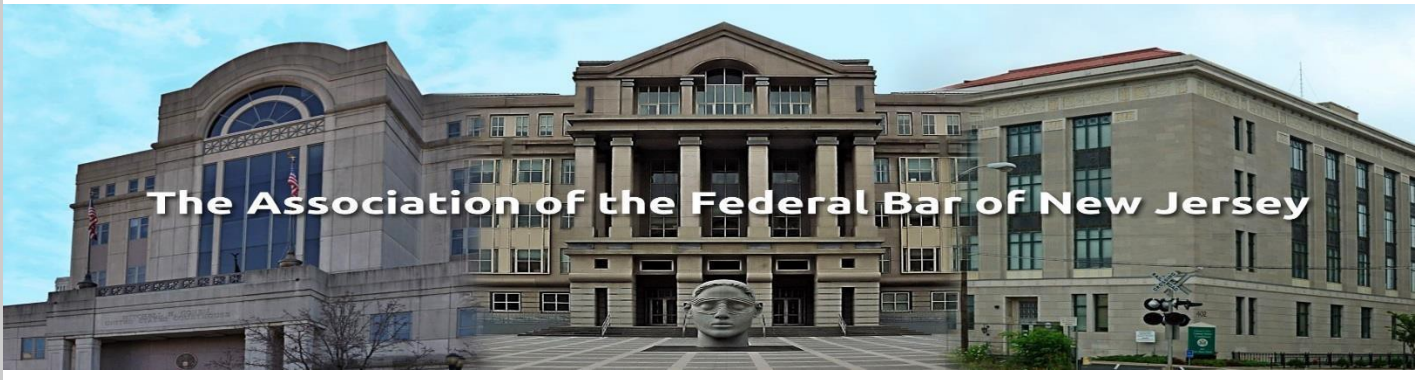
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

The Brown Bag Lunch Series

Social Media and Litigation: "The New Normal"

May 4, 2017



APPENDICES

Appendix A

I. Popular Forms of Social Media

A. Facebook

1. Facebook targets students and adults allowing members to create a profile that primarily focuses on more personal matters such as family and hobbies. Members use Facebook to talk with friends and share personal information about their lives. 1.79 billion active users monthly.

B. Twitter

1. Twitter is a social networking phenomenon. Twitter asks users "What are you doing?", and users answer with a brief message. Twitter members can post links to articles, pictures, videos or other information about themselves or topics of interest. 317 million active users monthly.

C. Instagram

1. Instagram is a mobile photo-sharing application and service that allows users to share pictures and videos either publicly or privately on the service, as well as through a variety of other social networking platforms, such as Facebook, Twitter, Tumblr, and Flickr. 600 million active users monthly.

D. LinkedIn

1. LinkedIn targets professionals and allows members to create a profile that describes their professional background. It is designed to facilitate connection and communication with other professionals. 106 million active users monthly.

E. Pinterest

1. Pinterest is a social network that allows users to visually share, and discover new interests by posting (known as 'pinning' on Pinterest) images or videos to their own or others' boards (i.e. a collection of 'pins,' usually with a common theme) and browsing what other users have pinned. 150 million active users monthly.

F. YouTube

1. YouTube is a video-sharing website and has 1.3 billion users who watch almost 5 billion videos per day.

G. Periscope

1. Periscope is an app that lets you share and experience live video streams direct from your smartphone or tablet. It can be used to capture the atmosphere among fans at an important match, to broadcast an unfolding news story or to experience what it's like to walk down the streets of New York or Dubai. 1.9

million daily active users.

II. Document Retention

A. Considerations

1. Specific consideration for social media:

a. At the outset, it is important for counsel to gather as much information as possible

b. Move quickly—sites only retain information for short period of time—consider preservation letters.

c. Save and print all electronic evidence-possible that alleged defamatory statement(s) may be removed from the blog or website.

d. Save valuable information.

(i) blogger's email address is valuable piece of information

(ii) blogger's "handle" (name used on Internet to identify himself)

e. Tip: Conduct independent research of public portions of social media; take screen shots; consider serving a legal hold that includes social media (but not a Friend request)

(i) No ethical prohibition on viewing public portions of social media accounts

2. Legal Discovery – all "ESI" is in play.

a. Courts expect that companies are able to identify, locate, collect and preserve relevant ESI:

(i) *Zubulake* line of cases (S.D.N.Y.).

(ii) Montreal Pension Plan (S.D.N.Y. 2010).

b. Consider discovery plan if you use social media in business

III. Social Media Evidentiary Issues

A. Authenticity

1. Evidence proffered as information allegedly drawn from social media websites, whether offered simply for the fact that such information appeared on a given website or for some other purpose, in the form of a "writing," a photograph, or

some other form of data, must be authenticated.

2. Laying the Foundation

    a. Example: printout of a user's Facebook Profile

        (i) Whether the exhibit is actually a printout from the social media site from which it purports to be?

        (ii) Did the information in the exhibit appear on the website, and does it accurately reflect it as it appeared on the website?

        (iii) Whether the posting can be satisfactorily shown to have arisen from the source (the particular person or entity) that the proponent claims.

3. Way to Authenticate

    a. Way Back Machine

4. Case Law

    a. U.S. v. Browne

        (i) Defendant appealed his conviction for child pornography and sexual offenses on the grounds that five Facebook chat records were not properly authenticated and should not have been admitted into evidence.

        (ii) The authenticity hinged on whether the defendant was the author of the Facebook chats.

        (iii) The court held that, "it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for the more traditional documental evidence." The court then found there was sufficient extrinsic evidence to authenticate four of the five admitted Facebook chats.

        (iv) The extrinsic evidence included: testimony from the minors regarding the context of the chats; in-person meetings between the defendant and the minors following the chats; the defendant's own concession he owned the Facebook account; the biographical information on his account were accurate.

    b. New Jersey v. Hannah

        (i) The court was faced with authenticating a tweet from defendant's Twitter page.

(ii) The court considered two approaches to authentication (1) the Maryland approach (which recognizes three ways to authenticate ask the author if it was his, search the computer of the author, obtain information from the social media site) (2) the Texas approach (which allows circumstantial evidence to support authenticity)

(iii) The court followed the traditional rules of authentication under N.J.R.E. 901 and allowed the use of circumstantial evidence to find that there was enough circumstantial evidence in this case to support authentication.

(iv) The circumstantial evidence the court relied on was: the tweet contained details about information that one would expect only a participant in the argument to have had, plaintiff testified that the tweet was posted in response to back and forth communication between her and the defendant; and the tweet itself notes that there was "no need" to keep responding to them. The court stated, "the defendant's twitter handle, profile photo, content of tweet, its nature to reply, and the testimony at trial was sufficient to meet the low burden imposed by our authentication rules."

