptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive").7

The leading New York case discussing this issue is the Court of Appeals' 1997 decision in*Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 37 (1997). Abandoning the distinction adopted by some courts "between documents representing the 'end product' of an attorney's services, which belong to the client, and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney," *id.* at 35, the Court of Appeals adopted what it termed the "majority view." It held that "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," the client is "presumptively accord[ed]... full access" to the lawyer's file on a represented matter. *Id.* at 34.8

Sage Realty recognized two principal exceptions to the general rule of presumptive right of full access. The Court of Appeals held that a client is not entitled to the disclosure of (i) "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law", or (ii) certain "firm documents intended for internal law office review and use" that are "unlikely to be of any significant usefulness to the client or to a successor attorney." *Id.* at 37-38. The Court of Appeals elaborated that this second category might include "documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." *Id.*9

Consistently with the exceptions recognized by *Sage Realty*, a client does not have a presumptive right of access to e-mail communications between lawyers of the same law firm that are "intended for internal law office review and use" and are "unlikely to be of any significant usefulness to the client or to a successor attorney." Although it would be impossible to construct a list of the types of e-mails that would fall within the *Sage Realty* exceptions, those e-mails might include an instruction to another lawyer or employee of the firm to perform a particular task; a

preliminary analysis by a lawyer of a factual or legal issue in the representation; or a communication by a lawyer addressing an administrative issue.

The *Sage Realty* Court did not address whether a lawyer would need to provide client access to otherwise inconsequential documents similar to those intended for "internal law office review and use," but sent instead to or from a third party not employed by the lawyer's firm. Common examples of these documents are an e-mail sent to opposing counsel confirming the starting time of a deposition, or an e-mail sent to a testifying expert asking for transcripts of recent testimony. A lawyer is not under an ethical obligation to provide a client with electronic documents of this sort.

V. A Lawyer's Entitlement to Reimbursement for Providing the Client with Electronic Documents in the Lawyer's File

The burden associated with retrieving and producing e-mails and other electronic documents is mitigated by the lawyer's ability, under *Sage Realty*, to charge the client based on the lawyer's "customary fee schedules" for gathering and producing documents to a client. *Sage Realty*, 91 N.Y.2d at 38. Although the Court of Appeals' *Sage Realty* decision principally related to paper documents, we do not see any principled reason why a lawyer's fees may not reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. *See* DR 2-106.10 The reasonableness of that fee will often depend on the circumstances. On the one hand, it may be reasonable for a lawyer to charge a client for hiring an outside vendor to assist in the retrieval of electronic documents that a lawyer has stored on a less accessible storage medium that was widely in use at the time of retention. On the other hand, it may not be reasonable for a lawyer, who chooses not to use widely available and cost-effective technology to organize or code electronic documents, to then charge the client the additional costs resulting from the lawyer's choice.

In some situations, a client might request a copy of the electronic documents in the lawyer's file, but decline to pay the lawyer's reasonable fee associated with the retrieval and review of those documents. As a general matter, a lawyer is not obligated to shoulder the costs of retrieving electronic documents in order to return those documents to the client. As the Court of Appeals held in *Sage Realty*: "[A]s a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement." 91 N.Y.2d at 38. We are reluctant, however, to articulate a bright-line rule. There may be some circumstances under which a client reasonably expects its lawyer to manage the client's e-mails and other electronic documents to allow for those materials to be sent to the client without either the lawyer or the client incurring substantial additional expense.11 A lawyer should also consider whether to insist on the advance payment of fees associated with the retrieval and review of electronic documents when it is reasonably foreseeable that the client would suffer immediate harm as a result of any delay in the delivery of the requested documents.

VI. At the Outset of the Engagement Lawyer and Client Should Consider Discussing the Retention, Storage, and Retrieval of E-mails and Other Electronic Documents

In light of the exponential growth in e-mails and other electronic documents, and the pace of technological change involving the organization and storage of electronic documents, it may be prudent for a lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of an engagement. Lawyer and client may find it worthwhile to discuss and reach agreement at the outset on issues such as (i) the types of e-mail and other electronic documents that the lawyer intends to retain, given the nature of the engagement; (ii) how the lawyer will organize those documents; (iii) the types of storage media the lawyer intends to employ; (iv) the steps the lawyer will take to make e-mail and other electronic documents available to the client, upon request, during or at the conclusion of the representation; and (v) any additional fees and expenses in connection with the foregoing. Consistently with the holding of *Sage Realty* and DR 2-106, those costs should accord with the lawyer's customary fee schedule and must not be excessive. By raising these issues at the outset of the representation, perhaps as part of the engagement letter, a lawyer and a client will be able to make informed decisions about the appropriate manner of retention, storage, and retrieval of electronic documents to which a client has a presumptive right of access.

CONCLUSION

In ABCNY Formal Op. 1986-4, we addressed a lawyer's obligations to retain paper documents relating to a representation. We now conclude that the guidelines articulated in ABCNY Formal Op. 1986-4 should also apply to a lawyer's obligations to retain e-mails and other electronic documents. With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in this Opinion, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided.

In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.

July 2008

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1 This Opinion does not purport to address issues relating to the duty of a lawyer and client to preserve evidence, including electronic documents, that arise when a party has notice that the evidence is relevant to litigation or reasonably should know that the evidence may be relevant to anticipated litigation. *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908 (Sup. Ct. Nassau County 2006).

2 The term "lawyer's file" is fast becoming a throwback to an earlier era, connoting as it does a collection of sorted physical documents. In this Opinion, "lawyer's file" means the collection of documents relating to a representation, regardless of the (electronic or paper) form or character (sorted or unsorted) of the documents.

3 Formal Opinion 1986-4 of the Committee on Professional and Judicial Ethics stated in pertinent part:
With respect to papers that belong to the lawyer, or papers as to which no clear ownership decision can be made, the answer to the questions whether and how long to retain such files is primarily a matter of good judgment, in the exercise of which the lawyer should bear in mind the possible need for the files in the future. *See* ABA Inf. Op. 1384 (1977); N.Y. State 460 (1977). The ABA guidelines, which follow, are particularly helpful:

- Unless the client consents, a lawyer should not destroy or discard items that . . . probably belong to the client. . . .
- A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.
- A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.
- In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.
- A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.
- In disposing of a file, a lawyer should protect the confidentiality of the contents.

- A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.
- A lawyer should [consider preserving], perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

ABCNY Formal Op. 1986-4.

4 Although the 1986 Opinion recognized the distinction between documents that are the client's property and documents that are the lawyer's, it did not articulate any rules for drawing that distinction. This is understandable because the distinction is a question of law, and is therefore beyond the Committee's jurisdiction. *See, e.g.*, N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."); ABCNY Formal Op. 1986-4 ("Initially, it must be determined whether the papers in question, including work product, belong to the client or to the attorney. This is a legal question beyond our jurisdiction.").

5 *But cf.* ABA Informal Op. 1384 (1977) ("A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.").

6 On a related subject, the Committee on Professional Ethics for the New York State Bar Association has set forth procedures for the disposal of an attorney's file at the conclusion of the representation. *See* N.Y. State 623. With respect to documents belonging to a client, the New York State opinion calls for the lawyer, in the first instance, to make the documents available to the client and, depending on the nature of the client's response, to take steps designed to give the client a full opportunity to take possession of those documents. With respect to documents belonging to the lawyer, the New York State opinion provides that 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 showing a client's "clear and present need for such documents." N.Y. State 623 (citing N.Y. State 398 (1975) and ABCNY Formal Op. 1986-4).

7 *See* Cal. State Bar Formal Op. 2007-174 (construing e-mail and certain other electronic documents to fall within the scope of California Rule of Professional Conduct 3-700(D)(a), which provides that when a client requests the return of the "[c]lient papers and property," they include any items that are "reasonably necessary to the client's representation").

8 The *Sage Realty* Court agreed with those lower courts that "refused to recognize a property right of the attorney in the file superior to that of the client." 91 N.Y.2d at 36. For this proposition, *Sage Realty* relied upon the New York Supreme Court's decision in *Bronx Jewish Boys v. Uniglobe, Inc.*, which held that:
Under New York Law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. In other words, the file belongs to the client.
Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 350, 633 N.Y.S.2d 711, 713 (Sup. Ct. 1995)(internal citation omitted).

9 The exceptions identified by *Sage Realty* to the presumption of client access to the documents in the lawyer's file are consistent with Comment (c) to Section 46 of the*Restatement (Third) of the Law Governing Lawyers*, which also recognizes circumstances under which a lawyer may refuse to provide certain documents in the lawyer's file to the client:
A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved . . . .

10 In those instances when a lawyer's electronic documents have not been coded, or saved to a specific file, a lawyer will need to take steps to ensure that in returning electronic documents to a client, the lawyer does not inadvertently reveal the confidences and secrets of another client. See DR 4-101(B)(1).

11 *See* Model Rule 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."). The lawyer may retain copies of the client file at the lawyer's expense. *See* N.Y. State 780 (2004).

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

Formal Opinion 2010-2: OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

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

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

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

OPINION

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

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

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

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

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

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

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

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

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

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

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[1] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to

employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

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

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

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

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

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

NYCLA ETHICS OPINION 745
JULY 2, 2013

ADVISING A CLIENT REGARDING POSTS ON SOCIAL MEDIA SITES

TOPIC: What advice is appropriate to give a client with respect to existing or proposed postings on social media sites.

DIGEST: It is the Committee's opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4.[1]

RPC: 4.1, 4.2, 3.1, 3.3, 3.4, 8.4.

OPINION:

This opinion provides guidance about how attorneys may advise clients concerning what may be posted or removed from social media websites. It has been estimated that Americans spend 20 percent of their free time on social media (Facebook, Twitter, Friendster, Flickr, LinkedIn, and the like). It is commonplace to post travel logs, photographs, streams of consciousness, rants, and all manner of things on websites so that family, friends, or even the public-at-large can peer into one's life. Social media enable users to publish information regionally, nationally, and even globally.

The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them. For example, teenagers and college students commonly post photographs of themselves partying, binge drinking, indulging in illegal drugs or sexual poses, and the like. The posters may not be aware, or may not care, that these posts may find their way into the hands of family, potential employers, school admission officers, romantic contacts, and others. The content of a removed social media posting may continue to exist, on the poster's computer, or in cyberspace.

[1] This opinion is limited to conduct of attorneys in connection with civil matters. Attorneys involved in criminal cases may have different ethical responsibilities.

That information posted on social media may undermine a litigant's position has not been lost on attorneys. Rather than hire investigators to follow claimants with video cameras, personal injury defendants may seek to locate YouTube videos or Facebook photos that depict a "disabled" plaintiff engaging in activities that are inconsistent with the claimed injuries. It is now common for attorneys and their investigators to seek to scour litigants' social media pages for information and photographs. Demands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine.

Recent ethics opinions have concluded that accessing a social media page open to all members of a public network is ethically permissible. New York State Bar Association Eth. Op. 843 (2010); Oregon State Bar Legal Ethics Comm., Op. 2005-164 (finding that accessing an opposing party's public website does not violate the ethics rules limiting communications with adverse parties). The reasoning behind these opinions is that accessing a public site is conceptually no different from reading a magazine article or purchasing a book written by that adverse party. Oregon Op. 2005-164 at 453.

