PROGRAM MATERIALS
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The Ethics of Social Media Use by Attorneys

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THE ETHICS OF SOCIAL MEDIA USE BY ATTORNEYS

CELESQ

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- This presentation represents the personal view of the presenter and does not reflect the views of his firm.
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RESOURCES

- NYSBA Social Media Ethics Guidelines (Release Date June 20, 2019), http://www.nysba.org/2019guidelines/ **- full document follows the presentation**
- *The Sedona Conference Primer on Social Media, Second Edition* (Feb. 2019), https://thesedonaconference.org/publication/Primer_on_Social_Media

RESOURCES

- ABA Formal Opinion 480: Confidentiality Obligations for Lawyer Blogging and Other Public Commentary (March 6, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.authcheckdam.pdf - **full document follows the presentation**

- Formal Opinion 477R: Securing Communication of Protected Client Information (May 11, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.authcheckdam.pdf - **full document follows the presentation**

SOCIAL MEDIA COMPETENCE

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

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.

SOCIAL MEDIA COMPETENCE (CONT'D)

- This applies to social media as well as other aspects of using technology for your legal practice.
- You need to know how to use social media, even if you never use it.

Rule 1.18 – Duties to Prospective Clients

APPLICABILITY OF ADVERTISING RULES

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

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

Rule 1.18 – Duties to Prospective Clients (cont'd)

- ABA recently clarified this rule by saying a person becomes a prospective client if the lawyer (in person or through advertising) "specifically requests or invites the submission of information about a potential representation" without clear or cautionary statements, "and a person provides information in response."

Rule 1.18 – Duties to Prospective Clients (cont'd)

- At its most basic, it begins with the person relying on the professional skills of a lawyer. This means that a relationship can be created in the absence of any express agreement
- If you answer questions on social media and the person who asked relies on those answers, a prospective client – attorney relationship could be inferred
- You must perform conflict of interest checks in order to ensure that there is no conflict with other clients (both current and past)
- You have a duty to ensure confidentiality of information for prospective clients.

Rule 1.18 – Duties to Prospective Clients (cont'd)

Rule 1.18 discusses when a person becomes a prospective client and when the duty to maintain confidence attaches:

- Social Media allows for quick communications back and forth. It allows for questions to be answered and discussions to be started.
- Websites that allow potential clients to contact or pose questions to lawyers can create confusion about when a lawyer-client relationship has been formed.
- Providing general information about the law and legal developments generally doesn't qualify as rendering legal advice, lawyers who answer fact- specific legal questions may be characterized as offering personal legal advice

1.6 Confidentiality of Information

LAWYERS RESPONSIBLITY TO MONITOR OR REMOVE SOCIAL MEDIA CONTENT BY OTHERS ON A LAWYER'S SOCIAL MEDIA PAGE

"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.

- RPC 1.6 (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted [by paragraph b]
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

LAWYER'S RESPONSIBIITY TO MONITOR OR REMOVE SOCIAL MEDIA CONTENT BY OTHERS ON A LAWYER'S SOCIAL MEDIA PAGE (CONT'D)

If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she may wish to ask that person to remove it."

- One of the most important obligations of an attorney is the duty to maintain confidentiality of information, and for some attorneys who use social media, this seems a bit difficult to them.
- We have become a world of TMI.
- IN RE: DISCIPLINARY PROCEEDINGS AGAINST Kristine A. PESHEK No. 2011AP909–D. Decided: June 24, 2011 – attorney suspended for 60 days for violating confidentiality rules on her blog.

LAWYER'S RESPONSIBIITY TO MONITOR OR REMOVE SOCIAL MEDIA CONTENT BY OTHERS ON A LAWYER'S SOCIAL MEDIA PAGE (CONT'D)

- American Bar Association (ABA) Committee on Ethics and Professional Responsibility issued Formal Opinion 480 on Confidentiality Obligations for Lawyer Blogging and Other Public Commentary clarifying what you could and could not talk about on social media or blogs (or anywhere else)

- In that opinion, the committee explained that the rule of confidentiality is not limited to matters that fall within the attorney-client privilege but extends to all information the lawyer possesses about the representation notwithstanding the public nature of the information.

LAWYER'S RESPONSIBIITY TO MONITOR OR REMOVE SOCIAL MEDIA CONTENT BY OTHERS ON A LAWYER'S SOCIAL MEDIA PAGE (CONT'D)

The difference between attorney-client privilege and confidentiality:

- Attorney-client privilege is an evidentiary concept and a privilege with respect to testimony and compelled production of communications in connection with litigation.

- Client confidentiality is an ethical duty that imposes absolute handcuffs on a lawyer's ability to voluntary disclose information about clients or information about the representation of clients.

1.7 Conflict of Interest: Current Client

POSITIONAL CONFLICTS IN ATTORNEY ADVERTISING

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

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly averse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (Emphasis Added)

1.7 Conflict of Interest: Current Client (cont'd)
POSITIONAL CONFLICTS IN ATTORNEY ADVERTISING

- A lawyer may unintentionally develop a relationship with a someone who they don't really know, but who has a directly adverse conflict with a client.

- Positional conflicts can arise when a lawyer takes one position online and then takes an inconstant position on behalf of a client.

- One issue implicated by the use of social media is the possibility that the attorney's social media posts will create a "positional" conflict.

- In Ethics Opinion 370, the District of Columbia Bar stated that attorneys sharing information on social media sites should exercise caution "when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict."

- You must avoid taking sides on an issue.

1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially averse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially averse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

1.9 Duties to Former Clients (cont'd)

c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
2) reveal information relating the representation except as these Rules would permit or require with respect to a client.