B. Preservation

1. Data residing on social media platforms is subject to the same duty to preserve as other types of electronically stored information (ESI). The duty to preserve is triggered when a party reasonably foresees that evidence may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve. Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it.

2. Methods of Preservation

a. Facebook: allows a user to "Download Your Info" in a single click

b. Twitter: users can download all tweets posted to an account by requesting a copy of the user's Twitter archive

c. Hire third-party vendor to collect data

C. Spoliation

1. Spoliation generally refers to "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably for[e]seeable litigation." *MOSAID Techs., Inc. v. Samsung*

Elecs. Co., 348 F. Supp. 2d 332, 335 (D.N.J. 2004).

2. In *Katiroll Company v. Kati Roll and Platters*, a New Jersey District Court determined that the defendant committed technical spoliation when he changed his Facebook profile picture, where the picture at issue was alleged to show infringing trade dress. Because the defendant had "control" over his Facebook page, he had the duty to preserve the photos. No. 10-3620 (GEB) (D.N.J. Aug. 3, 2011).

IV. Access to Social Media Evidence

A. Assuming a litigant is able to meet its burden to establish the relevancy of social-networking content, the question becomes a practical one – how to obtain the sought-after information? Currently, this question has no good answer. There have been a variety of methods requested by litigants and ordered by the courts, with mixed degrees of success.

B. Methods

1. Permit the requesting party access to the entire account (this method of "production" has not been popular with parties or with courts).

a. In *Trail v. Lesko*, No. GD-10-017249 (Pa. C.C.P. July 3, 2012), both sides sought to obtain Facebook posts and pictures from the other. The court held that a blanket request for login information is per se unreasonable.

b. In *Chauvin v. State Farm Mutual Automobile Insurance Company*, No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (S.D. Mich. Oct. 20, 2011), the court affirmed an award of sanctions against the defendant due to its motion to compel production of the plaintiff's Facebook password. The court upheld the decision of the magistrate judge, who had concluded that the content the defendant sought to discover was available "through less intrusive, less annoying and less speculative means," even if relevant.

c. In *Largent v. Reed*, No. 2009-1823 (Pa. C.P. Franklin, Nov 8 2011) the court granted 21- day access to Facebook account. Plaintiff claimed physical and emotional damages after an accident, but public social media showed otherwise. Defendant sought Facebook discovery, which Plaintiff refused to provide. Defendant moved to compel Plaintiff's Facebook log-in information, claiming in good faith that the public information included photos of extreme gym exercise.

d. In *Zimmerman v. Weis Markets, Inc.*, the defendant in a personal injury case sought access to the non-public portions of the plaintiff's Facebook and MySpace pages to refute the plaintiff's claim that a forklift accident caused serious and permanent impairment to his health and ability to enjoy life. A review of the public portions of the plaintiff's Facebook page reflected that his interests included bike stunts and included recent photographs of the plaintiff "with a black eye and his motorcycle before

and after an accident." The court permitted the discovery to proceed.

2. In Camera Review

a. In an effort to guard against overly broad disclosure of a party's social media information, some courts have conducted an in camera review prior to production.

b. *Offenback v. Bowman* (M.D. PA 2011), the plaintiff conceded that a limited amount of information in his Facebook account was subject to discovery, but the defendants nonetheless sought a much broader scope of discovery from the plaintiff. The court reviewed the information in camera and sided with the plaintiff. The court determined that only a limited amount of information from the Facebook account had to be produced to the defendants.

3. Attorneys' Eyes Only

a. Third-Party Subpoenas

b. Most on-line social media is "controlled" by a non-party service provider

C. Possible Approaches to Obtaining Information Controlled by a Non-Party Service Provider

1. Obtain authorization from adverse party for non-party to reclaim data

2. Obtain court order compelling production

3. Courts are mixed on production

a. Romano v Steelcase, Inc., (NY Sup 2010)

b. McCann v. Harleysville Ins Co., (4th Dept NY 2010)

c. Crispin v Christian Audigier, Inc., (C.D. Cal 2010)

(i) In *Crispin*, the court concluded that the SCA prohibited a social-networking site from producing a user's account contents in response to a civil discovery subpoena.

(ii) In that case, the defendants served subpoenas on several third parties, including Facebook and MySpace, seeking communications between the plaintiff and another individual. The plaintiff moved to quash the subpoenas.

(iii) The court held that plaintiff had standing to bring the motion, explaining that "an individual has a personal right in information in his or her profile and inbox on a social-networking site and his or her webmail inbox in the same way that an individual has a

personal right in employment and bank records."

(iv) The court determined that the providers were electronic communication service (ECS) providers under the SCA and were thus prohibited from disclosing information contained in "electronic storage." 717 F. Supp. 2d 965 (C.D. Cal. 2010).

D. Stored Communication Act

1. Prohibits electronic communication services from revealing users' private messages (even if subpoenaed).

a. Extent of privacy protection may depend on users' conduct (privacy settings).

b. The application of the SCA to discovery of communications stored on social-networking sites has produced mixed results.

c. Providers, including Facebook, take the position that the SCA prohibits them from disclosing social media contents, even by subpoena.

(i) From Facebook's website: Federal law prohibits Facebook from disclosing "user content (such as messages, Wall (timeline) posts, photos, etc.), in response to a civil subpoena. Specifically, the Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits Facebook from disclosing the contents of an account to any non-governmental entity pursuant to a subpoena or court order.

d. Ehling v. Monmouth-Ocean Hospital Service Corp. (D.N.J. Aug. 20, 2013)

(i) The court held that an employee's Facebook wall posts were protected by the SCA.

(ii) Plaintiff was a registered nurse and paramedic at Defendant's hospital.

(iii) Plaintiff maintained a Facebook account with 300 friends, including co-workers, and she set her Facebook privacy setting so that only her friends could see her posts on her Facebook wall. None of Plaintiff's managers or supervisors at the hospital were her Facebook friends.

(iv) Plaintiff posted a statement on her Facebook wall criticizing emergency response paramedics at a shooting at the Holocaust Museum in Washington, D.C. A co-worker who was her "friend" on Facebook printed out a screenshot of the post and gave it, unsolicited to Plaintiff's manager.

(v) Plaintiff was temporarily suspended and later terminated for

attendance reasons. She brought a suit alleging violations of the SCA among other claims.

(vi) Although the wall posts were covered by the SCA, the Court reasoned that the hospital did not violated the SCA by reading the post because the "authorized user" exception under the SCA applied. Plaintiff's wall post was viewed by a Facebook "friend" who was authorized to see her post and then printed the post and gave it hospital management unsolicited.