But an attorney's ability to access social media information is not unlimited. Attorneys may not make misrepresentations to obtain information that would otherwise not be obtainable. In contact with victims, witnesses, or others involved in opposing counsel's case, attorneys should avoid misrepresentations, and, in the case of a represented party, obtain the prior consent of the party's counsel. New York Rules of Professional Conduct (RPC 4.2). See, NYCBA Eth. Op., 2010-2 (2012); NYSBA Eth. Op. 843. Using false or misleading representations to obtain evidence from a social network website is prohibited. RPC 4.1, 8.4(c).

Social media users may have some expectation of privacy in their posts, depending on the privacy settings available to them, and their use of those settings. All major social media allow members to set varying levels of security and "privacy" on their social media pages. There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client's social media pages, requiring adverse counsel to request access through formal discovery channels.

A number of recent cases have considered the extent to which courts may direct litigants to authorize adverse counsel to access the "private" portions of their social media postings. While a comprehensive review of this evolving body of law is beyond the scope of this opinion, the premise behind such cases is that social media websites may contain materials inconsistent with a party's litigation posture, and thus may be used for impeachment. The newest cases turn on whether the party seeking such disclosure has laid a sufficient foundation that such impeachment material likely exists or whether the party is engaging in a "fishing expedition" and an invasion of privacy in the hopes of stumbling onto something that may be useful.[2]

[2] In Tapp v. N.Y.S. Urban Dev. Corp., 102 A.D.3d 620, 958 N.Y.S. 2d 392 (1st Dep't 2013), the First Department held that a defendant's contention that Facebook activities "may reveal daily activities that contradict or conflict with

Given the growing volume of litigation regarding social media discovery, the question arises whether an attorney may instruct a client who does not have a social media site not to create one: May an attorney pre-screen what a client posts on a social media site? May an attorney properly instruct a client to "take down" certain materials from an existing social media site?

Preliminarily, we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media. Thus, an attorney may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes. In advising a client, attorneys should be mindful of their ethical responsibilities under RPC 3.4. That rule provides that a lawyer shall not "(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce... [nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

Attorneys' duties not to suppress or conceal evidence involve questions of substantive law and are therefore outside the purview of an ethics opinion. We do note, however, that applicable state or federal law may make it an offense to destroy material for the purpose of defeating its availability in a pending or reasonably foreseeable proceeding, even if no specific request to reveal or produce evidence has been made. Under principles of substantive law, there may be a duty to preserve "potential evidence" in advance of any request for its discovery. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S. 2d 331 (1st Dep't 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data."); QK Healthcare, Inc., v. Forest Laboratories, Inc., 2013 N.Y. Misc. LEXIS 2008; 2013 N.Y. Slip Op. 31028(U) (Sup. Ct. N.Y. Co., May 8, 2013); RPC 3.4, Comment [2]. Under some circumstances, where 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 destruction or spoliation of evidence, there is no ethical bar to "taking down" such material from social media publications, or prohibiting a client's attorney 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.

An attorney also 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."

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plaintiff's" claim isn't enough. "Mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.'" Also, see, Kregg v. Maldonado, 98 A.D.3d 1289, 951 N.Y.S. 2d 301 (4th Dep't 2012); Patterson v. Turner Constr. Co., 88 A.D.3d 617, 931 N.Y.S. 2d 311 (1st Dep't 2011); McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 910 N.Y.S. 2d 614 (4th Dep't 2010).

RPC 3.1(a). Frivolous conduct includes the knowing assertion of "material factual statements that are false." RPC 3.1(b)(3). Therefore, if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements. See, also, RPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.")

Clients are required to testify truthfully at a hearing, deposition, trial, or the like, and a lawyer may not fail to correct a false statement of material fact or offer or use evidence the lawyer knows to be false. RPC 3.3(a)(1); 3.4(a)(4). Thus, a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject. RPC 3.3 (a)(3).

We further conclude that it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication, to guide the client appropriately, including formulating a corporate policy on social media usage. Again, the above ethical rules and principles apply: An attorney may not direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim; an attorney may not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false. RPC 3.4(a)(4).[3] However, a lawyer may counsel the witness to publish truthful information favorable to the lawyer's client; discuss the significance and implications of social media posts (including their content and advisability); advise the client how social media posts may be received and/or presented by the client's legal adversaries and advise the client to consider the posts in that light; discuss the possibility that the legal adversary may obtain access to "private" social media pages through court orders or compulsory process; review how the factual context of the posts may affect their perception; review the posts that may be published and those that have already been published; and discuss possible lines of cross-examination.

CONCLUSION:

Lawyers should comply with their ethical duties in dealing with clients' social media posts. The ethical rules and concepts of fairness to opposing counsel and the court, under RPC 3.3 and 3.4, all apply. An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed.

[3] We do not suggest that all information on Facebook pages would constitute admissible evidence; such determinations must be made as a matter of substantive law on a case by case basis.

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]

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[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]

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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].

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[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).

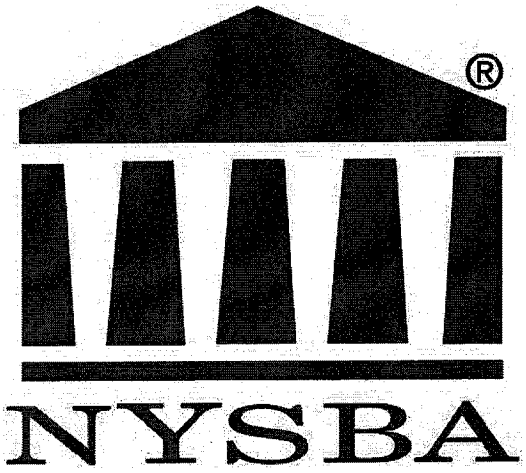
Conclusion

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.

APPENDIX C



SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

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(with revised commentary)

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

PREPARED BY

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INTRODUCTION

Social media networks, such as LinkedIn, Twitter, Instagram and Facebook, are 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 ("NYSBA") 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' duty of technological competence, attorney advertising, anonymous postings by attorneys regarding pending trials, online research of juror social media use, juror misconduct, and the treatment of social media connections between attorneys and judges.

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.

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1 The Social Media Ethics Guidelines were most recently updated in May 2017.

2 A breach of an ethics rule is not enforced by a bar association, but by an 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 (22 NYCRR 1200.0) ("NYRPC") (NY STATE UNIFIED CT. SYS. 2017). 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 in 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.[4] 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.

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.

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4 It may not always be readily apparent whether a lawyer's social media communications constitute regulated "attorney advertising." For example, recently-updated American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") have redefined the scope of attorney advertising to include "communications concerning a lawyer's services" on social media platforms. MODEL RULES OF PROF'L CONDUCT R. 7.1 (AM. BAR. ASS'N 2018).)

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, 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.[5] 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 Op. 466 (2014)[6] 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.[7]

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

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5 Prof'l Ethics Comm. for State Bar of Texas, Op. 673 (2018) (discussing ethical restrictions on attorneys' ability to seek advice for benefit of client from other lawyers in an online discussion group).

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

7 *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.

changes in the platforms' settings or policies."[8] The ethics opinion also holds that "[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...."[9]

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,[10] engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[11]

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

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8 NY City Bar Ass'n Comm. on Prof'l Ethics ("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 site works. Lawyers must understand the functionality of the social networking site, including its privacy policies.").

9 NYCBA, Formal Op. 2012-2.

10 *See* L.A. County Bar Ass'n Prof'l Responsibility and Ethics Comm., Op. 529 (2017) (ethical implications of disclosure of client-related information by attorney to unknown person on social media who, unbeknownst to attorney, was "catfishing," *i.e.*, assuming a false online identity to get information by pretext, and actually was working for opposing party in pending case involving attorney's client); Nebraska Ethics Advisory Opinion for Lawyers, No. 17-03 (2017) (circumstances under which attorney may receive bitcoin or other digital currencies as payment for legal services, and may hold digital currencies in trust or escrow for client, without violating rules of professional conduct); *see also* Jason Tashea, *Lawyers Have an Ethical Duty to Safeguard Confidential Information in the Cloud* (2018).

11 *See* ABA Formal Op. 477R (2018) (discussing the "technology amendments" made to the Model Rules of Professional Conduct in 2012, including to Model Rule 1.1).

applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.[12]

Many other states have also adopted a duty of competence in technology in their ethical codes. [13] 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."

The New York County Lawyers Association ("NYCLA") Professional Ethics Committee has set forth guidance regarding a "lawyer's ethical duty of technological competence" with respect to cybersecurity risk and the handling of eDiscovery. [14] The NYCLA opinion notes that "[t]he duty of competence expands as technological developments become integrated into the practice of law" and that lawyers "... should possess the technological knowledge necessary to exercise reasonable care with respect to maintaining client confidentiality ...."[15]

As the use of social media in cases becomes more and more common, the duty of technological competence is expanding to require attorneys to understand the benefits, risks and ethical implications associated with social media.[16]

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12 NYRPC 1.1 cmt. 8.

13 As of this writing, 34 states have adopted a duty of technological competence. https://www.lawsitesblog.com/2018/12/two-states-adopted-duty-tech-competence-total-now-34.html.

14 New York Cty. Lawyers Ass'n Prof'l Ethics Comm., Formal Op. 749 (2017).

15 *Id.*

16 California has also issued an ethics opinion finding that an attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Formal Op. 2015-193 described in detail the ethical duties of an attorney in dealing with electronically stored information during discovery. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2015-193 (2015).

2. ATTORNEY ADVERTISING AND COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

Guideline No. 2.A: Applicability of Advertising Rules

A lawyer's social media profile – whether its purpose is for business, personal or both – may be subject to attorney advertising and solicitation rules. If the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.

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

Comment: A social media profile that is used by a lawyer may be subject to attorney advertising[17] and solicitation rules.[18] Attorneys who communicate concerning their services using their social media profile(s) must comply with applicable attorney advertising and solicitation rules. Attorneys should also be aware that if they advertise and provide their services in multiple states, they need to comply with the attorney advertising and solicitation rules in each of those states.

Sections of the ABA *Model Rules of Professional Conduct* (hereinafter "ABA Model Rules") were updated in 2018 to simplify the advertising and solicitation rules and recognize the use of online communications for attorney advertising. The revised ABA Model Rules state that "[a] lawyer may communicate information regarding the lawyer's services through any media."[19] The scope and practical application of the language used in the revised rules, especially as applied to social media and online communications, are yet to be well defined. But the ABA Model Rules are influential, and individual states may adopt the same or similar language.

New York has not adopted the ABA's revisions to advertising and solicitation rules. Rather, New York legal ethics opinions have focused on whether a statement, in any medium, is an "advertisement"[20] under the applicable

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17 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's 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."

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

19 *Supra*, Note 4 at 7.2(a).

20 *See* NYRPC 1.0(a), *supra* Note 17.