1.9 Duties to Former Clients (cont'd)

- This rule creates the same obligations with respect to past clients that RPC 1. 6 (a) creates with respect to present clients and RPC 1.18 provides to prospective clients. That is, client confidentiality.
- Just because the case is finished doesn't give you cart blanche to begin writing about it on social media or in blogs.
- Anytime you want to blog about a successful out come of a case with the facts of the case, if it is not available in the public domain, you have two choices:

    1. Ask your client if it's okay and
    2. Don't

- There are so many things you could discuss or write about
- There are also other ways to promote your wins by being more generic. As long as the information does not point to a particular client or case you can write about it.
- Use Disclaimers

1.9 Duties to Former Clients (cont'd)

- ABA Formal Opinion 479 discusses the "Generally Known" exception to Rule 1.9(c)

- "A lawyer may use information that is generally known to a former client's disadvantage without the former client's informed consent. Information is generally known within the meaning of Model Rule 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client's industry, profession, or trade. For information to be generally known it must previously have been revealed by some source other than the lawyer or the lawyer's agents. Information that is publicly available is not necessarily generally known." (ABA Formal Opinion 479, December 17, 2017)

3.6 Trial Publicity

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

(b) Notwithstanding paragraph (a), a lawyer may state:

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

(2) information contained in a public record;

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

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

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

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

(7) in a criminal case, in addition to subparagraphs (1) through (6):

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

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

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

3.6 Trial Publicity (cont'd)

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

- This rule is designed to ensure that clients have the right to a fair trial.
- IN RE: SALVADOR R. PERRICONE – An AUSA was disbarred for extrajudicial comments he posted to a Louisiana Newspaper's Website anonymously
- Perricone's "caustic, extrajudicial comments about pending cases strikes at the heart of the neutral dispassionate control which is the foundation of our system," the court said. "Our decision today must send a strong message to [Perricone] and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the internet."

5.5 Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

7.1 Communications Concerning a Lawyer’s Service

- A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.
- Any communications you make with regard to your services cannot be “false and misleading.”
- This rule applies to social media, blogging, videos, and podcasts as well as any of the traditional marketing avenues you may use.
- A statement that is, prima facie, truthful but omits certain facts is considered misleading

7.1 Communications Concerning a Lawyer's Service (cont'd)

- You must be aware of the language you are using on social media to market yourself and your services.
- If it cannot be factually proved, you should not post about it.
- This rule also applies to you online handle/names/avatars as well as blog titles.
- In many states you MUST include disclaimer language: such as "prior results do not guarantee similar outcome."
- This also includes your speaking about various awards like Super Lawyer, Best Lawyer, Etc.

7.2 Communications Concerning a Lawyer's Service: Specific Rules

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

7.2 Communications Concerning a Lawyer's Service: Specific Rules (cont'd)

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

7.2 Communications Concerning a Lawyer's Service: Specific Rules (cont'd)

- A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services

- This includes offering to pay people to write testimonials and recommendations on the various sites available where reviews are posted:

    - Google
    - Yelp
    - Facebook
    - LinkedIn

- Ratings sites specific to lawyers:

    - AVVO
    - Super Lawyers
    - Martindale
    - Lawyer Ratingz
    - Lawyerreviews.com

7.2 Communications Concerning a Lawyer's Service: Specific Rules (cont'd)

- According to research done by BrightLocal, 91% of people regularly or occasionally read online reviews and 84% trust those reviews as much as a personal recommendation.

- FindLaw has specifically found that " . . . that consumers are more likely to hire a lawyer who has online reviews. In addition, most consumers have used online reviews in choosing providers of professional services."

- Story of attorney who was providing gift cards to any of her clients who would give her a review.

- RPC 7.2(b)(5) [A lawyer may] give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

7.3 Solicitation of Clients

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain unless the contact is with a:

(1) lawyer;
(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

7.3 Solicitation of Clients (cont'd)

- Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.
- This rule was initially aimed at prohibiting the practice of "ambulance chasing
- In today's digital age, this now rule prohibits improper solicitations on Social Media.
- Solicitation of business means approaching a potential client proactively and pitching them to hire you.
- It doesn't apply to situations where the potential client opens the dialogue
- With regard to social media, the rule applies in situations where a client is under duress. It is applicable in other situations where the potential client is not in the proper frame of mind to choose counsel or in the case of mass disaster or mass torts.

GENERAL GUIDELINES

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.”

VIEWING A PUBLIC PORTION OF A SOCIAL MEDIA WEBSITE

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

CONTACTING AN UNREPRESENTED PARTY AND/OR REQUESTING TO VIEW A RESTRICTED SOCIAL MEDIA WEBSITE

“A lawyer may communicate with an unrepresented party and also request permission to view a non-public portion of the unrepresented party’s social media profile. However, the lawyer must use her full name and an accurate profile, and may not create a false profile to mask her identity.

CONTACTING AN UNREPRESENTED PARTY AND/OR REQUESTING TO VIEW A RESTRICTED SOCIAL MEDIA WEBSITE (CONT'D)

If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the unrepresented party or otherwise cease all further communications and withdraw the request if applicable."

CONTACTING A REPRESENTED PARTY AND/OR VIEWING A NON-PUBLIC SOCIAL MEDIA WEBSITE

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

LAWYER'S USE OF AGENTS TO CONTACT A REPRESENTED PARTY

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

LAWYERS MAY CONDUCT SOCIAL MEDIA RESEARCH OF JURORS

“A lawyer may research a prospective or sitting juror’s public social media profile and public posts as long as it does not violate any local rules or court order.”

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."

QUESTIONS?
COMMENTS?
THANK YOU!

SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

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

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INTRODUCTION

Social media networks, such as LinkedIn, Twitter, Instagram and Facebook, are indispensable tools for legal professionals and the people with whom they communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethics issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association ("NYSBA") is updating these social media guidelines – which were first issued in 2014[1] – to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the "Guidelines"). In particular, these Guidelines add new content on lawyers' duty of technological competence, attorney advertising, anonymous postings by attorneys regarding pending trials, online research of juror social media use, juror misconduct, and the treatment of social media connections between attorneys and judges.

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

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

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

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

3 NY RULES OF PROF'L CONDUCT (22 NYCRR 1200.0) ("NYRPC") (NY STATE UNIFIED CT. SYS. 2017). These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court. In addition, the New York State Bar Association has promulgated comments regarding particular rules, but these comments, which are referenced in these Guidelines, have not been adopted by the Appellate Divisions of the Supreme Court.