(vii) Pietrylo v. Hillstone Restaurant Group, (D.N.J. 2009)

(viii) The court upheld the jury's verdict that the defendants violated the SCA when they intentionally logged into a private MySpace group created by the plaintiff without authorization.

(ix) Plaintiff, a waiter at defendant's restaurant, created a MySpace group for members to complain about work. The group was password protected and was intended to be entirely private, only other employees were invited, not managers.

(x) The managers learned of the group when one of the invited employees showed him a post from it. The manager then requested the password from the employee to access the group.

(xi) Based on the lewd nature of the posts, Plaintiff was terminated for damaging employee morale and for violating the restaurant's core values.

(xii) The jury found defendants violated the SCA and invasion of privacy and awarded the plaintiff the maximum amount of back pay.

E. What if the plaintiff restricts access on his or her social networking site?

1. The courts have tried to find a balance between producing all social media information and no social media information.

2. Social media information is discoverable when adequately tailored to satisfy the relevance standard.

a. *EEOC v. Simply Storage Mgmt.*, LLC, 270 F.R.D. 430 (S.D. Ind. May 11, 2010)

(i) A federal court in Indiana permitted an employer to obtain discovery of an employee's social networking activity that, through privacy settings, the employee had made "private" and not available to the general public.

(ii) In that case, the EEOC filed a complaint on behalf of two named claimants, alleging that the defendant businesses were liable for sexual harassment by a supervisor. The defendants sought the production of the claimants' social networking site (SNS) "profiles" - defined as any content, including postings, pictures, blogs, messages, personal information, lists of "friends" or causes joined - that they had placed or created online by using their social networking accounts (Facebook and MySpace.com).

(iii) The District Court ordered that portions of the claimants' SNS profiles be produced, including postings, messages (including status updates, wall comments, groups joined, activity streams, and blog entries), and social networking applications that reveal, refer or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state; third party communications, if they place the claimants' own communications in context; and photographs of the claimants, taken during the relevant time period.

(iv) In so doing, the District Court laid some guidance for future litigants.

a) SNS content was not shielded from discovery simply because it is "locked" or "private."

b) SNS content must be produced when it is relevant to a claim or defense in the case.

c) SNS communications can be relevant to allegations of emotional distress injuries.

1. In *Reid v. Ingerman Smith LLP*, (E.D. N.Y. Dec. 27, 2012) a legal secretary sued her former law firm employer for same-sex harassment and sought damages for emotional distress. The law firm obtained her private Facebook postings by showing the court that her public postings contradicted her claims of mental anguish.

2. In *Howell v. The Buckeye Ranch, Inc.*, (S.D. Ohio Oct.1, 2012), the court denied a motion to compel production of plaintiff's user names and password for each social media site she used. The request was deemed overbroad because it was not limited to seeking only social media information relevant to the limited purposes identified by the defendants – plaintiff's emotional state and whether the alleged sexual

harassment had occurred.

V. Ethics Rules Involved in Use of Social Media

A. Principal Ethical Rules Involved

1. Rule 4.1 – Truthfulness in statements with others

   a. "(a) In representing a client a lawyer shall not knowingly: (1) make a false statement of material fact or law to a third person; or (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."."

   b. An attorney may not make a false statement in gaining access to an individual's social media account.

2. Rule 4.2 – Prohibits communication with a person who is represented by counsel

   a. "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice."

   b. An attorney may not "friend" an adversarial party on Facebook where that party is represented by counsel.

   c. **NY Ethics Opinion 843** – Stated in footnote that a lawyer who friends a represented party, or directs another to do so, is governed by Rule 4.2 prohibiting contact with a represented party.

3. Rule 4.3 – Communications with unrepresented individuals

   a. "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. 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. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC

1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or has a right to such representation on request, and if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney."

4. Rule 5.3 – Responsibilities regarding non-lawyer assistants

   a. Requires the lawyer to ensure that the conduct of non-lawyers is compatible with the professional obligations of the lawyer; (b) lawyers having direct supervisory authority over non-lawyers shall make reasonable efforts to ensure that person's conduct is compatible with the obligations of the lawyer; and (c) the lawyer is responsible for conduct of non-lawyers that violate the RPCs if: (1) the lawyer orders or ratifies the conduct; (2) the lawyer has direct supervisory authority and knows of the conduct when its consequences can be avoided or mitigated and fails to take reasonable remedial action; or (3) the lawyer fails to reasonably investigate circumstances that would disclose past instances of conduct that is incompatible with the RPCs

   b. **Robertelli v. OAE**, 2016 N.J. LEXIS 323 (N.J. Sup. Ct. April 19, 2016) – Two defense attorneys directed their paralegal to friend a represented adversary-plaintiff on Facebook. The paralegal friended the plaintiff who was 18 when he alleges he was hit by a police car while doing push-ups in the firehouse driveway. After the friend request was accepted, defendants had access to videos and photos that were not available to the general public. The plaintiff accepted the friend request without screening the user to see who she was. The judge refused to allow the Facebook evidence in, and the case settled for $400,000. Soon after, the plaintiff's attorney filed a complaint with the OAE. The New Jersey Supreme Court held that the OAE had jurisdiction to prosecute the case despite the district ethics committee's decision to decline file the grievance.

5. Rule 8.4 – Misconduct

   a. It is professional misconduct for a lawyer to: (a) violate or attempt to violate the RPCs or assist or induce another to do so; (b) commit a criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer in other respects; (c) engage in conduct that involves dishonesty, fraud, or deceit

   b. *Philadelphia Bar Association's Professional Guidance Committee* – Under PA RPC 8.4(c). lawyer can't have third party "friend" an unrepresented witness on Facebook. Lawyer wanted to have third party access the Facebook account and provide truthful information about the third

party's identity but conceal the third party's connection to the lawyer.

c. New York Bar's Social Media Ethics Guidelines (2015)

(i) **Guideline 3.A:** a lawyer may freely access the public portion of an individual's social media website or profile, regardless of whether that individual is represented by a lawyer.

(ii) **Guideline 3.B:** a lawyer may request to review the restricted portion of an unrepresented individual's social media profile as long as the lawyer does not attempt to shield her identity and as long as the lawyer honestly answers any questions that the unrepresented individual might have.

a) recognizes conflicting guidance in different jurisdictions regarding how much information a lawyer must disclose in requesting to review the restricted portion of an unrepresented individual's social media profile.

(iii) **Guideline 4.C:** a lawyer cannot use false statements in litigation if the lawyer learns from a client's social media profile that the statements are false.

(iv) **Guideline 4.D:** a lawyer may review information from the restricted portion of a represented individual's social media profile that is provided by the lawyer's client as long as the lawyer does not inappropriately obtain confidential information about the represented person, invite the represented person to take action without the advice of his or her lawyer, or otherwise overreach with respect to the represented person.