New York rules and thus must comply with requirements such as labeling and retention. For example, one New York ethics opinion states that 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.[21] 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."[22]

The NYCLA ethics opinion states that if an attorney's LinkedIn profile includes a detailed description of practice areas and types of work performed 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) 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."[23]

The NYCLA opinion provides that attorneys who allow "Endorsements" from other users and "Recommendations" to appear on their profiles fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[24] 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).[25]

After NYCLA Formal Op. 748 was issued, the Association of the Bar of the City of New York ("City Bar") issued Opinion 2015-7 addressing attorney advertising. The 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:

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21 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)

22 NYCLA, Formal Op. 748 (2015).

23 *Id.*

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

25 NYCLA, Formal Op. 748.

> (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.[26]

The City Bar 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.[27] If attorneys merely include a list of "Skills," a description of practice areas, or displays "Endorsements" or "Recommendations," without more on their LinkedIn account, this does not, by itself, constitute attorney advertising.[28]

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.[29]

Attorneys practicing in New York should be aware of both opinions when complying with New York's attorney advertising rules. Moreover, attorneys should be aware of the revised ABA Model Rules, adoption of the new language by applicable states, and changing practices by legal advertisers (such as the use of geofencing or increased use of video ads).

An attorney's ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a "tweet") is

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26 NYCBA, Formal Op. 2015-7 (2015).

27 NYRPC 7.1(k).

28 NYRPC 1.0(c).

29 NYCBA, Formal Op. 2015-7; *see also* Peter Geraghty, *Social Media Endorsements: Undue Flattery Will Get You Nowhere*, YOURABA (July 2016); Strickler, *supra*, note 20

deemed attorney advertising, the rules require that a lawyer include disclaimers similar to those described in NYCLA Formal Op. 748.[30]

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's character limit 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.[31]

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.[32] Rule 1.0(c) of the NYRPC defines "computer-accessed communication" as any communication made by or on behalf of a lawyer or law firm that is disseminated through "the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto."[33] Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."[34]

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.

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30 NYSBA Comm. on Prof'l Ethics ("NYSBA"), Op. 1009 (2014).

31 NYSBA, Op. 1009.

32 *Id.*

33 *Id.*

34 *Id.*

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.[35]

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.[36] 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 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.[37]

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.[38] A lawyer may include information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits the inclusion of such biographical information. 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.[39]

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35 *See* NYSBA, Op. 972 (2013).

36 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, 1293 (N.D. Fla. 2015).

37 *See* 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)).

38 NYCLA, Formal Op. 748.

39 *See* NYRPC 7.4.

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.[40]

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.[41]

NYRPC 7.1, 7.2, 7.3, 7.4.

> *Comment*: While a lawyer is not responsible for a post made by a person who is not 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.

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40 *See* Fla. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised May 9, 2016); *see also* Geraghty, supra. note 28.

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

Guideline No. 2.D: Attorney Endorsements

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

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must monitor and verify that posts about them made to profiles they control[42] 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.[43] 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.[44] 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 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

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

43 NYCLA, Formal Op. 748.

44 *See* NYCLA, Formal Op. 748; Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-300 (2014); N.C.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) (https://www.attorneyatwork.com/ethics-of-social-media-use/) (last visited Mar. 28, 2019).

response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct."[45]

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 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."[46]

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45 Tex. Ctr. for Legal Ethics Op. 662 (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).

46 D.C. Bar Ethics Op. 370.

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,[47] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[48] business from the public through such means.[49]

If a potential client[50] 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,

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47 "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: "Ordinarily, email communications and websites 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. However, Instant messaging ("IM"), chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

48 "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.

49 *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); Mich. Standing Comm. on Prof'l and Jud. Ethics, Op. RI-276 (1996); Utah State Bar Ethics Advisory Opinion Comm., Op. 97-10 (1997); Va. Bar Ass'n Standing Comm. on Advertising, Op. A-0110 (1998); W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998).

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).

50 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.").

whether the communication is electronic or in some other format.[51] Emails and attorney communications via a website or over social media platforms, such as Twitter,[52] 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.[53]

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

> *Comment*: Answering general questions[54] on the Internet is analogous to writing for any publication on a legal topic.[55] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a 'specific request' to retain the lawyer."[56] In responding to questions,[57] 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.[58]

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51 "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.

52 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.

53 NYRPC 7.3(a)(1).

54 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).

55 *See* NYSBA, Op. 899.

56 *See id.*

57 *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).").

58 *Id.*

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.[59]

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[60] 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.[61] However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer's actual response should not be made through a real-time communication.[62]

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

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59 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).

60 *See* NYRPC 7.1(f), (h), (k).

61 *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.').

62 *Id.*

representation ...."[63] NYRPC 1.0(x), the definition of "writing," was expanded in late 2016 to specifically include a range of electronic communications.[64]

The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation."[65] 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.[66] However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without the knowledge of the lawyer.[67] Casual communications may be deleted without impacting ethical rules.[68]

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

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63 NYRPC 1.0(n), Terminology.

64 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.

65 *See* NYCBA, Formal Op. 2008-1 (2008).

66 *Id.*

67 *Id.*; *see also* Pa. Bar Ass'n, 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.")

68 *Id.*

> 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.[69]

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

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69 Formal Op. 623 states that "all documents belonging to the lawyer may be destroyed without consultation or notice to the client in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents" and that "[a]bsent a legal requirement or extraordinary circumstances, the lawyer's only obligation with respect to such documents is to preserve confidentiality." NYSBA, Op. 623 (1991).

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 view 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 party's social media website,[70] profile or posts, whether that party is represented or not, for the purpose of obtaining information about the party, including impeachment material for use in litigation.[71]

This allowance is based, in part, on case law that holds that a litigant is said to have a lesser expectation of privacy with respect to social media content relevant to claims or defenses, let alone content that is specifically designated as "public."[72]

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 non-public portion of the unrepresented party's social media profile.[73] However, the lawyer must use her full name and an accurate profile, and may not create a false profile 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 unrepresented party or otherwise cease all further communications and withdraw the request if applicable.

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

71 *See* NYSBA, Op. 843 (2010); *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015); Me. Prof'l Ethics Comm'n, Op. 217 (2017).

72 *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 434 (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."); *see also Forman v. Henkin*, 30 N.Y.3d 656, 666 (2018) (court assumed some Facebook materials may be characterized as private, but held that some private Facebook materials may be subject to discovery if relevant).

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

NYRPC 4.1, 4.3, 8.4.

Comment: It is permissible for a lawyer to join a social media network solely for the purpose of obtaining information concerning a witness.[74] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using any form of "deception."[75] Nor may a lawyer or lawyer's agent anonymously use trickery to gain access to an otherwise secure social networking page and the information that it holds.[76]

In New York, no "deception" occurs when a lawyer utilizes his or her "real name and profile" to contact an unrepresented party via a "friend" request in order to obtain information from the party's account.[77] In New York, the lawyer is **not** required to initially disclose the reasons for the communication or "friend" request.[78]

However, other states require that a lawyer's initial "friend" request must contain additional information to fully apprise the witness of the lawyer's 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."[79] The Massachusetts and San Diego Bar Associations simply require disclosure of the lawyer's "affiliation and the purpose for the request."[80] The Philadelphia Bar Association notes that failure to disclose the attorney's true intention constitutes an impermissible omission of a "highly material fact."[81]

In Oregon, there is an opinion that if the person being sought on social media "asks for additional information to identify [the l]awyer, or if [the l]awyer

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

75 NYCBA, Formal Op. 2010-02 (2010).

76 Tex. State Bar, Op. 671, (2018).

77 NYCBA, Formal Op. 2010-02.

78 *See id.*

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

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

81 Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009); *see* Me. Prof'l Ethics Comm'n, Op. 217.

has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[82]

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

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

NYRPC 4.1, 4.2.

Comment: It is significant to note that, unlike an unrepresented party, the ethics rules are different when the party 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."[83]

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 her actions would cause the juror to receive such message or notification." [84]

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 [electronic social media] service is communicating with the juror based on a technical feature of the ESM,"

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82 Or. State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

83 *Id.; see also* San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2.

84 *See* NYCBA, Formal Op. 2012-2; NYCLA, Formal Op. 743 (2011).

and the lawyer is not involved.[85] This view has also been adopted by the District of Columbia and Colorado Bar Associations.[86]

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

As it relates to viewing a party's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, 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[87] and could, as well, apply to the lawyer's client.[88]

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

86 *See* D.C. Bar Legal Ethics Comm., Formal Op. 371 (2016); Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

87 *See* NYCBA, Formal Op. 2010-02.

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

5. COMMUNICATING WITH CLIENTS

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

A lawyer may advise a client as to what content[89] may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings.[90] 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.[91] 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"[92] 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,[93] 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."[94] 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, as long as

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

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

91 NYCLA, Formal Op. 745 (2013); *see also* Phila. Bar Ass'n. Guidance Comm. Op. 2014-5 (2014).

92 *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33,36 (1st Dept. 2012).

93 *See* Phila. 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.*").

94 NYCLA, Formal Op. 745.

social media is appropriately preserved in the proper format and such is not a violation of law or a court order.[95]

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."[96]

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[97] 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

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95 *See* N.C. State Bar Ass'n 2014 Formal Ethics Op. 5 (2014); Phila. 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).

96 NYCLA, Formal Op. 745.

97 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.").

lawyer may advise a client to refrain from or limit social media posts, including during the course of a litigation or investigation.

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.[98]

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."[99] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[100]

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."[101] 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."[102]

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98 *See* NYCLA, Formal Op. 745.

99 NYRPC 3.1(a).

100 NYRPC 3.1(b)(3).

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

102 *Id.*

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

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

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

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.[103] In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[104]

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."[105]

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

104 *Id.*

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

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

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent.[106] Social media activities and a lawyer's website or blog must comply with these limitations.[107]

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 operates before using it and consider whether any activity places client information and confidences at risk.[108]

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.[109]

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106 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018).

107 *See* NYRPC 1.6.

108 D.C. Bar Legal Ethics Comm., Op. 370 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).

109 NYRPC 1.6(c). The NYRPC 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

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

Comment: A lawyer is prohibited, absent a recognized exception, from disclosing client confidential information. Moreover, a lawyer should be aware that "information distributed electronically has a continuing life, and it might be possible for recipients to aggregate, mine, and analyze electronic communications made to different people at different times and through different social media."[110]

Attorneys should be aware of issues related to anonymously posting online during trial. In *In re Perricone*, 2018-1233 (La. 2018), the Supreme Court of Louisiana concluded that "[t]he only appropriate sanction under the[] facts" was disbarring an attorney who had anonymously posted online critical comments that concerned, among other things, pending cases in which he or colleagues were assigned as prosecutors. The attorney had "stated that he made the anonymous online comments to relieve stress, not for the purpose of influencing the outcome of a defendant's trial." But the court opined that its decision "must send a strong message to respondent and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet."

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

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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].

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.

110 L.A. Cnty Bar Ass'n Prof'l Responsibility and Ethics Comm., Op. No. 529 (2017).

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."[111] 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."[112] 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.[113]

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception."[114] 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."[115]

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

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

112 *Id.*

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

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

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

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).