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

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

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet "community," attorney advertising rules and other ethical rules must be considered when a lawyer uses social media.[4] Similarly, privileged or confidential information can be unintentionally divulged beyond the intended recipient if a lawyer communicates to a group using social media. In addition, lawyers must be careful to avoid creating an unintended attorney-client relationship when communicating through social media. Finally, certain ethical obligations arise when a lawyer counsels a client about the client's own social media posts and the removal or deletion of those posts, especially if such posts are subject to litigation or regulatory preservation obligations.

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

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

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

1. ATTORNEY COMPETENCE

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

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

NYRPC 1.1(a) and (b).

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

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons.[5] Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer uses in connection with the practice of law or that his or her client may use if it is relevant to the purpose or purposes for which the lawyer was retained.

Maintaining this level of understanding is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Op. 466 (2014)[6] states:

> As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network.[7]

A lawyer must "understand the functionality and privacy settings of any [social media] service she wishes to utilize for research, and to be aware of any

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

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

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

changes in the platforms' settings or policies."[8] The ethics opinion also holds that "[i]f an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site...."[9]

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

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology,[10] engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[11]

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

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all

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8 NY City Bar Ass'n Comm. on Prof'l Ethics ("NYCBA"), Formal Op. 2012-2 (2012). *Accord* D.C. Bar Legal Ethics Comm., Ethics Op. 370 (2016) ("The guiding principle for lawyers with regard to the use of any social network site is that they must be conversant in how the site works. Lawyers must understand the functionality of the social networking site, including its privacy policies.").

9 NYCBA, Formal Op. 2012-2.

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

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

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

Many other states have also adopted a duty of competence in technology in their ethical codes. [13] Although a lawyer may not delegate his or her obligation to be competent, he or she may rely, as appropriate, on other lawyers or professionals in the field of electronic discovery and social media to assist in obtaining such competence. As NYRPC 1.1 (b) requires, "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it."

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

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

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12 NYRPC 1.1 cmt. 8.

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

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

15 *Id.*

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

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

Guideline No. 2.A: Applicability of Advertising Rules

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

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

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

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

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

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

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

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

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

New York rules and thus must comply with requirements such as labeling and retention. For example, one New York ethics opinion states that the nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[21] According to NYCLA Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."[22]

The NYCLA ethics opinion states that if an attorney's LinkedIn profile includes a detailed description of practice areas and types of work performed in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. If an attorney also includes: (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome."[23]

The NYCLA opinion provides that attorneys who allow "Endorsements" from other users and "Recommendations" to appear on their profiles fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[24] Also, the NYCLA opinion noted that if an attorney claims to have certain skills, they must also include this disclaimer because a description of one's skills – even where those skills are chosen from fields created by LinkedIn – constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).[25]

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

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

22 NYCLA, Formal Op. 748 (2015).

23 *Id.*

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

25 NYCLA, Formal Op. 748.

> (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising.[26]

The City Bar opinion notes that it should not be presumed that an attorney who posts information about herself on LinkedIn is doing so for the primary purpose of attracting paying clients.[27] If attorneys merely include a list of "Skills," a description of practice areas, or displays "Endorsements" or "Recommendations," without more on their LinkedIn account, this does not, by itself, constitute attorney advertising.[28]

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

> (1) labeling the LinkedIn content "Attorney Advertising"; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising.[29]

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

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

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

27 NYRPC 7.1(k).

28 NYRPC 1.0(c).

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

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

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's character limit may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, attorneys should consider only posting tweets that would not be categorized as attorney advertising to avoid having to comply with the attorney advertising rules within the Twitter environment.[31]

Rule 7.1(k) of the NYRPC provides that all advertisements "shall be pre-approved by the lawyer or law firm." It requires that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies a one-year retention period for advertisements contained in a "computer-accessed communication" and yet another retention scheme for websites.[32] Rule 1.0(c) of the NYRPC defines ''computer-accessed communication'' as any communication made by or on behalf of a lawyer or law firm that is disseminated through "the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto."[33] Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."[34]

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

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

31 NYSBA, Op. 1009.

32 *Id.*

33 *Id.*

34 *Id.*

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

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[35]

NYRPC 7.1, 7.4.

Comment: Although LinkedIn's headings no longer include the term "Specialties," lawyers still need to be cognizant of the prohibition on claiming to be a "specialist" when creating a social media profile.[36] To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey the lawyer's experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.[37]

A lawyer shall not list information under the ethically prohibited heading of "specialist" in any social media network unless appropriately certified as such. Skills or practice areas listed on a lawyer's profile under the headings "Experience" or "Skills" do not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4.[38] A lawyer may include information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits the inclusion of such biographical information. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings such as "expert."

A limited exception to identification as a specialist may exist for lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example, identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.[39]

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

36 One court has found that the prohibition on the words "expertise" and "specialty" in relation to attorney advertising is unconstitutional; see Searcy v. Florida Bar, 140 F. Supp. 3d 1290, 1293 (N.D. Fla. 2015).

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

38 NYCLA, Formal Op. 748.

39 *See* NYRPC 7.4.

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

A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.[40]

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she may wish to ask that person to remove it.[41]

NYRPC 7.1, 7.2, 7.3, 7.4.

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

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

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

Guideline No. 2.D: Attorney Endorsements

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

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must monitor and verify that posts about them made to profiles they control[42] are accurate. "Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists," as well as to confirm the accuracy of any endorsements or recommendations.[43] A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.[44] Certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

When an attorney provides information on social media related to successful results she has achieved for a client, she should be careful to avoid disclosing confidential information about her client and the matter. The risk of disclosure of confidential information can also arise when a lawyer deems it necessary to correct adverse comments made by clients or former clients about the lawyer's legal skills made on social media (known as "reverse advertising"). New York has not addressed the issue, but the Texas Center for Legal Ethics recently opined that in such a situation, a lawyer may post a "proportional and restrained

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

43 NYCLA, Formal Op. 748.

44 *See* NYCLA, Formal Op. 748; Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-300 (2014); N.C.State Bar Ethics Comm., Formal Op. 8 (2012); *see also* Mary Pat Benz, *New Guidance for Lawyers on the Ethics of Social Media Use*, ATTORNEYATWORK (Oct. 23, 2014) (https://www.attorneyatwork.com/ethics-of-social-media-use/) (last visited Mar. 28, 2019).

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

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

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

NYRPC 1.7, 1.8.