B. Advising Your Client About Social Media Use

1. Duty to preserve relevant information when it is reasonably foreseeable litigation will ensue.

a. **Litigation holds apply to social media!** An attorney must take reasonable steps to preserve and produce what is on a client's social media page.

b. An attorney must play an active and ongoing role in a preservation plan, including sending preservation mandates in writing to the client and to other nonparties if necessary.

2. **Spoliation issues:** Attorney sanctions for advising client to "clean up" social media account. IMO Matthew B. Murray, VSB Docket Nos. 11-070-088405 and 11-070-088422 (July 17, 2013) http://www.vsb.org/docs/Murray-092513.pdf

a. Virginia lawyer agreed to a 5 year suspension for advising his client "clean up" his Facebook photos. The lawyer's name was Matthew Murray, and

his client, Isaiah Lester sued Allied Concrete for his wife's death caused when a cement truck crossed the center line and fell on her car. Although the jury returned a verdict for his client, the lawyer personally paid $594,000 to the defendants for their legal fees. E-mail from legal assistant to client stated: "The pic Zunka has is on your facebook. You have something (maybe plastic) on your head and are holding a bud with your I Love Hot Moms shirt on. There are 2 couples in the background…both girls have long blond hair. Do you know the pic? There are some other pics that should be deleted."

b. **Gatto v. United Air Lines**, Inc., No. 10-cv-1090, 2013 WL 1285285 (D.N.J. 2013) (Magistrate Judge Mannion) Defendants sought discovery from plaintiff's Facebook account, and the court previously ordered the plaintiff to disclose information from his account. Plaintiff agreed to disclose his password to Facebook. After Plaintiff had been notified that his account was accessed from an unknown IP address, he deactivated his account, even though defense counsel confirmed that it directly accessed plaintiff's account. Defendants sought an adverse inference instruction and spoliation instructions since plaintiff's Facebook account was deactivated and all information was lost. The court granted defendants' request for an adverse inference instruction, but denied its request for attorneys' fees and costs because the destruction of evidence did not appear to be motivated by fraudulent purposes or diversionary tactics.

c. *NYSBA Social Media Guideline 4.A* : a lawyer may advise a client to remove content as long as it would not violate any decision, statute, rule or regulation on spoliation of evidence. An individual cannot delete content that is subject to a duty to preserve unless an "appropriate record" of the information is created.

3. Duty to competently advise as to how to mitigate risks from social media. RPC 1.1 Competence

a. An attorney can advise client to adjust privacy settings. Note the difference between access to social media in investigatory searches and the more comprehensive access that may result from discovery obligations.

b. Duty to advise clients to be cognizant of what they post online. A lawyer may also review what a client plans to publish on a social media website in advance of publication.

c. NYSBA Social Media Guideline 4.B: a lawyer may suggest that a client create new social media content, as long as that content is not false or misleading information that is relevant to a claim." See Erin Louise Primer, New York Bar Issues Social Media Guidelines, Litigation News (July 25, 2014

C. Ethical Use of Social Media at Trial

1. Use of Social Media to Obtain Information on Prospective Jurors

a. **RPC 3.5** – "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 except as permitted by law…."

b. **Carino v. Muenzen**, 2010 N.J. Super. Unpub. LEXIS 2154 (N.J. Super. Ct. Aug. 30, 2010) (Approving of use of internet research on prospective jurors during jury selection)

(i) Despite the deference we normally show a judge's discretion in controlling the courtroom, we are constrained in this case to conclude that the judge acted unreasonably in preventing use of the internet by Joseph's counsel. There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it.

c. **Khoury v. Conagra Foods, Inc**., 368 S.W.3d 189 (Mo. Ct. App. 2012 (defendant successfully moved for dismissal of a juror after research disclosed his corporate blog called "The Insane Citizen: Ramblings of a Political Madman," which included statements such as "F___ McDonald's.")

2. RPC 8.4 – Misconduct Rule

a. *New York City Bar Association – Formal Opinion 2012-2* – Attorneys are permitted to use social media websites to obtain information about prospective jurors; however, research is not permissible if it results in the juror receiving a communication. This is so even if the communication as unknowing or inadvertent. The ethics rules also prohibit an attorney from using deceit to gain access to information, and third parties working for the benefit of or on behalf of an attorney must also comply with the ethics rules.

b. "Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications."

c. Attorneys are prohibited from sending message chat or friend requests to jurors. Also, some websites allow a person to determine if his or her profile has been viewed. This would also pose an ethical risk even if the

attorney did not intend or know that the communication would be generated by the website.

d. Bank of America case: Judge Jed Rakoff. https://www.law360.com/articles/476511/linkedin-search-nearly-upends-bofa-mortgage-fraud-trial (Sept. 27, 2013): Juror sent note to judge stating: "I saw the defense was checking me on social media. I feel intimidated and don't f eel I can be objective." Potential risk of sanctions and mistrial.

e. **U.S. v. Kilpatrick**, 2012 U.S. Dist. LEXIS 110165 (E.D. Mich. Aug. 7, 2012) (parties were not permitted to monitor social media use of anonymous jurors but, instead, court would do so).

3. Attorneys must know privacy platforms to ensure that no communication is received.

a. LinkedIn- notifies users when another individual views their profile. Premium version allows users to see all individuals who have viewed their profile.

b. Snapchat- No privacy settings. No traditional friend request where mutuality exists through an option to approve or deny the request. Instead, one's Snapchat postings can be viewed only by those who unilaterally "add" that user. Once this "adding" occurs, the owner of the added account automatically receives a notification that he or she has been "added" by a certain user.

c. "Live" features on both Facebook and Instagram. The Live feature allows users to broadcast live video to their network and this live feed can be accessed by the "public" if that user has set his or her privacy settings accordingly. A notification is sent to this user any time someone watches the video.

d. Note that Snapchat and Live have not been addressed by any ethics body.

4. Juror Misconduct Issues

a. **In re Daniel Kaminsky**, 2012 N.J. Super. Unpub. LEXIS 539, *5-9n.3 (March 9, 2012) (Judge Peter Doyne imposed a $500 contempt fine a jury foreman for Googling possible sentencing penalties for a defendant in a drug case. Case ended in a mistrial after he shared his concerns with other jurors.)

b. If an attorney discovers juror misconduct, attorney has duty to report it to court.

c. **U.S. v. Fumo**, 655 F.3d 288 (3d Cir. 2011) (juror posted various comments to Facebook during the trial, then deleted them after they were reported

in the media. Trial court questioned juror in camera and determined that Facebook posts were "harmless ramblings having no prejudicial impact." Third Circuit affirmed.)

d. *New York City Bar Association – Formal Opinion 2012-2* – If a lawyer learns of juror misconduct through permissible juror research on social media, a lawyer must promptly notify the court. The attorney must use their best judgment and good faith in determining whether a juror acted improperly.

e. **NY RPC 3.5(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 her family of which the lawyer has knowledge." NJ RPC 3.5 does not contain this language.

f. But see **U.S. v. Fumo**, supra, (holding that when attorneys are aware of a juror's use of social media in a manner they believe improper, they have an obligation to report the misconduct to the court and their adversary.)