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

A lawyer may research a prospective or sitting juror's public social media profile and public posts as long as it does not violate any local rules or court order.

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."[116] At this juncture, it is "not only permissible for trial counsel to conduct Internet research on prospective jurors, but [] it may even be expected."[117]

The ABA issued Formal Op. 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."[118] "There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[119] Opinion 466, however, does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[120]

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116 NYCBA, Formal Op. 2012-2 (2012).

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

118 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466. Attorneys should be mindful of court orders concerning online research in jurisdictions in which they practice. *See, e.g.*, Standing Order Regarding Research as to Potential Jurors in All Cases Assigned to U.S. District Judge Rodney Gilstrap (E.D. Tex. 2017).

119 *Id.*

120 *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 or her agent or automatically generated by the social media network) with the juror.[121]

NYRPC 1.1, 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need to "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[122]

"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 *ex parte* communication."[123] 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.[124] 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."[125]

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.[126] New York ethics opinions also draw a distinction between public and private juror information.[127] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic

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121 *See* NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2 (2012); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

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

123 Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

124 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466.

125 *Id.*

126 NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2 (2012).

127 *Id.*

message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).[128]

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 an [electronic social media ("ESM")] network setting notifies the juror of such review does *not* constitute a communication from the lawyer in violation" of the Rules of Professional Conduct.[129] The ABA concluded that, as a general rule, an automatic notification represents a communication between the juror and a given ESM platform, instead of an impermissible communication between the juror 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 and the juror or prospective juror" as opposed to a "friend" request, which would be impermissible.[130]

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."[131] 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 see the lawyer and will advise the juror of this drive-by and the signage."[132]

Under ABA Formal Op. 466, a lawyer must: (1) "be aware of these automatic, subscriber-notification features" and (2) make sure "that their review is

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128 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. 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.

129 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (emphasis added).

130 D.C. Bar Legal Ethics Comm., Formal Op. 371; *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

131 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014); *see also* Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014) ("There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed.").

132 *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).

purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[133] 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.[134]

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.[135]

The New York opinions cited above draw a distinction between public and private juror information.[136] 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, assuming other ethics rules are not implicated. Such opinions, however, 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 through an alumni social network in which both the lawyer and juror are members or where access can be obtained by being a "friend" of a "friend" of a juror on Facebook.

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

134 *Id.*

135 *See* NYCBA, Formal Op. 2012-2; NYCLA, Formal Op. 743; SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

136 *Id.*

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."[137]
>
> "Subordinate lawyers and nonlawyers 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.[138]

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 or her agent or automatically generated by the social media network) with the juror.

NYRPC 1.1, 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.[139]
>
> > [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

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137 *See* NYCBA, Formal Op. 2012-2.

138 Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

139 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.

> 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.[140]

ABA Formal Op. 466 permits passive review of juror social media postings, even when an automated response of a reviewer's Internet "presence" is sent to the juror during trial, absent court instructions prohibiting such conduct.[141] In one New York case, a lawyer's review 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 information to the attention of the court, stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."[142] This case demonstrates that a lawyer must use caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.[143]

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."[144]

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140 *See* NYCBA, Formal Op. 2012-2 (2012).

141 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466; D.C. Bar Legal Ethics Comm., Formal Op. 371.

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

143 *See id.*

144 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466.

Guideline No. 6.E: Juror Misconduct

If 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.[145]

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 discusses a lawyer's obligation 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."[146]

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 his or her family of which the lawyer has knowledge."[147] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[148] "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."[149]

In *People v. Jimenez*, 159 A.D.3d 574 (1st Dept. 2018), "[a]fter a jury note revealed that a juror had conducted online research on false confessions and

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145 *See* NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2; SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

146 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466; *see also* D.C. Bar Legal Ethics Comm., Formal Op. 371 (the determination of "[w]hether and how such misconduct must or should be disclosed to a court is beyond the scope" of the ethical rules, except in instances "clearly establishing that a fraud has been perpetrated upon the tribunal.")

147 NYRPC 3.5(d).

148 NYCBA, Formal Op. 2012-2; *see also* SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

149 NYCBA, Formal Op. 2012-2; *see also* Pa. Bar Assn, Ethics Comm., Formal Op. 2014-300 ("[A] lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").

shared it with the rest of the jury," the Appellate Division concluded that the lower court had "providently exercised its discretion in denying defendant's request to discharge the offending juror and concomitantly declare a mistrial." The Appellate Division also found that the lower court had taken "adequate curative measures by thoroughly admonishing the jury to disregard the information obtained by a juror, not to conduct any outside research, and to decide the case solely based on the evidence presented at trial."[150]

150 *See*, with regard to juror misconduct that led to reversal of a conviction and a new trial, *People v. Neulander*, 162 A.D.3d 1763 (4th Dept. 2018), *appeal pending*.

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,"[151] 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."[152]

It should be noted that New York Advisory Committee on Judicial Ethics Opinion 08-176 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."[153] 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

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151 Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300.

152 NYRPC 3.5(A)(1).

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

> information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

Furthermore, New York Advisory Committee on Judicial Ethics Opinion 13-39 concludes that "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."[154]

The New York Advisory Committee on Judicial Ethics opinion is consistent with the Florida Supreme Court's recent holding that a "judge [who] is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."[155] For state judicial ethics commissions that have considered this issue, the "minority view" is that "Facebook 'friendship' between a judge and an attorney appearing before the judge, standing alone, creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge in violation of the applicable code of judicial conduct."

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154 N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013).

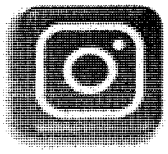
155 *See Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, No. SC17-1848, 2018 WL 5994243, at *2 (Fla. Nov. 15, 2018) (collecting cases consistent with N.Y. Advisory Comm. on Judicial Ethics Op. 13-39).

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.

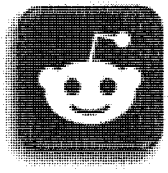


Instagram: a visually-focused platform that allows users to post photos and videos. Created in 2010, and later purchased by Facebook, it has approximately 500 million active monthly users.

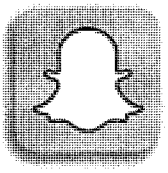
LinkedIn: an employment-based networking platform which focuses on engagement with individuals in their respective professional capacities. Launched in 2002, it now boasts roughly 100 million active monthly users.

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.

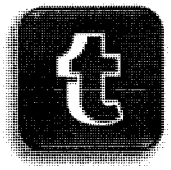
Pinterest: a platform that essentially functions as a social scrapbook, allowing users to save and collect links to share with other users. Started in 2010, it has in excess of 100 million active monthly users, majority of whom are female.



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.



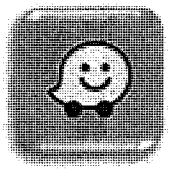
Snapchat: an image messaging application that allows users to send and receive photos and videos known as "snaps," which are hidden from the recipients once the time limit expires. Officially released in September 2011, it has in excess of 200 million active monthly users.



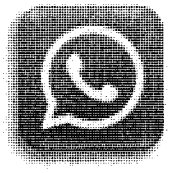
Tumblr: a microblogging platform that allows users to post text, images, video, audio, links, and quotes to their blogs. It was created in 2007 and has more than 500 million active monthly users.

Twitter: a real-time social network that allows users to share updates that are limited to 280 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 280 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 STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

ETHICS OPINION 1032

New York State Bar Association
Committee on Professional Ethics

Opinion 1032 (10/30/2014)

Topic: Responding to a former client's critical commentary on a website

Digest: A lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a lawyer-rating website.

Rules: 1.6(a); 1.6(b); 1.9(c)

FACTS

1. The inquirer, a New York law firm, believes that a "disgruntled" former client has unfairly characterized the firm's representation of the former client on a website that provides reviews of lawyers. A note posted by the former client said that the former client regretted the decision to retain the firm, and it asserted that the law firm provided inadequate services, communicated inadequately with the client, and did not achieve the client's goals. The note said nothing about the merits of the underlying matter, and it did not refer to any particular communications with the law firm or any other confidential information. The former client has not filed or threatened a civil or disciplinary complaint or made any other application for civil or criminal relief.

2. The law firm disagrees with its erstwhile client's depiction of its services and asserts that the firm achieved as good a result for the client as possible under the difficult circumstances presented. The firm wishes to respond to the former client's criticism by telling its side of the story if it may do so consistently with its continuing duties to preserve a former client's confidential information.

QUESTION

3. When a lawyer's former client posts accusations about the lawyer's services on a website, may the lawyer post a response on the website that tends to rebut the accusations by including confidential information relating to that client?

OPINION

4. The Internet and social media today provide a number of sites that ask visitors to state their views of and experiences with lawyers, presumably to provide other visitors with information on which to base their choice of counsel. Our survey of a few of these sites did not reveal any protocols to monitor the accuracy of the commentary, except to assure that the very lawyers being reviewed are not the source. In this respect, the sites differ from other lawyer-rating agencies – Chambers, Super Lawyers, Best Lawyers in America, Martindale-Hubbell and the like – which claim to base their ratings on a canvass of clients and other members of the bar.

5. The inquiry concerns a negative posting on such a site by a former client. The inquiring firm believes that certain information about its representation of that client would tend to rebut the posted allegations. The information in question constitutes "Confidential information" as defined by Rule 1.6(a) of the Rules of Professional Conduct (the "Rules"). Under Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client.

6. 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) says 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." When applicable, this exception permits, but does not require, disclosure of confidential information, and only to the extent the lawyer reasonably believes necessary to serve the purpose of self-defense. See Rule 1.6, Cmts. [12] & [14].

7. The inquiry raises the question whether a lawyer may rely on this exception to disclose a former client's confidential information in response to a negative web posting, even though there is no actual or threatened proceeding against the lawyer. We do not believe that a lawyer may do so.

8. The language of the exception suggests that it does not apply to informal complaints such as this website posting. The key word is "accusation," which has been defined as "[a] formal charge against a person, to the effect that he is guilty of a punishable offense," Black's Law Dictionary 21 (5th ed. 1979), or a "charge of wrongdoing, delinquency, or fault," Webster's Third International Dictionary Unabridged 22 (2002). See Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 230 (2013 ed.) ("An accusation means something more than just casual venting.")

9. Comment [10] to Rule 1.6 supports this conclusion. It says that "[w]here a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense." In the context of a set of legal standards, the words "claim" and "charge" typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction. Comment [10] continues by saying: "Such a claim may arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone." Each of these examples involves a formal proceeding in which the lawyer's conduct has been placed in issue.