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

While no New York ethics opinion has addressed the issue, the D.C. Bar Legal Ethics Committee recently provided guidance on this subject stating, "Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or the lawyer's firm. Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict. [D.C. Rule of Professional Conduct] 1.7(b)(4) states that an attorney shall not represent a client with respect to a matter if 'the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by ... the lawyer's own financial, business, property or personal interests,' unless the conflict is resolved in accordance with [D.C. Rule of Professional Conduct] 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts."[46]

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

46 D.C. Bar Ethics Op. 370.

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

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

Due to the "live" nature of real-time or interactive computer-accessed communications,[47] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[48] business from the public through such means.[49]

If a potential client[50] initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential,

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

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

49 *See* NYSBA, Op. 899 (2011). Ethics opinions in a number of states have addressed chat room communications; *see also* Ill. State Bar Ass'n, Op. 96-10 (1997); Mich. Standing Comm. on Prof'l and Jud. Ethics, Op. RI-276 (1996); Utah State Bar Ethics Advisory Opinion Comm., Op. 97-10 (1997); Va. Bar Ass'n Standing Comm. on Advertising, Op. A-0110 (1998); W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998).

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

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

whether the communication is electronic or in some other format.[51] Emails and attorney communications via a website or over social media platforms, such as Twitter,[52] may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client.[53]

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

> *Comment*: Answering general questions[54] on the Internet is analogous to writing for any publication on a legal topic.[55] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a 'specific request' to retain the lawyer."[56] In responding to questions,[57] a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.[58]

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

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

53 NYRPC 7.3(a)(1).

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

55 *See* NYSBA, Op. 899.

56 *See id.*

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

58 *Id.*

Moreover, a lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.[59]

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

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

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

NYRPC 1.1, 1.15.

Comment: A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or

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

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

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

62 *Id*.

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

The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation."[65] The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, which the lawyer believes need to be saved.[66] However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without the knowledge of the lawyer.[67] Casual communications may be deleted without impacting ethical rules.[68]

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

> As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other

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63 NYRPC 1.0(n), Terminology.

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

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

66 *Id.*

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

68 *Id.*

> electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.
>
> We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.[69]

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

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

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

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

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a party's social media website,[70] profile or posts, whether that party is represented or not, for the purpose of obtaining information about the party, including impeachment material for use in litigation.[71]

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

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

A lawyer may communicate with an unrepresented party and also request permission to view a non-public portion of the unrepresented party's social media profile.[73] However, the lawyer must use her full name and an accurate profile, and may not create a false profile to mask her identity. If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the unrepresented party or otherwise cease all further communications and withdraw the request if applicable.

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

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

72 *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 434 (Sup. Ct. Suffolk Cty. 2010) ("She consented to the fact that her personal information would be shared with others, notwithstanding her privacy setting. Indeed that is the very nature and purpose of these social networking sites else they would cease to exist."); *see also Forman v. Henkin*, 30 N.Y.3d 656, 666 (2018) (court assumed some Facebook materials may be characterized as private, but held that some private Facebook materials may be subject to discovery if relevant).

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

NYRPC 4.1, 4.3, 8.4.

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

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

However, other states require that a lawyer's initial "friend" request must contain additional information to fully apprise the witness of the lawyer's identity and intention. For example, the New Hampshire Bar Association, holds that an attorney must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[79] The Massachusetts and San Diego Bar Associations simply require disclosure of the lawyer's "affiliation and the purpose for the request."[80] The Philadelphia Bar Association notes that failure to disclose the attorney's true intention constitutes an impermissible omission of a "highly material fact."[81]

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

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

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

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

77 NYCBA, Formal Op. 2010-02.

78 *See id.*

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

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

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

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

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

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

NYRPC 4.1, 4.2.

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

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible."[83]

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

Nevertheless, in New York, drawing upon those opinions addressing jurors, receipt of an automatic notification can be considered an improper communication with someone who is represented by counsel, particularly where "the attorney is aware that her actions would cause the juror to receive such message or notification."[84]

Conversely, ABA Formal Op. 466 opined that, at least within the juror context, an automatically-generated notification does not constitute an impermissible communication since "… the ESM [electronic social media] service is communicating with the juror based on a technical feature of the ESM,"

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

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

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

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

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

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

NYRPC 5.3, 8.4.

Comment: This would include, *inter alia*, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent[87] and could, as well, apply to the lawyer's client.[88]

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

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

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

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

5. COMMUNICATING WITH CLIENTS

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

A lawyer may advise a client as to what content[89] may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings.[90] A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations.[91] Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

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

> *Comment*: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[92] or where preservation is required by common law, statute, rule, regulation or other requirement. Failure to do so may result in sanctions or other penalties. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,[93] there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."[94] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after litigation has commenced, as long as

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

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

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

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

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

94 NYCLA, Formal Op. 745.

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

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

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

A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."[96]

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

Comment: A lawyer may review what a client plans to publish on social media in advance of posting[97] and guide the client, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may, for example, counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the posts may be perceived; and discuss how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client that social media content or data that the client considers highly private or personal, even if not shared with other social media users, may be reviewed by opposing parties, judges and others due to court order, compulsory process, government searches, data breach, sharing by others or unethical conduct. A

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

96 NYCLA, Formal Op. 745.

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

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

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

Guideline No. 5.C: <u>False Social Media Statements</u>

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion and if proper inquiry of the client does not negate that conclusion.[98]

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

Comment: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[99] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[100]

Guideline No. 5.D: <u>A Lawyer's Use of Client-Provided Social Media Information</u>

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

NYRPC 4.2.

Comment: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[101] New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."[102]

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98 *See* NYCLA, Formal Op. 745.

99 NYRPC 3.1(a).

100 NYRPC 3.1(b)(3).

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

102 *Id.*

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

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

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

A New Hampshire opinion states that a lawyer's client may, for instance, send a friend request or request to follow a private Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations.[103] In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[104]

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication …. [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."[105]

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

104 *Id.*

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

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

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

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool or practice operates before using it and consider whether any activity places client information and confidences at risk.[108]

Where a client has posted an online review of the lawyer or her services, the lawyer's response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.[109]

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106 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018).

107 *See* NYRPC 1.6.