VI. Employee and Workplace Issues

A. Some of the Areas of Risk for Employers

1. Hiring

a. Employers must be careful to avoid discriminatory practices when searching social media for background information

b. The information obtained from a background check cannot be used to discriminate based on a person's protected characteristic

2. Trade secret or proprietary information disclosure

a. Privacy

b. In private employment arena, the extent of employee's privacy expectation is predicated on the employer's policies with respect to the use of: Company property and Company property used to access personal password-protected e-mail.

c. Stengart v. Loving Care Agency (N.J. March 30, 2010)

(i) Executive Director of Nursing resigned and sued for gender discrimination. Employer imaged company owned hard drive and retrieved temporary internet files containing e-mails between plaintiff and her counsel. The e-mails in question were sent via a company owned computer, but through plaintiff's personal password-protected e-mail account. The Court held that plaintiff possessed a reasonable expectation of privacy in e-mails

exchanged with her counsel. The Company policy was unclear as to the employer's right to monitor the personal e-mails.

(ii) Public policy underlying the attorney/client privilege prevailed. Even if the policy were clear, will never justify the employer reading privileged attorney/client communications.

(iii) It is unclear under New Jersey law whether the employer can review personal, but non-privileged e-mails.

3. Harassment

4. Wrongful termination

5. Defamation

6. Disclosure of nonpublic material information creating securities law issues

7. Negligent referral based on LinkedIn references

B. When Social Media is Relevant in the Workplace:

1. Pre-Employment:

a. Search for applicant information in social media?

b. Access more information typically not available in traditional hiring process.

(i) New Facebook privacy settings made name, profile picture, current city, gender, networks, friends, Pages, and some photos public.

(ii) Employers are "googling" applicant names.

(iii) Can make hiring decision based on lawful information found such as:

a) illegal drug use

b) Poor work ethic

c) Poor writing/communications skills

d) Negative feelings about previous employers.

(iv) New Jersey's Facebook Law

a) Employers are banned from requiring employees and job applicants to turn over their passwords for their personal

Facebook and other online accounts.

b) Employers can still access public information on social media pages, and the law doesn't apply to accounts used for business purposes.

c) Employers can still investigate wrongdoing on a social media site, such as harassment of a colleague, if it affects the company.

2. During Employment:

a. Allow/encourage employees to use social media?

(i) More collegial atmosphere

(ii) Shared experiences and stronger working relationships

(iii) "Listen" to employees, customers, and competitors

(iv) Respond to legitimate criticisms

(v) Business development/publicity, and

(vi) Expectations of Generation Y.

3. Internal Risks for employees use of social media

a. Supervisor/subordinate awkwardness

b. Co-worker or supervisor sexual harassment

c. Cyber-stalking

d. Hostile work environment

e. Blakey v. Continental Airlines, Inc.

f. Examples

(i) Domino's employee posted YouTube video harming company image

(ii) Several Burger King employees were terminated after an internet video surfaced of one worker bathing in a restaurant sink

(iii) KFC terminated three girls for posting MySpace photos of themselves using KFC's sink as their personal hot tub

(iv) Delta Airlines fired a flight attendant for posting revealing photos

in company uniform on her blog

4. Post-Employment:

   a. "Recommend" a former employee using social media?

   b. Supervisor/co-worker asked to "recommend" former employee on LinkedIn.

   c. Positive recommendation on LinkedIn could conflict with company position regarding performance.

   d. Positive recommendation on LinkedIn could harm employer in employment discrimination litigation.

   e. Should be treated the same as an employment reference

Appendix B

MEMORANDUM[1]

ETHICAL ISSUES IN THE USE OF SOCIAL MEDIA BY ATTORNEYS

Part I: Background and Introduction

Social media use has transformed how the world receives information. According to a 2016 study by the Pew Research Center ("Pew"), 79 percent of Americans internet users subscribe to Facebook; meaning approximately 68 percent of all American adults use Facebook.[2] 76 percent of American Facebook users use the site at least daily.[3] Another Pew study found that 62 percent of Americans receive their news from social media, with 18 percent of those claiming that they "often" get news from social media.[4] Frequent social media users cut across socioeconomic, age, gender and political lines.[5]

The legal profession is no exception to society's increasing reliance on social media. The American Bar Association ("ABA") acknowledges that "[u]sed carefully, social media can give [one's] firm a voice, amplify [one's] professional reputation, and help drive new business."[6] According to the ABA's 2015 Legal Technology Survey Report, 57 percent of law firms use LinkedIn and 35 percent of law firms utilize Facebook.[7] Furthermore, the number of law firms and the reasons for attorneys using social

[1] Prepared by a law school legal intern from the Chambers of the Honorable Tonianne J. Bongiovanni, U.S.M.J.

[2] http://www.pewinternet.org/2016/l 1/11/social-media-update-2016/#fn-17239-1

[3] *Id.*

[4] http://www.journalism. org/20 I n/05/26/news- use -across-social-media-platforms-2016

[5] See http ://www.pewinternet.org/2016/11/11/social-media-update-2016/#fn- 17239- 1

[6]http://www.arnericanbar.org/groups/departments_offices/legal_technolgy_rescoures/rescources/social_media.html

[7]http://www.arnericanbar.org/content/dam/aba/publications/techreports/2015/social-media/Social-media.authchcckdam.pdf

media, been increasing annually.[8] Nearly 25 percent of respondents claim to have retained clients because of social media, while approximately the same number of firms claim to have used social media for "case investigation".[9]

The increased use of social media in the legal profession has opened up numerous legal ethical concerns and issues. This memorandum will give an overview of the ethical challenges legal practitioners face because of social media. Part II of this memo focuses on ABA opinions as well as jury instructions pertaining to social media. Part ill provides examples of case law and incidents concerning social media in the legal profession.

Part II: ABA Opinions and Jury Instructions

While neither the ABA Model Rules nor the NJ Rules of Professional Conduct contain any explicit rules pertaining to social media usage, many of the current rules have overlap with social media.

The ABA is aware of the ethical challenges stemming for social media and has provided some guidance for members of the legal community. The ABA Standing Committee on Ethics and Professional Responsibility ("Standing Committee") issued two notable formal opinions pertaining to attorney use of social media.