10. Case law supports our conclusion. New York cases permitting disclosure of confidential information under Rule 1.6(b)(5)(i) and its nearly identical predecessor DR 4-101(C)(4) have invariably involved allegations of lawyer wrongdoing in formal proceedings such as legal malpractice or other civil actions, disqualification proceedings, or sanctions motions.[1] Those cases stand in contrast to those in which lawyers have not been permitted to use a client's confidential information to initiate actions against former clients (other than lawsuits to collect legal fees, for which Rule 1.6(b)(5)(ii) provides a different exception to confidentiality).[2] Thus under the case law, a lawyer is not authorized to reveal confidential information whenever helpful in a dispute, but rather only when facing some kind of formal proceeding.[3]

11. In at least one case, discipline has been imposed for the kind of conduct in question here. In re Tsamis, Joint Stipulation and Recommendation ¶¶ 4-10 & Reprimand ¶ 1, No. 2013PR00095 (Hearing Board, Ill. Att'y Reg. & Disc. Comm. 2014) (reprimanding lawyer for revealing confidential information about her former client in response to client's negative review on AVVO legal referral website). Ethics opinions from other jurisdictions have reached varying results on the question facing us, but their relevance is limited by differences in the ethical rules in force in those jurisdictions.[4]

12. We note a New York opinion that addressed the predecessor to Rule 1.6(b)(5)(i), though in a different context. In N.Y. County 732 (2004), a client threatened to file a disciplinary complaint against a lawyer if the lawyer did not release funds in an IOLA account, the proper disposition of which was a part of the lawyer's inquiry to the Committee. The Committee opined that in the event of such a complaint, "the law firm would be entitled to disclose confidences or secrets necessary to defend itself against the client's accusations." The Committee concluded that the "rules permitting disclosure of client confidences should be read restrictively" but that the law firm may disclose protected client information "if the client files a complaint or claim against the law firm."

13. We do not mean to say that a formal proceeding must be actually commenced to trigger the authorization of disclosure by Rule 1.6(b)(5)(i). There may be circumstances in which the material threat of a proceeding would give rise to that right. See N.Y. City 1986-7 (in-house lawyer may disclose confidential information to government prosecutors who have identified the lawyer as the subject of a grand jury investigation in which other witnesses have made incriminating statements about the lawyer). We do not need to reach that question here because no material threat of a proceeding has been made on the website posting that is the subject of this inquiry.

14. Nor do we consider the question of whether and when a negative website posting may effect a waiver of a client's right to confidentiality, because that question is not raised by the facts as presented in the inquiry. If there were facts raising the question of waiver, it would be necessary to consider separately the possible waivers of attorney-client privilege and of other kinds of confidentiality under Rule 1.6(a). Waiver of attorney-client privilege turns on questions of law beyond our jurisdiction. See, e.g., 1050 Tenants Corp. v. Lapidus, 12 Misc. 3d 1118, 1123-25 (Civ. Ct. N.Y.C. 2006). Given the facts as presented, we need not consider whether a negative website posting might waive other kinds of confidentiality. Rather, we assume for present purposes that confidentiality has not been waived. It suffices to say that the mere fact that a former client has posted critical commentary on a website is insufficient to permit a lawyer to respond to the commentary with disclosure of the former client's confidential information.

15. This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client – or others – being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion.

CONCLUSION

16. A lawyer may not disclose client confidential information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers.

(1-14)

[1] See, e.g., Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2d 1190, 1195 (2nd Cir.), cert. denied, 419 U.S. 998 (1974); First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567-68 (S.D.N.Y. 1986); Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP, 39 A.D.3d 201, 201 (1st Dep't 2007); Nesenoff v. Dinerstein & Lesser, P.C., 12 A.D.3d 427, 429 (2nd Dep't 2004); In the Matter of Koeppel, 32 Misc.3d 1245(A) (Surr. Co. N.Y. Co. 2011); General Realty Assoc. v. Walters, 136 Misc. 2d 1027, 1029 (Civ. Ct. N.Y.C. 1987).

[2] See, e.g., Eckhaus v. Alfa-Laval, Inc., 764 F. Supp. 34, 37-38 (S.D.N.Y. 1991) (defamation); Wise v. Con. Edison Co. of N.Y., Inc., 282 A.D.2d 335, 336 (1st Dep't 2001) (wrongful discharge). See also D.C. Opinion 363 (2012) (in-house lawyer may not disclose confidential information in retaliatory discharge claim).

[3] See N.Y. City 2005-03 (noting recognition by courts that "an attorney may use client confidences or secrets to defend himself or herself from a claim or counterclaim brought by the client, or as evidence in a fee collection dispute, but may not necessarily be permitted to use that same information affirmatively in a different type of claim against a client"); Restatement (Third) of the Law Governing Lawyers § 64, comment (c) (2000) (noting that a lawyer may act under the Restatement's self-defense provision "only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification").

[4] In California there is no ethical counterpart to New York Rule 1.6(b)(5)(i), but the Evidence Code contains a self-defense exception to attorney-client privilege. Opinions interpreting that exception have concluded that California law does not permit a lawyer "to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver." San Francisco Opinion 2014-1; see Los Angeles County Opinion 525 (2012) (attorney may respond to former client's internet posting if (1) "response does not disclose confidential information"; (2) response will not injure former client in matter involving the former representation; and (3) response is proportionate and restrained). An Arizona opinion concluded that the right to disclose was not limited to "a pending or imminent legal proceeding," relying on a

provision found in the Arizona rule (and in the ABA Model Rule) but not in the New York rule. Arizona Opinion 93-02 (reasoning that one category of cases within the exception, for a claim or defense "in a controversy" between the lawyer and the client, would include cases not covered by another category within the exception, for "allegations in any proceedings").

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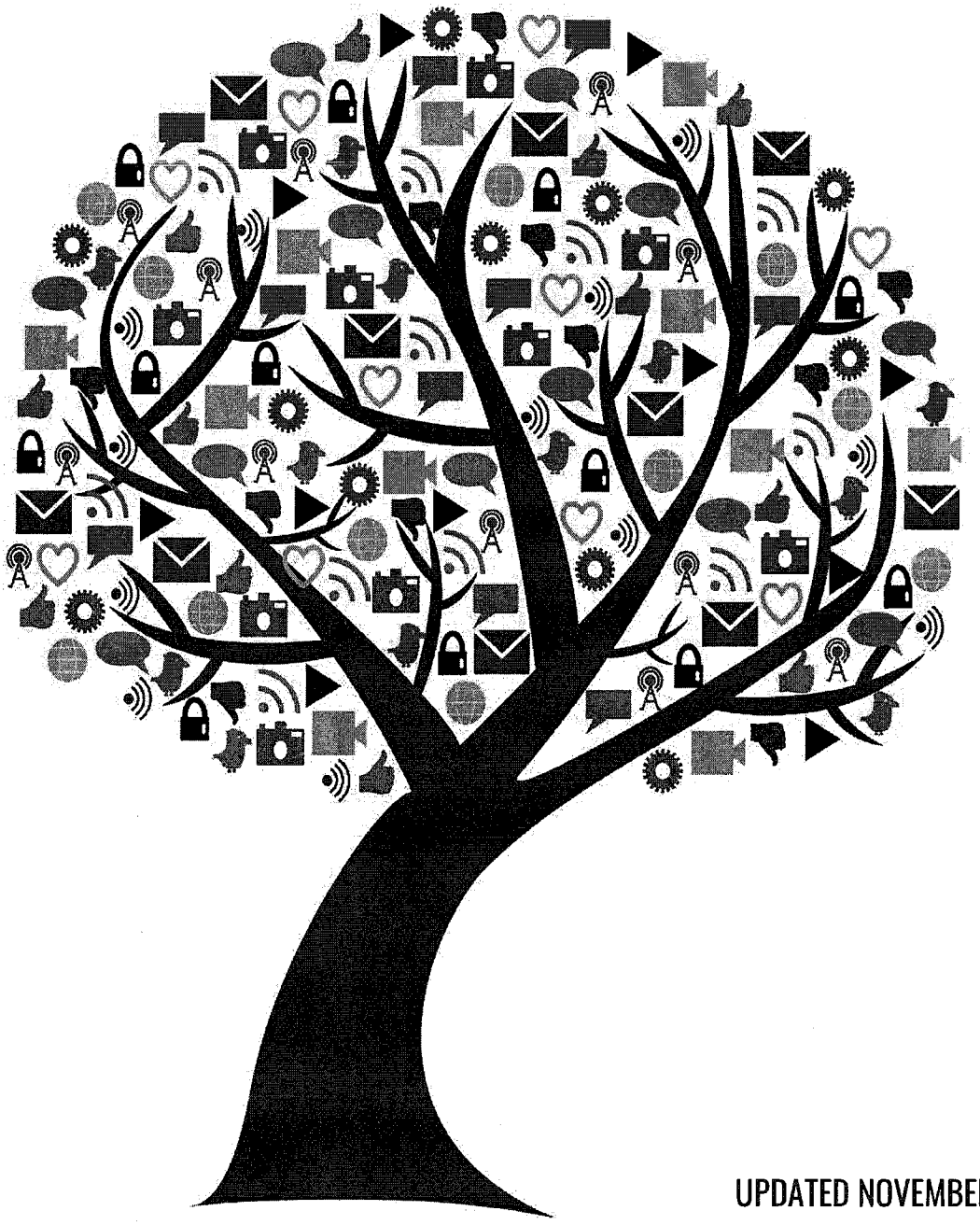
APPENDIX D

THE FLORIDA BAR

Best Practices for Professional Electronic Communication



UPDATED NOVEMBER 2019

Table of Contents

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I. Communication

The Oxford Dictionary defines communication as: "The imparting or exchanging of information or news" or, alternatively, "The successful conveying or sharing of ideas and feelings."

Lawyers use multiple forms of communication on a daily basis to diligently advocate and are in a constant state of communication with clients, opposing counsel, the court and colleagues. This guide provides best practices for the most popularly used forms of electronic communication.

The Oath of Admission to The Florida Bar includes a pledge of "fairness, integrity and civility, not only in court, but also in all written and oral communications."

II. Texting

Texting is a common form of communication that requires a basic level of etiquette. It is best practice to:

- Keep texts short. More than 160 characters means that a telephone call or email is the better way to deliver your message. Think of texts as preludes or follow-ups to conversation, not the conversation itself.
- Because of the brevity of most texts, your tone can be misunderstood by the recipient. Texts are best left for general messages such as, "I will be arriving at mediation in less than five minutes" or "Our conference call will start at 2 p.m."
- Texting is the most informal form of communication. If the message is important, deliver it in person, by telephone or via email.
- Try to spell out all words to eliminate confusion. Never use ALL CAPS; which is the digital equivalent of yelling. Check your spelling; autocorrect will often change words you intended to use into words you did not intend to use.
- If your conversation requires the exchange of more than three texts, it is probably better to communicate face-to-face or by email or telephone.
- Be sure you have permission to text the person. Just because the person provided a cell phone number does not mean you have permission to text. If you are texting someone for the first time, identify yourself.
- Do not text while in business meetings or court proceedings (be aware of Rule 4-1.6 Confidentiality). Do not text while driving or send a text to someone who you know is driving.