108 D.C. Bar Legal Ethics Comm., Op. 370 explains one risk of services that import email contacts to generate connections: "For attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure."

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

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

NYSBA Comment 16 to NYRPC 1.6 provides:

Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the

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

Comment: A lawyer is prohibited, absent a recognized exception, from disclosing client confidential information. Moreover, a lawyer should be aware that "information distributed electronically has a continuing life, and it might be possible for recipients to aggregate, mine, and analyze electronic communications made to different people at different times and through different social media."[110]

Attorneys should be aware of issues related to anonymously posting online during trial. In *In re Perricone*, 2018-1233 (La. 2018), the Supreme Court of Louisiana concluded that "[t]he only appropriate sanction under the[] facts" was disbarring an attorney who had anonymously posted online critical comments that concerned, among other things, pending cases in which he or colleagues were assigned as prosecutors. The attorney had "stated that he made the anonymous online comments to relieve stress, not for the purpose of influencing the outcome of a defendant's trial." But the court opined that its decision "must send a strong message to respondent and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet."

Under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which, as to

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likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, *see* Rule 5.3, Comment [2].

Comment 17 further provides:

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

110 L.A. Cnty Bar Ass'n Prof'l Responsibility and Ethics Comm., Op. No. 529 (2017).

former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary … to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."[111] NYSBA Ethics Opinion 1032 indicates that the self-defense exception applies to "claims" and "charges" in formal proceedings or a "material threat of a proceeding," which "typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction" but not to a "negative web posting."[112] As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on platforms such as Avvo, Yelp or Facebook.[113]

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception."[114] Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events."[115]

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

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

112 *Id.*

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

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

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

Opinion 370 which states a "confidence" is "information protected by the attorney-client privilege" and a "secret" is "… other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."

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

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

A lawyer may research a prospective or sitting juror's public social media profile and public posts as long as it does not violate any local rules or court order.

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[116] At this juncture, it is "not only permissible for trial counsel to conduct Internet research on prospective jurors, but [] it may even be expected."[117]
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> The ABA issued Formal Op. 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[118] "There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[119] Opinion 466, however, does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[120]

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116 NYCBA, Formal Op. 2012-2 (2012).

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

118 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466. Attorneys should be mindful of court orders concerning online research in jurisdictions in which they practice. *See, e.g.*, Standing Order Regarding Research as to Potential Jurors in All Cases Assigned to U.S. District Judge Rodney Gilstrap (E.D. Tex. 2017).

119 *Id.*

120 *Id.*

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

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.[121]

NYRPC 1.1, 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need to "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[122]

"Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper *ex parte* communication."[123] For example, ABA Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.[124] This type of communication would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[125]

NYCLA Formal Op. 743 and NYCBA Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation.[126] New York ethics opinions also draw a distinction between public and private juror information.[127] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic

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121 *See* NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2 (2012); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

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

123 Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

124 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466.

125 *Id.*

126 NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2 (2012).

127 *Id.*

message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).[128]

In contrast to the above New York opinions, ABA Formal Op. 466, opined that "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when an [electronic social media ("ESM")] network setting notifies the juror of such review does *not* constitute a communication from the lawyer in violation" of the Rules of Professional Conduct.[129] The ABA concluded that, as a general rule, an automatic notification represents a communication between the juror and a given ESM platform, instead of an impermissible communication between the juror and the attorney. The Colorado Bar Association and DC Bar have since adopted the ABA's position, i.e., "such notification does not constitute a communication between the lawyer and the juror or prospective juror" as opposed to a "friend" request, which would be impermissible.[130]

According to ABA Formal Op. 466, this type of notice is "akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."[131] Yet, this view has been criticized on the basis of the possible impact such communication might have on a juror's state of mind and has been deemed more analogous to the improper communication where, for instance, "[a] lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial, knowing that a neighbor will see the lawyer and will advise the juror of this drive-by and the signage."[132]

Under ABA Formal Op. 466, a lawyer must: (1) "be aware of these automatic, subscriber-notification features" and (2) make sure "that their review is

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

129 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (emphasis added).

130 D.C. Bar Legal Ethics Comm., Formal Op. 371; *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

131 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014); *see also* Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (2014) ("There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed.").

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

purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[133] Moreover, ABA Formal Op. 466 suggests that "judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds," including a juror's or potential juror's social media presence.[134]

New York guidance similarly holds that, when reviewing social media to perform juror research, a lawyer needs to perform such research in a way that does not leave any "footprint" or notify the juror that the lawyer or her agent has been viewing the juror's social media profile.[135]

The New York opinions cited above draw a distinction between public and private juror information.[136] They opine that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror's profile, assuming other ethics rules are not implicated. Such opinions, however, have not taken a definitive position that such unintended automatic contact is subject to discipline.

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

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

134 *Id.*

135 *See* NYCBA, Formal Op. 2012-2; NYCLA, Formal Op. 743; SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

136 *Id.*

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: An "attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable."[137]
>
> "Subordinate lawyers and nonlawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access" to portions of social media accounts not otherwise accessible to the lawyer.[138]

Guideline No. 6.D: Juror Contact During Trial

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

NYRPC 1.1, 3.5, 4.1, 5.3, 8.4.

> *Comment:* The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.
>
> Yet, these later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.[139]
>
> > [W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore

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137 *See* NYCBA, Formal Op. 2012-2.

138 Colo. Bar Ass'n Ethics Comm., Formal Op. 127.

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

> re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.[140]

ABA Formal Op. 466 permits passive review of juror social media postings, even when an automated response of a reviewer's Internet "presence" is sent to the juror during trial, absent court instructions prohibiting such conduct.[141] In one New York case, a lawyer's review of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this information to the attention of the court, stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."[142] This case demonstrates that a lawyer must use caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.[143]

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."[144]

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140 *See* NYCBA, Formal Op. 2012-2 (2012).

141 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466; D.C. Bar Legal Ethics Comm., Formal Op. 371.

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

143 *See id.*

144 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466.

Guideline No. 6.E: Juror Misconduct

If a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[145]

NYRPC 3.5, 8.4.