ABA Formal Opinion 462, dated February 21, 2013, pertains to a "Judge's Use of Electronic Social Networking Media ("ESM")." The ABA concluded while a judge is free to use social media, "a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance

[8] *Id.*

[9] *Id.*

of impropriety."[10] The ABA notes that "[b]ecause of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection."[11] However, the ABA advises judges to use the same analysis normally used under ABA Model Judicial Code Rule 2.11 "whenever matters before the court involve persons the judge knows or has a connection with professionally or personally." [12] Furthermore, a judge "should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification eve if the judge believes there is no basis for the qualification."[13] This should not be interpreted to mean, however, that a judge is required to search all of his or her social media connections "if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual."[14]

ABA Formal Opinion 466, issued on April 24, 2014, is entitled "Lawyer Reviewing Jurors' Internet Presence." The opinion concludes that while an attorney may review a juror or potential juror's social media accounts, attorneys are prohibited, either themselves or through another individual, from communicating with or sending an "access request" to the juror or potential juror's social media accounts; likely constitute an *ex parte* communication in violation of ABA Model Rule 3.5(b).[15]

The trickier issue concerns social media platforms that

[10] ABA Formal Opinion 462 (Feb. 21, 2013) at 1.

[11] /d. at 3.

[12] /d.

[13] /d.

[14] /d.

[15] ABA Formal Opinion 466 (Apr. 24, 2014) at 1, 4

automatically send users a notification when their profile is viewed. The standing committee concluded this is not considered an improper communication, as it is the technical feature of the social media platform, rather than the attorney, sending the notification.[16] Despite this ruling, the standing committee advises attorneys to (1) review the terms of use of each social media platform, noting that ABA Model Rule 1.1, comment 8 states how lawyers should be up-to-date with technology; and (2) attorney review of juror's social media account should be "purposeful and not crafted to embarrass, delay, or burden the juror or proceeding."[17]

The standing committee has additionally expressed concerns of improper social media usage by jurors. In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States proposed a model jury instruction pertaining to the use of social media, stating jurors may not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google +, My Space, Linkedln, or YouTube … I expect you will inform [the judge] as soon as you become aware of another juror's violation of these instructions.[18]

The Federal Judicial Center, the educational and research center of the federal courts, conducted a study in 2011 entitled "Jurors' Use of Social Media During Trials and Deliberations." 508 federal judges responded to the survey, with 478 (approximately 94 percent) of the judges surveyed claiming to have taken preventive measures to ensure jurors do not use social media.[19]

---

[16] d. at 5.

[17] d. at 5-6.

[18] d. at 6.

[19] Meghan Dunn, Juror' Use of Social Media During Trials and Deliberations, 2, 5.

304 (60 percent) of the judges surveyed used the model jury instructions outlined above during a trial.[20]

30 judges (6 percent) reported instances of jurors using social media during trials and deliberations.[21] Reported social media usage is most common during criminal trials (22 judges reporting such instances), followed by during deliberations (12judges reporting), with the smallest number of instances reported during civil trials (5 judges).[22]

Of the 30 judges revealing witnessing social media usage by jurors, 9 removed the juror from the jury; 8 cautioned the juror, but allowed him or her to remain on the jury; 4 declared a mistrial; 1 held the juror in contempt of court; 1 fined the juror; and 7 judges took other actions, including conducting a hearing to consider the extent of information inappropriately shared and questioning the juror to investigate possible damage.[23]

Part III: Case law and examples

Several state trial courts have heard discipline complaints pertaining to the inappropriate use of social media by attorneys. In Robertelli v. New Jersey Office of Atty. Ethics[24] the attorneys representing the defendant in a personal injury case directed a paralegal to "friend" the plaintiff on Facebook without explicitly identifying that she worked for the defendant's law firm.[25] The plaintiffs Facebook page was not public and could only be

[20] Dunn, supra note 19, at 6

[21] Dunn, supra note 19, at 2.

[22] Dunn, supra note 19, at 2.

[23] Dunn, supra note 19, at 5.

[24] 134 A.3d 963 (N.J. 2016)

[25] D. at 965

accessed by successfully "friending" the plaintiff.[26] The plaintiff, through his attorney, filed a complaint with the District 11-B Ethics Committee, and the committee initially determined that the alleged actions taken by the paralegal did not amount to unethical conduct.[27] As a result, the committee's secretary declined to docket the grievance.[28]

The plaintiffs attorney then requested that the New Jersey Office of Attorney Ethics ("NJ OAE") "review the matter and have it docketed for a full investigation and potential hearing."[29] A few months later, the director of the NJ OAE filed a complaint against defendant's attorneys in front of the District *XN* Ethics Committee, alleging violations of the following rules of professional conduct ("RPC"):

- RPC 4.2- "communicating with a person represented by counsel";
- RPC 5.l(b) and (c)- "failure to supervise a subordinate lawyer (against Mr. Robertelli)";
- RPC 5.3(a), (b), and (c) - "failure to supervise a non-lawyer assistant";
- RPC 8.4(a) - "violation of the RPCs by inducing another person to violate them or doing so through the acts of another";
- RPC 8.4(c) - "conduct involving dishonesty, fraud, deceit, and misrepresentation";and

[26] d.

[27] d.

[28] d.

[29] D. at 966

- RPC 8.4(d)- "conduct prejudicial to the administration of justice."[30]

The plaintiffs responded by asking the NJ OAE Director to withdraw the complaint, claiming that the NJ OAE was prevented from hearing the complaint because the District 11-B Ethics Committee's secretary declined to docket the grievance. The NJ OAE Director disagreed with the plaintiffs, and plaintiffs filed a complaint in Superior Court, alleging (1) "the [NJ OAE] Director lacked authority to 'review' the decision not to docket the grievance"; and (2) "to enjoin the [NJ] OAE from pursuing the grievance."[31] The Superior Court ruled it did not have jurisdiction over attorney disciplinary matters as the plaintiffs were not raising a constitutional challenge to an ethics rule, affirmed by the Appellate Division.[32]

The Supreme Court, in a unanimous opinion, found that "the Director of the [NJ] OAE has authority under court rules to review a grievance after a [District Ethics Committee] Secretary has declined to docket it. We anticipate that the Director will use that power sparingly to address novel and serious allegations of unethical conduct."[33] However, the Court did not reach a decision on the merits of the case and remanded it back to the NJ OAE for review.[34]

Although the Court has yet to rule on the merits of the case, other state and local bar associations have provided guidelines on how attorneys should deal with adversaries on social media. The New

[30] d.

[31] d.

[32] d.

[33] d.

[34] d.