- Respect the time of others. Do not send text messages to clients, opposing counsel or others involved with legal matters outside of normal business hours (8 a.m.-5 p.m.) unless you have permission. Be mindful of time zones.
- Pursuant to a decision of the Board of Governors, an advertising lawyer may send advertisements via text only if (1) the advertising lawyer complies with all requirements for written communications sent to specific recipients under Rule 4-7.18(b), (2) provides an "opt-out" for recipients, (3) the recipients are not required to pay for receipt of the text messages, and (4) the lawyer complies with all state and federal laws, rules and regulations regarding unsolicited text messages. The advertising lawyer is responsible for determining compliance with all applicable laws, rules and regulations, including the federal Telephone Consumer Protection Act, 47 U.S.C. §227. This advisory advertising opinion only addresses compliance with the Rules Regulating The Florida Bar related to attorney advertising and does not address whether the advertising lawyer is in compliance with applicable laws, rules and regulations regarding unsolicited text messages.

Technology Considerations of Texting

- Texts are not temporary. Text messages can be saved on a cell phone within the actual conversation or on a smartphone by simply taking a screenshot of the conversation. These captured text messages can be forwarded to other recipients or exported off the device.
- Text threads can be altered. Most smartphones allow users to delete individual text messages in a thread/conversation. Do not assume the thread you are seeing, reading or sending will remain intact.
- When dealing with text messages related to a client, you should be familiar with the backup policies, methods, retrieval, metadata, etc. that texting service providers and devices employ for retaining and destroying sent and received text messages.
- Use sound judgment when texting. Although texting is an easy and quick form of communication, lawyers should consider whom they text and whom they receive texts from. Responding to clients via text could consume a large part of your day if you do not control communication.

III. Email

Email is a quick and convenient way to connect with clients, colleagues, the court system and opposing counsel. It is not a good substitute for face-to-face contact and telephone calls for interpersonal communication. Email messages may become part of a court record and may be subject to disclosure to third parties. Compose email messages in the same manner and with the same good judgment that you would employ for any other communication. When a topic needs

to be explained or negotiated and will generate too many questions and confusion, don't handle it via email. Also, email should not be used for last minute cancellations of meetings, lunches or interviews, and never for devastating news. If you need to deliver bad news, a phone call or meeting is preferable.

It is best practice to:

- Use a descriptive subject line; never leave the subject line blank. It should pinpoint for the recipient exactly why you are emailing. Also, a clear subject line allows for easy searches later. Don't hit "Reply" to an old message and send an email that has nothing to do with the previous one. Change the subject line when the content of the email chain changes.
- Use a salutation. Make no assumptions about the receiving party's gender. Your email greeting and signoff should be consistent with the level of respect and formality of the person you're communicating with. Write for the person who will be reading it: If the recipient is very polite and formal, write in that language. The same goes for a recipient who tends to be more informal and relaxed. If you are uncertain about whether the recipient remembers you, or will recognize your name and email address, include a simple reminder of who you are. Example: "I am emailing about the Smith case that we discussed at the CLE event on xx/yy/zzzz in Tampa."
- Be courteous. As with any other form of business correspondence, email messages should be written with courtesy and respect – two hallmarks of professionalism. Do not employ rude or facetious remarks that could be deemed unethical, unprofessional, defamatory or prejudicial (Rule 4-8.4(d)).
- Don't use ALL CAPS. It can be read as shouting and makes your email difficult to read. Exclamation points and other indications of excitement such as emojis, abbreviations such as LOL, and ALL CAPS do not translate well in business communications. Leave them off unless you know the recipient extremely well. Humor can easily get lost in translation without tone or facial expressions. In a professional exchange, it's better to leave humor out of emails unless you know the recipient well. Just as jokes get lost in translation, tone is easy to misconstrue without the context you'd get from vocal cues and facial expressions. Avoid using negative words such as "failure," "wrong," or "neglected," and always say "please" and "thank you." Miscommunication can easily occur because of cultural differences, especially in writing where we can't see body language. Tailor your message to the receiver's background or how well you know them.
- Check, revise and edit your email. Do not ignore the basics of writing, punctuation and spelling. Watch your tone. Avoid slang, jargon and abbreviations. Be succinct without coming across as rude. Create your message as a concise, stand-alone note, even if it is in response to a chain of emails. It is frustrating for recipients to scroll back through

multiple emails to understand the issues. Be clear. Make sure it's not a burden to read. Consider using bullet points or numbering. The person reading your email should not have to dig through several paragraphs to figure out what you're saying. State the purpose of your email within the first two sentences.

- Sign your email. Include information such as your telephone number, position, location and email address. Different signatures for different recipients may be appropriate. For example, shorter signatures may suffice for email to internal colleagues. This provides the recipient, particularly external recipients, with some information about you. The recipient should not have to look up how to get in touch with you.
- Appropriately use "cc." A "cc" (carbon copy) suggests that the message is for information only; no action is necessary on the part of the "cc" recipients. Send carbon copies only to those who need a copy. Before you click "Reply All" or put names on the "cc" or "bcc" (blind carbon copy) lines, ask yourself if the recipients really need the information in your email; if they don't, why send it? Take time to send your messages to the right people.
- If you're sending a message to a group of people and you need to protect the privacy of your list, use "Bcc," otherwise, use bcc with caution.
- Use attachments for long text or reports, or when special formatting is necessary. To keep the file size small, avoid unnecessary graphics (pictures and logos) and/or embedded multimedia. Most email servers accept attachments up to 10 MB, the general standard. Your email system may let you attach a document as large 25 MB, but that doesn't mean the recipient can or will receive it, as large attachments can clog the recipient's inbox and cause other emails to be returned to the sender. There are other ways to reduce a document's file size, such as compressing images or selecting "reduce file size" when savings PDFs. If the attachment is still larger than 20 MB, consider using a secure file-sharing service. Also, give the attached files logical names so the recipient knows at a glance the subject and the sender. Example: "Smith contract – GB version 8-22-19."
- Add the email address last. This ensures that you don't accidentally send an email before you have finished writing and proofing. Doublecheck your recipient list. Pay careful attention when typing a name from your address book on the "To" line. It's easy to select the wrong name, which can be embarrassing to you and to the person who receives the email by mistake. Email can be unforgiving. Thanks to high-speed Internet, it is almost impossible to "recall" an email. Even if you could, doing so would only call more attention to the original message, your mistake and your attempts to undo it.
- Email should not be used to resolve conflict or to say things that would not be said in person.

- Evaluate the importance of your email. If you overuse the "High Importance" feature, few people will take it seriously. Instead, use descriptive subject lines that explain exactly what a message is about.
- Your mistakes won't go unnoticed by the recipients. Don't rely solely on spellcheckers. Read and re-read your email a few times before sending it. Example: You intended to type, "Sorry for the inconvenience" but you accidentally typed, "Sorry for the incontinence." Spellchecker will not correct that.
- Keep your fonts, colors, and sizes classic. Your emails should be easy for recipients to read. It's best to use 12- or 14-point type and an easy-to-read font such as Arial, Calibri, or Times New Roman. As for font color, black is the safest choice.
- Keep private material confidential. Assume that others will see what you write, so don't write anything you wouldn't want everyone to see. Email is dangerously easy to forward; it's better to be safe than sorry.
- When corresponding with a judge about a pending case, copy the opposing counsel (or opposing party if pro se) to avoid ex parte communications.

A. Replying to Email

Colleagues expect prompt responses to email questions. It is best practice not to leave the sender hanging. Depending on the sender and the nature of the email, responding within 24 to 48 hours is generally acceptable. If you cannot send a full response in a reasonable time, it is best practice to send a quick reply stating that you have received the message and give an estimate of when you will provide a more detailed response. If possible, you should reply to an email accidentally sent to you and especially if the sender is expecting a reply. Example: "I don't think you meant to send this to me, and I thought you should know so you can send it to the correct person." However, refrain from sending one-liners: "Thanks," and "Oh, OK" do not advance the conversation in any way. Consider putting "No Reply Necessary" at the top of emails if you don't anticipate a response.

An automatic response that says "Thank you for your email message. I will respond to you as soon as I can" is not helpful. Using one when you are out of the office – that tells when you will return or be able to respond – is.

It is also best practice to use "Reply All" only when appropriate. Be careful when replying to a message that was sent by a bulletin board or automatic remailer. Your reply may be sent to the entire audience subscribing to the bulletin board.

As a matter of both courtesy and efficiency, include the original email when replying. It avoids confusion and making the sender search for the original message. Where your reply is relevant to only a portion of the original message, consider excerpting and including in your reply only the relevant portions.

B. Rules for Email Discussion Groups

Group discussions on listservs are meant to stimulate conversation, not create contention. Here are best practices for navigating the realm of listservs:

- Do not post anything in a message that you would not want the world to see or that you would not want anyone to know came from you.
- Be aware that advertising rules apply to commercial messages or promotional information regarding yourself or your firm that is posted on the listserv (Rule 4-7.11).
- Do not post messages to all members of the list disparaging the system of justice or any individual who is a part of the system of justice. (Rule 4-8.2(a).)
- Do not use a listserv to vent about the particulars of a case (Rule 4-1.6; also, Rule 4-3.6 Trial Publicity and Rule 4-3.5 Impartiality).
- Do not post any information or other material protected by copyright without the permission of the copyright owner.
- Do not challenge or attack others. Let others have their say.

C. Responding to an Angry Email

As email has made it easier for people to communicate very quickly, it also has made it easier for people to forget about civility. How do you react when you are the recipient of an angry email? How do you keep the situation from escalating? It is best practice to:

- Step away from the computer. An angry email will usually trigger your own anger. Never reply to the email right away; it will only escalate the issue. Never send an angry email or give a flip response. Give your message thoughtful consideration before sending it. If you feel angry, put your message in the "drafts" folder and review it again later.
- Identify the facts in the email. Does the writer have a reason to be angry? Did you say or do something that legitimately offended the person? Be objective.
- Evaluate what the writer got wrong. Did the writer misinterpret a letter or get the wrong information?
- Put yourself in the writer's shoes. What kind of response would you expect? Understanding the writer's perspective will aid in your response.
- Verify all the facts and fix what you can before writing back. Being able to state in your reply that you already have taken action will go a long way toward resolving the issue.
- Begin your reply with positives. Explain where the writer was right and that you understand why the writer is upset. Explain what has been done to fix the problem and apologize if necessary.
- Once you provide the positives, ease into explaining where the writer was wrong. Do not get emotional or confrontational. Avoid name-calling, placing the blame and

sarcasm. State your side of the issue. If it was a misunderstanding, try to interject that you understand what caused it.

- Do not be afraid to give consequences. If the business relationship cannot continue, say so. Be straightforward so it does not sound like a threat. Don't make ultimatums if you cannot or will not follow through. Do not threaten to file a Bar complaint or seek criminal prosecution, as these violate Rule 4-3.4(g) and (h).
- Be respectful and civil, even if the writer failed to show you the same respect.
- Think about how permanent emails are. They can be forwarded, printed and shared. Make sure you are prepared to stand by your words; do not write anything you might regret later.
- Save records of the correspondence. It is easier to defend yourself later if you have proof.

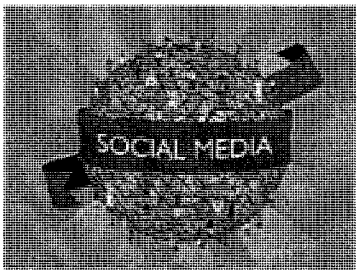
A lawyer should be mindful of Florida Bar Rule 4-8.4 Misconduct when engaging in an angry email exchange. In addition, review Rule 3-4.3 Misconduct and Minor Misconduct before responding.