Comments: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 discusses a lawyer's obligation to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[146]

New York, however, provides that "[a] lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge."[147] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[148] "Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney."[149]

In *People v. Jimenez*, 159 A.D.3d 574 (1st Dept. 2018), "[a]fter a jury note revealed that a juror had conducted online research on false confessions and

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145 *See* NYCLA, Formal Op. 743; NYCBA, Formal Op. 2012-2; SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

146 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466; *see also* D.C. Bar Legal Ethics Comm., Formal Op. 371 (the determination of "[w]hether and how such misconduct must or should be disclosed to a court is beyond the scope" of the ethical rules, except in instances "clearly establishing that a fraud has been perpetrated upon the tribunal.")

147 NYRPC 3.5(d).

148 NYCBA, Formal Op. 2012-2; *see also* SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).

149 NYCBA, Formal Op. 2012-2; *see also* Pa. Bar Assn, Ethics Comm., Formal Op. 2014-300 ("[A] lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").

shared it with the rest of the jury," the Appellate Division concluded that the lower court had "providently exercised its discretion in denying defendant's request to discharge the offending juror and concomitantly declare a mistrial." The Appellate Division also found that the lower court had taken "adequate curative measures by thoroughly admonishing the jury to disregard the information obtained by a juror, not to conduct any outside research, and to decide the case solely based on the evidence presented at trial."[150]

150 *See*, with regard to juror misconduct that led to reversal of a conviction and a new trial, *People v. Neulander*, 162 A.D.3d 1763 (4th Dept. 2018), *appeal pending*.

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

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

NYRPC 3.5, 8.2 and 8.4.

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

A lawyer may connect or communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"[151] which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."[152]

It should be noted that New York Advisory Committee on Judicial Ethics Opinion 08-176 provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."[153] New York Advisory Committee on Judicial Ethics Opinion 08-176 further opines that:

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

151 Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300.

152 NYRPC 3.5(A)(1).

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

> information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

Furthermore, New York Advisory Committee on Judicial Ethics Opinion 13-39 concludes that "the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (*see* 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (*see* 22 NYCRR 100.2[A]) based solely on having previously 'friended' certain individuals who are now involved in some manner in a pending action."[154]

The New York Advisory Committee on Judicial Ethics opinion is consistent with the Florida Supreme Court's recent holding that a "judge [who] is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."[155] For state judicial ethics commissions that have considered this issue, the "minority view" is that "Facebook 'friendship' between a judge and an attorney appearing before the judge, standing alone, creates the appearance of impropriety because it reasonably conveys or permits others to convey the impression that they are in a special position to influence the judge in violation of the applicable code of judicial conduct."

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154 N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013).

155 *See Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, No. SC17-1848, 2018 WL 5994243, at *2 (Fla. Nov. 15, 2018) (collecting cases consistent with N.Y. Advisory Comm. on Judicial Ethics Op. 13-39).

APPENDIX – Social Media Definitions

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

A. Social Technologies

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

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

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

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

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

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

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

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

Twitter: a real-time social network that allows users to share updates that are limited to 280 characters. Founded in 2006, it has more than 315 million active monthly users.

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

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

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

B. Social Terminologies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tweet: The term for a user's post on Twitter that can contain up to 280 characters of text, as well as photos, videos, and links.

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

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

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

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

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

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

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477R* **May 11, 2017**

Revised May 22, 2017

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for email communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."[1]

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.[2]

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook

*The opinion below is a revision of, and replaces Formal Opinion 477 as issued by the Committee May 11, 2017. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.[3]

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c) and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."[4] Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.[5]

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] The scope of this requirement was

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3. *See* JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/cybersecurity (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> 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]

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [8]

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[9] The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[10]

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7. *Id.* at 43.

8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.[11]

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.[12]

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- the sensitivity of the information,

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11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[13]

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.[14] Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

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13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2016). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

14. See item 3 below.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

   Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.[15] "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

   A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

   Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As Comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

   A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex

15. *See, e.g.*, Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/.

passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,[16] and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

16. *See* Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.[17] If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived. Therefore, the lawyer should warn the client about the risk of sending or receiving electronic communications using a computer or other device, or email account, to which a third party has, or may gain, access.[18]

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as "privileged and confidential" in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or "disclaimer" to client emails, where such a disclaimer is accurate and appropriate for the communication.[19]

Model Rule 4.4(b) obligates a lawyer who "knows or reasonably should know" that he has received an inadvertently sent "document or electronically stored information relating to the representation of the lawyer's client" to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer's duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

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17. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (2011). Formal Op. 11-459 was issued prior to the 2012 amendments to Rule 1.6. These amendments added new Rule 1.6(c), which provides that lawyers "shall" make reasonable efforts to prevent the unauthorized or inadvertent access to client information. *See, e.g.*, Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. Some state bar ethics opinions have explored the circumstances under which email communications should be afforded special security protections. *See, e.g.*, Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

- communicating highly sensitive or confidential information via email or unencrypted email connections;
- sending an email to or from an account that the email sender or recipient shares with others;
- sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer…;
- sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
- sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
- sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

19. *See* Veteran Med. Prods. v. Bionix Dev. Corp., Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read "this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed" with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

- reference checks and vendor credentials;
- vendor's security policies and protocols;
- vendor's hiring practices;
- the use of confidentiality agreements;
- vendor's conflicts check system to screen for adversity; and

- the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.[20]

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

- the education, experience, and reputation of the nonlawyer;
- the nature of the services involved;
- the terms of any arrangements concerning the protection of client information; and
- the legal and ethical environments of the jurisdictions in which the services will be performed particularly with regard to confidentiality.

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[21] If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.[22]

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer's actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

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20. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

21. The ABA's catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, "the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [4] (2016). The concept of monitoring recognizes that although it may not be possible to "directly supervise" a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.[23] The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [19] to Model Rule 1.6, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

23. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1) & (4) (2016).