York State Bar Association ("NYSBA") advises that "a lawyer shall not contact a represented person to seek to review the restricted portion of the person's social media profile unless an express authorization has been furnished by the person's counsel."[35] However, the NYSBA advises that lawyer's may view the public portion of a represented person's social media profile, but notes that attorneys should be aware that certain social media platforms send a notification to the user when their profile is viewed.[36] The **NYSBA** defines public as "information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed."[37]

Other case law arises out of whether social media posts are properly authenticated under the Rules of Evidence for admission. U.S. v. Browne[38] concerns Tony Jefferson Browne, a man convicted of child pornography and other sexual offenses based on Facebook chat records. Mr. Browne argued that his conviction should be overturned as the Facebook chat records "were not properly authenticated with evidence of his authorship".[39] Mr. Browne, using a Facebook account under the name of "Billy Button", exchanged explicit photos through Facebook chat with an 18-year old woman.[40] Mr. Browne than threatened to release the photos of the woman publicly unless the woman agreed to engage in sexual acts with Mr. Browne and said he would only delete the photos if the woman provided Mr. Browne with her Facebook password.[41]

---

[35] New York State Bar Association Social Media Ethics Guidelines at 17.

[36] d. at 15

[37] d.

[38] 834 F.3d 403 (3d Cir. 2016)

[39] d. at 405

[40] d.

[41] d.

Using the woman's Facebook account, Mr. Browne requested explicit photographs from four minors with whom the woman was "Facebook friends" with.[42] If the minors refused to participate in sexual acts with Mr. Browne, he threatened to publicly release the photos.[43]

Mr. Browne argued that the "Facebook records were not properly authenticated because the Government failed to establish that he was the person who authored the communications."[44] Mr. Browne claims that "(1) no witness identified the Facebook chat logs on the stand; (2) nothing in the contents of the messages was uniquely known to Browne; and (3) Browne was not the only individual with access to the Button account."[45] The Government contends that "Facebook records are business records that were properly authenticated pursuant to Rule 902(11) of the Federal Rules of Evidence by way of a certificate from Facebook's records custodian."[46]

The court took a three-step analysis to determine the proper authentication of social media records:

> (1) "as with non-digital records, we assess whether the communications at issue are, in their entirety, business records that may be 'self-authenticated' by way of a certificate from a records custodian under R. 902(11) of the F.R.E.";
>
> (2) "whether the Government nonetheless

[42] d.

[43] d. at 405-06

[44] d. at 408

[45] d.

[46] d.

> provided sufficient extrinsic evidence to authenticate the records under a traditional R. 901 analysis"; and
>
> (3) "whether the chat logs, although properly authenticated, shall have been excluded as inadmissible hearsay, as well as whether their admission was harmless."[47]

In order to authenticate the messages, "the government was therefore required to introduce enough evidence such that the jury could reasonably find, by preponderance of the evidence, that Browne and the victims authored the Facebook messages at issue."[48] As Facebook's records custodian only contends that the communications took place between the two Facebook accounts, the court found that "accepting the Government's contention that it fulfilled its authentication obligation simply by submitting such an attestation would amount to holding that social media evidence need not be subjected to a 'relevance' assessment prior to admission."[49] Furthermore, the Third Circuit held that the Facebook chat records do not meet the business records exception, as Facebook' s records custodian cannot verify the accuracy of the substantive contents of the Facebook chat records, only the technical aspects of the chat; the court compared this to postal receipts and certain bank records.[50]

Next, the court analyzed whether the Facebook chat logs could be authenticated through intrinsic evidence. Although the court specifically noted the strong possibility that a social media

---

[47] d.

[48] Id. at 410

[49] d.

[50] d. at 410-11

account could be hacked or falsified, it ultimately concluded the Government produced "more than adequate" extrinsic evidence "that the jury could reasonably find the authenticity of the records by a preponderance of the evidence."[51] The court came to this conclusion because "(1) of the consistency between the testimony of three of the alleged victims and the Facebook chat logs introduced into evidence; and (2) that three of the alleged victims were able to identify Defendant Browne after meeting with him following their communications through Facebook. [52] Moreover, Defendant Browne testified he owned the Facebook account in question and that he had conversed with three of the alleged victims on Facebook, as well as providing the password to the "Billy Button" Facebook account in his post-arrest statement.[53] Furthermore, Mr. Browne's confirmed personal details were consistent with the personal details he spread on the "Billy Button" Facebook account and the court noted the chat records introduced by the Government were obtained directly from Facebook with a certificate "attesting to their maintenance by the company's automated systems." [54]

The Third Circuit concluded that all of the chats, except for one which Mr. Browne did not participate in, were admissible as evidence, and upheld the conviction against Defendant Browne.[55]

In ~~State v.~~ Hannah[56], Defendant Terri Hannah appealed her conviction arguing that a Twitter posting admitted was inadmissible evidence, following a Maryland decision requiring greater

[51] d. at 413

[52] d.

[53] d. at 413-14

[54] d. at 414

[55] d. at 415

[56] 448 N.J. Super. 78 (App. Div. 2016)

authentication for social media posts to be admitted into evidence.[57]

Ms. Hannah was arrested after striking another woman in the face with a shoe, which was allegedly followed by a post on Twitter from Ms. Hannah to the woman assaulted stating "shoe to ya face b***h."[58] The tweet displayed Ms. Hannah's profile picture and Twitter handle.[59] Ms. Hannah appealed to the Law Division after being found guilty of simple assault in municipal court; the conviction was affirmed.[60]

Ms. Hannah then appealed to the Appellate Division, claiming the above-referenced tweet was improperly admitted into evidence, arguing:

> "(1) THE SUPERIOR COURT JUDGE MISTAKENLY ADOPTED WHAT HE BELIEVED TO BE THE DIFFERENT, MORE LENIENT TEXAS AUTHENTICATION STANDARD [RATHER THAN THE MARYLAND STANDARD] WITHOUT UTILIZING NEW JERSEY'S CIRCUMSTANTIAL EVIDENCE MODE OF AUTHENTICATION, N.J.R.E. 901, AND ASSESSING THE NON-PRODUCTION OF THE OTHER "DIFFERENT" SNAPSHOTS SUPPOSEDLY TAKEN BY THE ACCUSER IN AN ALLEGED EXCHANGE OF TWEETS BETWEEN ACCUSER AND DEFENDANT SOME THREE MONTHS AFTER THE

[57] d. at 81

[58] d. at 82

[59] d. at 85

[60] d. at 83

ALLEGED ASSAULT;

THIS JUDGE IMPROPERLY AUTHENTICATED THE TWEET BY RELYING ON THE ACCUSER'S TESTIMONY AS WELL AS THAT OF THE DEFENDANT, WHO ONLY TESTIFIED AFTER THE STATE HAD RESTED;