Technology Considerations of Email

- When sending attachments, be aware that they may contain metadata that could disclose unwanted information to the recipient.
- Attachments may contain malicious software code. Use scanning software for both outbound and inbound emails.
- If you use email as form of confidential communication, you should know the risks and be familiar with the options of sending secure/encrypted messages.
- There is always a chance that your email may be intercepted. Many of these risks are mitigated if not entirely eradicated when using an encrypted email service.
- Secure client portals are an emerging and safe alternative to email. There are many case and practice management systems that offer a client portal component. You should seriously consider this option as a method of communication for confidential information.

IV. Social Media

Social media allows people to create and share information and ideas in virtual communities. Social media include but are not limited to blogging, micro-blogging (i.e., Twitter), social networking sites (Facebook, LinkedIn) and interactive multimedia sites (YouTube).



Here are best-practice tips, rules and real-life scenarios:

- The Florida Supreme Court's Civility Pledge added to the Oath of Admission in 2011 requires lawyers to promise fairness, integrity and civility, not only in court, but also in all written and oral communications. This includes emails, blogs and social media sites.
- Any communication made by a lawyer must refrain from fraud, deceit, dishonesty and misrepresentation (See Rules 4-7.13, 4-7.14, and 4-8.4(c)). These rules apply to posts on social media sites such as Twitter, Facebook, Instagram and LinkedIn. (For example, do not allow family members to praise your legal services on social media if they have not been a client.)
- Social media sites are not a way to circumvent the lawyer advertising rules. Information appearing on networking sites that is used to promote the lawyer or law firm is subject to the lawyer advertising rules and must comply with all substantive lawyer advertising rules (see Subchapter 4-7).
- Invitations sent directly from a social media site via instant message to a third party to view or link to the lawyer's page on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business are solicitations and violate Rule 4-7.18(a), unless the recipient is the lawyer's client, former client or relative, has a prior professional relationship with the lawyer or is another lawyer.
- There is no expectation of privacy on the Internet. There is no such thing as a true delete of information. Privacy settings are not a safeguard to protect what you post, and information is stored forever.
- In general, if you would be ashamed to content on a billboard, do not post it.
- Do not disparage or seek to humiliate the judicial system, judges, opposing counsel, clients or others via social media (Rules 4.82 and 4.8-4(d)).
- Do not post inappropriate or unprofessional pictures.
- If misleading or dishonest information has been posted on your social media profile or account by others, remove the information.
- Visit your social media profile or account on a consistent basis to ensure that you are not running afoul of the rules of the disciplinary system or any of the lawyer advertising rules. If you are unable to actively engage on a social media site, deactivate your account to avoid inappropriate commentary being placed by hackers in your name.
- Responsible participation in social media is time-consuming. Keeping abreast of one social media site may be all that your schedule will allow.
- If you do not know much about the social media site, educate yourself before joining.
- Change your password frequently to avoid hackers and spam messages being sent to those with whom you interact.
- Log off after visiting your social media page.
- Delete browsing history, saved passwords and cookies on a regular basis to secure your social media accounts from hackers.

Social media can be a fun way for your practice to reach an entirely new audience. Following these tips will keep you safe and within the rules.

V. Telephone/Cell Phone

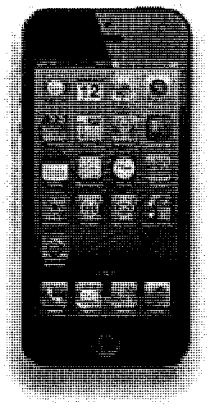
A. Telephone

Telephone calls frequently serve as introductions that could lead to a new client or business venture. Telephone conversations also provide an efficient means of negotiating, scheduling and generally informing all parties as a case progresses. It is best practice to:

- Answer a call before the fourth ring.
- Set your phone to divert to voicemail or an alternate line where another person or service will answer after the fourth ring.
- Before answering, determine whether you can devote your full attention to the caller; if not, allow it to go to voicemail and return the call within a reasonable amount of time.
- Ask for clarification – "If I understand you correctly ..."
- Take notes.
- If you need to place the caller on hold, ask first and assure it will not be long (15-30 seconds maximum). If you need longer, ask if you can return the call later.
- Consider whether the conversation is better suited for a face-to-face meeting.
- Place the caller on hold if seeking assistance of a co-worker rather than muffle the phone with your hand.
- If you need to transfer the caller, advise and provide the extension in case the caller is disconnected.

Lawyers should train their support staff to adopt these principles. Telephone calls cannot be recorded without the consent of all parties and generally are not recorded as a business practice. For communications that need to be memorialized, consider either a written communication or a telephone call followed by written confirmation.

B. Cell Phone



Most people use a cell phone on a daily basis and keep it close at all times. Use cell phones with caution, remaining mindful that conversations conducted in public regarding client affairs may inadvertently disclose confidential information to others (Rule 4-1.6). When using a cell phone, it is best practice to:

- Keep your voice low. Unless necessary, do not place or accept phone calls when you are in locations that will make it difficult for you to be heard.
- Ensure your phone is off or silenced when entering court or meetings. Federal courthouses have strict rules regarding cell phones.
- Keep conversations private. If you are expecting an important call or one that deals with confidential matters, remove yourself from the company of others. Be cautious of personal space and keep several feet from others when conducting legal matters.
- Know when to call. Best practice is normal business hours, which are 8 a.m.-5 p.m., unless you are authorized to call at other times. Keep time zones in mind.
- Use a speaker phone only when you are alone. Advise callers when you put them on a speaker phone.

C. Hostility via the Telephone/Cell Phone

Dealing with an angry person over the phone requires a patient and thoughtful response. As lawyers, we pledge to "abstain from all offensive personality." It is best practice to:

- Keep your composure. Attempting to combat an angry caller will only escalate the situation.
- Listen. Figure out what is causing the hostility and begin to generate ideas on how to resolve the issue.
- Do not interrupt. Let the caller vent. If you cut the caller off, it will make constructive communication more difficult.
- Be empathetic. Is the anger valid? Indicate that insults and disrespect are not acceptable, but attempt to understand and address the root of the issue.
- Ask questions. Make sure you truly understand the situation.
- Seek a solution. Indicate you will do your best to resolve the matter.
- Apologize. We all make mistakes; if an apology is appropriate, offer one.
- Get solutions approved. Do not impose a solution; get the caller to agree.
- If all else fails, put the phone down. Politely explain that calmer heads may prevail and indicate that the conversation should be resumed at a later time. It is not ideal, but

sometimes it is your best option. Do not feel pressured to resolve the matter; the person could be having a bad day. Know when to end the call and move on.

D. Setting Voicemail

Keep things simple and to the point. It is best practice to:

- Identify your name and organization.
- State that you are unavailable and any other important information.
- Ask the caller to leave a message.

Change your voicemail if you go out of the office. Return calls as promised. Best practice dictates that a person leaving a voicemail should hear from you or your assistant within 24 hours (this advice does not circumvent Rule 4-1.4 Communication). The longer you wait to return calls, the more likely your backlog will get out of hand. After you have written the message down, delete it from your voicemail box. It can be very irritating to a caller to find a voicemail box that is full.

E. Leaving a Voicemail

When leaving a voicemail it is best practice to:

- Speak slowly and leave your number at both the beginning and end of the message.
- Limit your comments to one or two matters. Keep your message short.
- Never leave a message to defend your character, establish your reputation or resolve a feud.
- Make the call's purpose clear, beyond just please return my call.
- Don't leave confidential information on a voicemail; you could have dialed a wrong number (Rule 4-1.6). If you receive a voicemail related to the representation of your client that you reasonably should know was sent inadvertently, you should promptly notify the caller (See Rule 4-4.4(b)).

Here is an example of a professional voicemail:

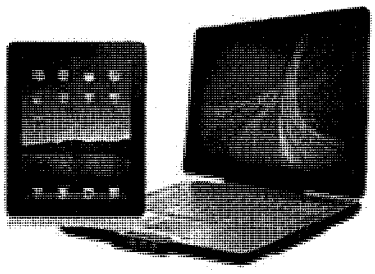
"Hi, this is Cathy Smith with Dale and Dale Law Firm at 112-555-1245. I am calling to let you know that I received a settlement offer in your case, and I would like to schedule an appointment with

you. Please call me at your earliest convenience to schedule an appointment. Again, this is Cathy Smith with Dale and Dale Law Firm, and you can reach me at 112-555-1245. Thank you."

VI. Laptop/Tablet Usage in Public and Cybersecurity

The ability to take work anywhere with a laptop or tablet comes with potential threats to confidentiality (Rule 4-1.6) and security of client information. It is best practice to:

- Use a virtual private security network (VPN). A VPN set up by your company allows you to connect remotely using a secure connection.
- Keep your laptop/tablet secure. A thief can physically steal your laptop, but you can keep your information secure by using a strong access password or passcode.
- Use built-in security features. Your device may already have security features built in. Use these features to keep hackers from accessing data.
- Keep your software updated. Many updates include security patches to correct problems found in outdated versions.
- Turn off sharing. You may have your device set up so others can access documents while you are in the office, but turn off this feature when you are in public.



- Be aware of your surroundings. Not all dangers in the digital world are high-tech. Someone may simply be looking over your shoulder.
- Use a privacy screen to keep people from looking over your shoulder and seeing your data.
- Avoid "free" and "unsecured" Wi-Fi connections. Always use a Wi-Fi service or connection that encrypts your data transmission.

It is critical in this day and age to ensure that cyber dangers are taken seriously in order to protect the integrity of your data and technology resources. If you follow the news at all, you have likely heard about another business or government agency that has had to invest significant resources to recover from damage caused by a careless user or malicious actor. Below are five steps that you can take to help ensure that your technology stays safe and sound.

1. **Educate users**: Awareness of basic computer security principles can go a long way in helping to keep your information safe. Create appropriate internet usage guidelines and rules of behavior for information resources.
2. **Protect your computer and network**: Installing the latest security software, web browser, and operating system updates are good defenses against viruses, malware, and other online threats.

3. **Make backup copies of important data and information**: Regularly backup your important data. If possible, backup the data automatically and store the copies offsite.
4. **Secure your Wi-Fi**: If you have a Wi-Fi network, make sure it is secure and password protected.
5. **Use strong passwords**: Use unique, strong passwords and change them routinely. If possible, consider implementing multi-factor authentication that requires additional information beyond a password.

VII. Records Management

A core asset of every law firm and legal organization is information. Lawyers sift through enormous amounts of information daily – everything from client files to printed contracts to the emails they receive. Making sense of all this information and ensuring that it is sufficiently protected and accessible is daunting but necessary.

There are several Bar rules dealing with record-keeping. (See "Ethics Informational Packet: Closed Files," produced by The Florida Bar's Ethics Department.)