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 480 **March 6, 2018**

Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.[1]

Introduction

Lawyers comment on legal topics in various formats. The newest format is online publications such as blogs,[2] listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").[3]

Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer's public commentary may also implicate the lawyer's duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

Online public commentary provides a way to share knowledge, opinions, experiences, and news. Many online forms of public commentary offer an interactive comment section, and, as such, are also a form of social media.[4] While technological advances have altered how lawyers

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016 [hereinafter the "Model Rules"]. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] A "blog" is commonly understood to be a website consisting of written entries (posts) regularly updated and typically written in an informal or conversational style by an individual or small group. As recently described in a California State Bar advisory opinion, "[b]logs written by lawyers run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to self-promotional descriptions of the attorney's legal practice and courtroom successes to overt advertisements for the attorney or her law firm." State Bar of Cal. Comm'n on Prof'l Responsibility & Conduct Op. 2016-196 (2016).

[3] These are just examples of public written communications but this opinion is not limited to these formats. This opinion does not address the various obligations that may arise under Model Rules 7.1-7.5 governing advertising and solicitation, but lawyers may wish to consider their potential application to specific communications.

[4] Lawyers should take care to avoid inadvertently forming attorney-client relationships with readers of their public commentary. Although traditional print format commentary would not give rise to such concerns, lawyers interacting with readers through social media should be aware at least of its possibility. A lawyer commenting publicly about a legal matter standing alone would not create a client-lawyer relationship with readers of the commentary. *See* Model Rule 1.18 for duties to prospective clients. However, the ability of readers/viewers to make comments or to

communicate, and therefore may raise unexpected practical questions, they do not alter lawyers' fundamental ethical obligations when engaging in public commentary.[5]

Duty of Confidentiality Under Rule 1.6

Model Rule 1.6(a) provides:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

As Comment [2] emphasizes, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

This confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[6] In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.

Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6.[7] Rule 1.6(b) provides other exceptions to Rule 1.6(a).[8] However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to a

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ask questions suggests that, where practicable, a lawyer include appropriate disclaimers on websites, blogs and the like, such as "reading/viewing this information does not create an attorney-client relationship."

Lawyer blogging may also create a positional conflict. *See* D.C. Bar Op. 370 (2016) (discussing lawyers' use of social media advising that "[c]aution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict.") *See also* ELLEN J. BENNETT, ELIZABETH J. COHEN & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 148 (8th ed. 2015) (addressing positional conflicts). *See also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 50-51 (11th ed. 2018) ("[S]ocial media presence can pose a risk for attorneys, who must be careful not to contradict their firm's official position on an issue in a pending case"). This opinion does not address positional conflicts.

[5] *Accord* D.C. Bar Op. 370 (2016) (stating that a lawyer who chooses to use social media must comply with ethics rules to the same extent as one communicating through more traditional forms of communication).

[6] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (2017). There is also a general principle noted in the Restatement (Third) of the Law Governing Lawyers that "[c]onfidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients." AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS §59, cmt. e (1998). It is beyond the scope of this opinion to define what specific elements will be considered to distinguish between protected client information and information about the law when they entwine.

[7] *See* Wis. Op. EF-17-02 (2017) ("a client's identity, as well as a former client's identity, is information protected by [Rule 1.6]"); State Bar of Nev. Comm'n on Ethics and Prof'l Responsibility Formal Op. 41, at 2 (2009) ("Even the mere identity of a client is protected by Rule 1.6."); State Bar of Ariz. Comm. on the Rules of Prof'l Conduct Op. 92-04 (1992) (explaining that a firm may not disclose list of client names with receivable amounts to a bank to obtain financing without client consent). *See also* MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. [2] (2017) & N.Y. Rules of Prof'l Conduct R. 7.1(b)(2) (requiring prior written consent to use a client name in advertising). *But see* Cal. Formal Op. 2011-182 (2011) ("…[I]n most situations, the identity of a client is not considered confidential and in such circumstances Attorney may disclose the fact of the representation to Prospective Client without Witness Client's consent.") (*citing to* LA County Bar Ass'n Prof'l Responsibility & Ethics Comm'n Op. 456 (1989)).

[8] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(7) (2017).

lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.[9]

Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6.[10] The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.[11]

A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical.[12] Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.

The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is

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[9] For ethical issues raised when a lawyer is participating in an investigation or litigation and the lawyer makes extrajudicial statements, see *infra* at page 6.

[10] *See* ABA Formal Op. 479 (2017). *See also In re* Anonymous, 932 N.E.2d 671 (Ind. 2010) (neither client's prior disclosure of information relating to her divorce representation to friends nor availability of information in police reports and other public records absolved lawyer of violation of Rule 1.6); Iowa S. Ct. Attorney Disciplinary Bd. v. Marzen, 779 N.W.2d 757 (Iowa 2010) (all lawyer-client communications, even those including publicly available information, are confidential); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995) ("[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it"); State Bar of Ariz. Op. 2000-11 (2000) (lawyer must "maintain the confidentiality of information relating to representation even if the information is a matter of public record"); State Bar of Nev. Op. 41 (2009) (contrasting broad language of Rule 1.6 with narrower language of Restatement (Third) of the Law Governing Lawyers); Pa. Bar Ass'n Informal Op. 2009-10 (2009) (absent client consent, lawyer may not report opponent's misconduct to disciplinary board even though it is recited in court's opinion); Colo. Formal Op. 130 (2017) ("Nor is there an exception for information otherwise publicly available. For example, without informed consent, a lawyer may not disclose information relating to the representation of a client even if the information has been in the news."); *But see In re* Sellers, 669 So. 2d 1204 (La. 1996) (lawyer violated Rule 4.1 by failing to disclose existence of collateral mortgage to third party; because "mortgage was filed in the public record, disclosure of its existence could not be a confidential communication, and was not prohibited by Rule 1.6"); Hunter v. Va. State Bar, 744 S.E.2d 611 (Va. 2013) (rejecting state bar's interpretation of Rule 1.6 as prohibiting lawyer from posting on his blog information previously revealed in completed public criminal trials of former clients). See discussion of *Hunter*, *infra*, at note 20.

[11] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-433 (2004) ("Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.")