WITH THIS JUDGE FINDING [SIC] THAT THE DEFENDANT'S JANUARY 12, 2015 MUNICIPAL COURT TESTIMONY WAS NOT CREDIBLE BECAUSE HE CONTRASTED HER TESTIMONY WITH EXHIBIT D-4 ATTACHED TO DEFENSE COUNSEL'S MAY 8, 2015 APPEAL BRIEF; AND,

THIS JUDGE ADMITTED THE TWEET, WITHOUT ANALYSIS AS TO THE TWEETS RELEVANCE OR PROBATIVE VALUE."[61]

The Appellate Division rejected Ms. Hannah's arguments, concluding the Maryland standard is too strict in its authentication requirements and that N.J.R.E. 901 was a satisfactory standard for social media posts, considering a social media post can be just as easily forged as a letter or another form of writing.[62] Additionally, in New Jersey, "authentication 'does not require absolute certainty or conclusive proof - only a 'prima facie showing of authenticity' is required."[63] Furthermore, a prima facie showing can be made using circumstantial evidence, and

[61] d. at 83-84

[62] d. at 89

[63] d. citing State v. Tormasi, 443 N.J. Super. 146, 155 (N.J. App. Div. 2015)

direct proof is allowed but not required.[64] Ultimately, the Appellate Division concluded that the "Defendant's Twitter handle, her profile photo, the content of the tweet, its nature as a reply, and the testimony presented at trial were sufficient to meet the low burden imposed by our authentication rules", establishing a prima facie case. [65]

[64] d. at 90

[65] d. at 90-91

Appendix C

SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED JUNE 9, 2015

James M. Wicks, Section Chair
Mark A. Berman, Co-Chair of the Social Media Committee
Ignatius A. Grande, Co-Chair of the Social Media Committee

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

PREPARED BY

THE SOCIAL MEDIA COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION

CO-CHAIRS

Mark A. Berman
Ganfer & Shore, LLP

Ignatius A. Grande
Hughes Hubbard & Reed LLP

SECRETARY

Aaron E. Zerykier
Farrell Fritz, PC

TWITTER ACCOUNT MANAGER
Scott L. Malouf

MEMBERS

Craig Brown
Damian R. Cavaleri
Adam I. Cohen
Philip H. Cohen
Tarique N. Collins
Melissa Crane
Joseph V. DeMarco
Jonathan E. DeMay
Dauphine Alexandra Dunlap
Marcy Einhorn
Alfred Fatale
Tom Fini
Jessica Page Fisher
Ronald J. Hedges
David Paul Horowitz
David Jaroslawicz
Jessica L. Jimenez
Shawndra G. Jones
Jessie A. Kuhn
Janelle Lewis
Scott L. Malouf
Marc Melzer
Yitzy Nissenbaum
Jason S. Oliver
Michael Parker
Peter J. Pizzi
Gina M. Sansone
Brendan Schulman
Loree J. Shelko
Maryanne Stanganelli
Dan Toshiki Szajngarten
Deirdre E. Tracey
Michael Weiss
Aaron E. Zerykier

LAW SCHOOL INTERN
Zahava Moedler

TABLE OF CONTENTS

Page

INTRODUCTION

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

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

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

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

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

---

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

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

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

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

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

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

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

1. ATTORNEY COMPETENCE

Guideline No. 1: Attorneys' Social Media Competence

A lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.

NYRPC 1.1(a) and (b).

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

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

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

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

---

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

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

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

[6] Id.

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

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

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

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

2. ATTORNEY ADVERTISING

Guideline No. 2.A: Applicability of Advertising Rules

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

NYRPC 1.0, 7.1, 7.3.

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

---

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

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

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

[11] Id.

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

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

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

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

---

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

13 NYCLA, Formal Op. 748.

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

15 NYSBA, Op. 1009.

16 Id.

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

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

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

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

NYRPC 7.1, 7.4.

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

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

---

17 Id.

18 Id.

19 See NYSBA, Op. 972 (2013).

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

21 NYCLA, Formal Op. 748.

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

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

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

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

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

---

[22] See NYRPC Rule 7.4.

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

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

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

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

---

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

[26] NYCLA, Formal Op. 748.

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

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

[34] See NYSBA, Op. 899.

[35] See id.

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

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

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

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

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

NYRPC 1.1, 1.15.

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

---

[37] Id.

[38] See id.

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

[40] Id.

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

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

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

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

---

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

42 Id.

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

44 Id.

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

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

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

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

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

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

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

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

---

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

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

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

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

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

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

NYRPC 4.1, 4.3, 8.4.

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

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

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

---

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

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

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

53 Id.

54 See id.

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

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

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

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

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

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

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

NYRPC 4.1, 4.2.

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

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

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

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

---

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

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

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

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

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

NYRPC 5.3, 8.4.

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

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

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

5. COMMUNICATING WITH CLIENTS

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

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

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

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

---

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

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

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

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

67 NYCLA, Formal Op. 745.

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

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

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

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

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

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

---

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

69 NYCLA, Formal Op. 745.

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

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

Guideline No. 5.C: False Social Media Statements

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

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

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

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

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

NYRPC 4.2.

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

---

71 NYCLA, Formal Op. 745.

72 NYRPC 3.1(a).

73 NYRPC 3.1(b)(3).

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

75 Id.

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

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

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

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

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

---

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

77 Id.

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

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

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

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

NYRPC 1.6, 1.9(c).

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

---

79 NYRPC 1.6.

80 Comment 17 to NYRPC Rule 1.6 provides:

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

81 NYSBA Op. 1032 (2014).

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

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

---

82 NYSBA, Opinion 1032.

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

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

85 Pennsylvania Bar Association Ethics Committee Opinion 2014-200.

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

---

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

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

88 Id.

89 Id.

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

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

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

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

---

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

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

92 See ABA, Formal Op. 14-466.

93 Id.

94 Id.

95 See ABA Formal Op. 14-466.

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

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

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

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

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

---

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

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

[98] Id.

[99] Id.

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

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

[102] See Id.

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

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

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

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

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

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

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

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

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

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

---

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

105 See NYCBA, Formal Op. 2012-2.

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

107 Id.

108 ABA, Formal Op. 14-466.

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

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

NYRPC 3.5, 8.4.

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

---

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

110 See ABA, Formal Op. 14-466.

111 NYRPC 3.5(d).

112 NYCBA, Op. 2012-2.

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

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

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

NYRPC 3.5, 8.2 and 8.4.

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

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

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

---

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

115 NYRPC 3.5(a)(1).

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

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

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

APPENDIX

DEFINITIONS

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

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

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

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

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

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