Records information management, often abbreviated "RIM," encompasses the policy, processes and procedures that law office administrators employ to manage such information. RIM is the process of identifying, organizing, maintaining and accessing all of the records created or received by an organization in its day-to-day operations. These records can be electronic or paper and include virtually everything that passes through an organization's doors. There are many reasons a firm or individual lawyer might employ a particular RIM strategy, but the most important are the most practical: improving productivity, cutting costs and complying with legislative, regulatory, Bar-mandated and internal policy requirements.

VIII. Expectations

Best practice dictates that lawyers must manage expectations in electronic communication. When dealing with a client or opposing counsel, explain to them how your office works, and that if you are not available they are welcome to speak with your staff. Let them know when you generally return calls.

Before you give out your cell phone number, consider whether it is necessary for the contact to have this access. Advise whether it is for emergency purposes only. Let contacts know if you will receive and respond to text messages. If you are leaving the office for an extended period, set an away message for your email and voicemail. If you take a long vacation, file notices of unavailability on all of your cases.

Set limits on access to you via cell phone, email and text. If you do not work on weekends, let people know and set a message on your cell phone and work phone that calls will be returned during the workweek. When expectations are established in the beginning, people will generally respect boundaries.

IX. A discussion of Ethics Issues in Electronic Communication

The increased use of technology makes it imperative that lawyers be well-versed not only in technology but also in the issues that may arise with the use of technology. The Rules Regulating The Florida Bar and various Florida Bar ethics opinions set forth guidelines and limitations of the use of technology.

A. Creating Inadvertent Relationships

Lawyers should not give off-the-cuff advice via social networking sites or other electronic communication, particularly specific advice in response to online questions, to avoid inadvertently creating a lawyer-client relationship. Ethics rules do not create lawyer-client relationships; instead, they guide the lawyer's conduct once the relationship has been established. Whether a lawyer-client relationship has been established is a legal and factual matter based on the reasonable, subjective belief of the person seeking legal advice or services, not the lawyer's intent or belief.

B. Electronic Practice

Lawyers may provide legal services over the Internet, as long as the services do not require in-person consultation with the client or court appearances (Florida Ethics Opinion 00-4). All of the Rules of Professional Conduct apply to representation over the Internet, including diligence, competence, communication, confidentiality, conflicts of interest, etc. (*Id.*). Florida Ethics Opinion 00-4 was written before adoption of Rule 4-1.2(c), which permits limited representation as long as the limitation is reasonable under the circumstances and is not prohibited by law or rule, and the client gives informed consent in writing. Rule 4-1.2(c) applies if the Internet representation is a limited form of representation.

C. Confidentiality

Many lawyers treat confidentiality as synonymous with privilege, but the two are distinct, and confidentiality is much broader. A lawyer may not disclose any information relating to a client's representation, regardless of the source, without the client's informed consent (with limited exceptions) (Rule 4-1.6). For resources on how to keep information secure, see the Records Management section.

Many confidentiality issues relate to electronic communications. For example:

- Lawyers who use cloud computing must take appropriate care to ensure confidentiality of client information (Florida Ethics Opinion 12-3).
- Lawyers who use electronic devices such as printers, copiers and scanners should be aware that those devices can store data, and take appropriate steps to secure client information (Florida Ethics Opinion 10-2).
- A lawyer who uses electronic forms of communication should take care not to inadvertently provide confidential client information via metadata (see section on metadata below) (Florida Ethics Opinion 06-2).
- When a lawyer outsources paralegal services, communication often occurs via electronic means. The lawyer should take appropriate steps to ensure confidentiality of client information, including investigating any non-lawyer services to be used and appropriately supervising the non-lawyers involved (Florida Ethics Opinion 07-2). Consider a secure client portal when using outside services.

D. Inadvertent Disclosure via Metadata

Metadata is information about a particular document or data set that describes how, when and by whom it was created, modified and formatted. It helps users revise, organize and access electronically created files. Lawyers who send documents electronically (outside the discovery context) should take appropriate steps to prevent the disclosure of confidential client information via metadata (Florida Ethics Opinion 06-2). Lawyers should not "mine" the metadata of documents sent to them electronically (*Id.*). Lawyers who receive information inadvertently via metadata (e.g., tracked changes and comments) that were clearly not intended for them must notify the sender of the receipt of the information (*Id.*). After the adoption of Florida Ethics Opinion 06-2, Rule 4-4.4(b) was adopted, which states:

> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The comment provides further guidance:

> Subdivision (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the

sending person. For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 4-1.2 and 4-1.4.

Microsoft Word documents can contain the following types of hidden data and personal information:

- Comments, revision marks from tracked changes, versions and ink annotations.
- Document properties and personal information.
- Headers, footers and watermarks.
- Hidden text.
- Document server properties.
- Custom XML data.

In Microsoft Word, the Document Inspector can be used to find and remove hidden data and personal information in Word documents. Refer to the help function to search for instructions specific to a particular version of Word.

E. Impugning Integrity of Judges

Electronic communications create the possibility that lawyers may impugn the integrity of a judge, which is prohibited under the rules. Social media and blogging in particular create a situation in which lawyers may post information without thinking about the potential consequences (Rule 4-8.2 and *The Florida Bar v. Conway*, Case No. SC08-326 (2008)).

F. Communication with/Investigating Witnesses

A lawyer generally may view the public social networking pages of a witness. A lawyer generally may subpoena the social networking page of a witness (See New York City Ethics Opinion 2010-2). A lawyer may or may not be able to "friend" an unrepresented witness using the lawyer's own name and profile. Although at least one state has taken the position that a lawyer may do so, The Florida Bar Professional Ethics Committee has not addressed the issue and may take the position that any friend request would have to clearly indicate that a lawyer is making the request in a representational capacity (New York City Ethics Opinion 2010-2).

Rule 4-4.3 prohibits a lawyer from "stating or implying the lawyer is disinterested." A lawyer also "may not engage in conduct involving fraud, dishonesty, deceit or misrepresentation" under Rule 4-8.4(c), nor violate the rules of conduct through an agent under 4-8.4(a). Thus, a lawyer may not

create a false social networking profile to "friend" an unrepresented witness to obtain information, or use an investigator to create a false profile to make a "friend" request (New York City Ethics Opinion 2010-2). A lawyer also may not use an investigator or other third person to "friend" an unrepresented witness to obtain possible impeachment material, because use of the third party is deceptive (See Philadelphia Ethics Opinion 2009-02).

G. Communicating with Represented Persons via Social Networking Sites or Other Electronic Means

A lawyer may access the public pages of an opposing party's social networking site (See New York State Bar Ethics Opinion 843 (2010)). A lawyer may subpoena an opposing party's social networking site pages, including private portions of the profile (See *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d (N.Y. Sup. 2010)). A lawyer may not make a "friend" request to high-ranking employees of a represented corporation that is the defendant in a lawyer's case who have supervisory authority, whose statements can be imputed to the corporation, or who can bind the corporation. They are considered represented for purposes of the ex parte rule (See, San Diego Ethics Opinion 2011-2; Rule 4-4.2, 4-8.4(c)). A lawyer would not be able to use an investigator to do so either (Rule 4-4.2, 4-8.4(c) and 4-8.4(a)).

A lawyer should be careful about use of "reply all." A lawyer should not assume that an opposing counsel has given consent to direct communication with the opposing counsel's client merely because the opposing counsel has copied the opposing counsel's own client on an email. (See Alaska Ethics Opinion 2018-1; Kentucky Ethics Opinion E-442; New York City Bar Opinion 2009-1 .) Lawyers should also not copy their own clients on email because it risks a client "replying all" and waiving lawyer-client privilege or confidences. A better practice is to blind copy a client on email or forward an email to the client after sending it to opposing counsel. *Id.*

H. Social Networking, Electronic Communication and Judges

Judges should be careful regarding social networking. In Florida, a judge who is a Facebook "friend" of a lawyer who appears before the judge is not necessarily subject to disqualification according to *Herssein and Herssein, P.A. v. United Services Automobile Association,* 271 So.3d 889 (Fla. 2018). However, in *Herssein,* a concurring opinion "strongly urge[s] judges not to participate in Facebook."

Judges also should avoid the potential for ex parte communications – at least one judge has received a public reprimand for ex parte communications on Facebook with a lawyer for a party in a pending matter before him (See North Carolina Judicial Standards Commission 08-234). Similarly, judges should avoid ex parte communications via email. Judges should consider not communicating via email to avoid accidental ex parte, but if a judge chooses to communicate via email, the judge should be careful to copy both parties or their lawyers. See *In re Contini,* 205 So.3d 1281 (Fla. 2016).

Judges should be careful regarding their campaign activities relating to social media. In Florida, judges' election committees may have social networking sites that comply with campaign requirements and may allow lawyers to list themselves as "fans" as long as the committees/judges do not control who may list themselves as fans (See Florida Judicial Ethics Advisory Opinion 2009-20).

I. Social Networking and Mediators

In Florida, a mediator may "friend" lawyers and parties appearing before the mediator on the mediator's social networking page and may become a "friend" on the pages of parties or lawyers appearing before the mediator. However, doing so may limit a mediator's ability to handle future mediations, as "friending" may create an appearance that the party or lawyer can influence the mediator, and the mediator would therefore lack the required impartiality (See Florida Mediator Ethics Advisory Opinion 2010-001).

J. Social Networking and Jurors

Lawyers may view public portions of prospective jurors' networking sites. However, lawyers may not "friend," contact, communicate or subscribe to Twitter accounts of jurors. Lawyers also may not make any misrepresentation or engage in any deceit in viewing jurors' social networking sites (See New York County Ethics Opinion 743 (2011); New York City Formal Opinion 2012-2). Lawyers must bring juror misconduct to the court's attention following rules on court and juror contact (*Id.*; see also Rule Regulating The Florida Bar 4-3.5). Lawyers also should be mindful of any rules of civil or criminal procedure that address juror contact (e.g., Fla. R. Civ. Pro. 1.431(h), Fla. R. Crim. Pro. 3.575, which prohibit a lawyer from communicating with a juror after trial unless the lawyer has legal grounds, has filed a motion and has obtained an order permitting the contact).

Juror misconduct during trials relating to social media includes: researching information on the Internet, posting real time information about ongoing trials, "friending" a defendant in an ongoing trial and polling friends to determine the juror's verdict (e.g., "Social Media, Jury Duty a Bad Mix," *Miami Herald*, May 5, 2012).

Resources

The Florida Bar
850-561-5600
800-342-8060
www.floridabar.org

The Henry Latimer Center for Professionalism
850-561-5747
www.flabar.org/professionalism

The Florida Bar Ethics and Advertising Department
850-561-5780
Ethics Hotline (for Florida Bar Members Only)
800-235-8619
www.floridabar.org/ethics

FLA, Inc. (Florida Lawyers Assistance – Substance Abuse Help)
800-282-8981
www.fla-lap.org

The Florida Bar's LegalFuel
866-730-2020
www.legalfuel.com

The Florida Bar Attorney Client Assistance Program (ACAP)
850-561-5673
866-352-0707
www.floridabar.org/ACAP

The Florida Bar Unlicensed Practice of Law
850-561-5840
www.floridabar.org/UPL

Florida Board of Bar Examiners
850-487-1292
www.floridabarexam.org