[12] MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6 cmt. [4] (2017). The possibility of violating Rule 1.6 using hypothetical facts was discussed in ABA Formal Opinion 98-411, which addressed a lawyer's ability to consult with another lawyer about a client's matter. That opinion was issued prior to the adoption of what is now Rule 1.6(b)(4) which permits lawyers to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to secure legal advice about the lawyer's compliance with these Rules. However, the directive provided in Formal Opinion 98-411 remains sound, namely, that a lawyer use caution when constructing a hypothetical. For an illustrative case, see *In re* Peshek, M.R. 23794, 2009 PR 00089 (Ill. 2010). Peshek was suspended for sixty days for violating Rule 1.6. Peshek served as a Winnebago County Public defender for about 19 years. After being assaulted by a client, Peshek began publishing an Internet blog, about a third of which was devoted to discussing her work at the public defender's office and her clients. Peshek's blog contained numerous entries about conversations with clients and various details of their cases, and Peshek referred to her clients by either first name, a derivative of their first name, or their jail ID number, which were held to be disclosures of confidential information in violation of Rule 1.6. She was suspended from practice for 60 days.

not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a).[13] Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record."[14] Accordingly, if a lawyer wants to publicly reveal client information, the lawyer[15] must comply with Rule 1.6(a).[16]

First Amendment Considerations

While it is beyond the scope of the Committee's jurisdiction to opine on legal issues in formal opinions, often the application of the ethics rules interacts with a legal issue. Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals' right to free speech, this right is not without bounds.[17] Lawyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer's free speech rights are limited.[18]

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[13] We again note that Rule 1.6(b) provides other exceptions to Rule 1.6(a).

[14] Model Rule 1.9 addresses the duties lawyers owe to former clients. Rule 1.9(c)(1) permits a lawyer, who has formerly represented a client, to use information related to the representation that has become generally known to the disadvantage of a former client, and Rule 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation except as the Rules permit or require with respect to a current client. This opinion does not address these issues under Model Rule 1.9. The generally known exception in Rule 1.9(c)(1) is addressed in ABA Formal Opinion 479.

[15] Lawyers also have ethical obligations pursuant to Rules 5.1 and 5.3 to assure that lawyers and staff they supervise comply with these confidentiality obligations.

[16] In addition to the requirements of Rules 1.6(a), a lawyer may consider other practical client relations and ethics issues before discussing client information in public commentary to avoid disseminating information that the client may not want disseminated. For instance, Model Rule 1.8(b) reads: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Rule 1.8(b) could be read to suggest that a lawyer may use client information if it *does not* disadvantage a client. The lawyer, nevertheless, has a common-law fiduciary duty not to profit from using client information even if the use complies with the lawyer's ethical obligations. *See* RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 60(2) (1998) ("a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made"). *Accord* D.C. Bar Op. 370 (2016) ("It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client's consent in a written form.")

[17] *See* Gregory A. Garbacz, *Gentile v. State Bar of Nevada: Implications for the Media*, 49 WASH. & LEE L. REV. 671 (1992); D. Christopher Albright, *Gentile v. State Bar: Core Speech and a Lawyer's Pretrial Statements to the Press*, 1992 BYU L. REV. 809 (1992); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998). *See also* Brandon v. Maricopa City, 849 F.3d 837 (9th Cir. 2017) (when a lawyer speaks to the media in her official capacity as an attorney for county officials, such speech involves her conduct as a lawyer and therefore is not "constitutionally protected citizen speech").

[18] *See In re* Snyder, 472 U.S. 634 (1985) (a law license requires conduct "compatible with the role of courts in the administration of justice"); U.S. Dist. Ct. E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993) ("once a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct"); *In re* Shearin, 765 A.2d 930 (Del. 2000) (lawyers' constitutional free speech rights are qualified by their ethical duties); Ky. Bar Ass'n v. Blum, 404 S.W.3d 841 (Ky. 2013) ("It has routinely been upheld that regulating the speech of attorneys is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of '[t]he license granted by the court.'" [citing *Snyder*]); State ex rel. Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46 (Neb. 1982) ("A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into

The plain language of Model Rule 1.6 dictates that information relating to the representation, even information that is provided in a public judicial proceeding, remains protected by Model Rule 1.6(a).[19] A lawyer may not voluntarily disclose such information, unless the lawyer obtains the client's informed consent, the disclosure is impliedly authorized to carry out the representation, or another exception to the Model Rule applies.[20]

At least since the adoption of the ABA Canons of Ethics, the privilege of practicing law has required lawyers to hold inviolate information about a client or a client's representation beyond that which is protected by the attorney-client privilege. Indeed, lawyer ethics rules in many jurisdictions recognize that the duty of confidentiality is so fundamental that it arises before a lawyer–client relationship forms, even if it never forms,[21] and lasts well beyond the end of the professional relationship.[22] It is principally, if not singularly, the duty of confidentiality that enables and encourages a client to communicate fully and frankly with his or her lawyer.[23]

Ethical Constraints on Trial Publicity and Other Statements

Model Rule 3.5 prohibits a lawyer from seeking to influence a judge, juror, prospective juror, or other official by means prohibited by law. Although using public commentary with the client's informed consent may be appropriate in certain circumstances, lawyers should take care not to run afoul of other limitations imposed by the Model Rules. [24]

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some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics.").

[19] *See* ABA Formal Op. 479 (2017). See also cases and authorities cited *supra* at note 10.

[20] One jurisdiction has held that a lawyer is not prohibited from writing a blog that includes information relating to a representation that was disclosed in an open public judicial proceeding after the public proceeding had concluded. In Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013) the Supreme Court of Virginia held that the application of Virginia Rule of Professional Conduct 1.6(a) to Hunter's blog posts was an unconstitutional infringement of Hunter's free speech rights. The Committee regards *Hunter* as limited to its facts. Virginia's Rule 1.6 is different than the ABA Model Rule. The Virginia Supreme Court rejected the Virginia State Bar's position on the interpretation and importance of Rule 1.6 because there was "no evidence advanced to support it." But see *People vs. Isaac* which acknowledges *Hunter* but finds a violation of Colorado Rule 1.6. We note, further, that the holding in *Hunter* has been criticized. *See* Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Give Way to the First Amendment & Social Media in Virginia State Bar ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. 75, 98-106 (2013).

[21] *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2017) (Even when no client–lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation except as permitted by the Rules). *Implementation Chart on Model Rule 1.18*, American Bar Ass'n (Sept. 29, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckdam.pdf.

[22] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (2017); *see also* D.C. Bar Op. 324 (Disclosure of Deceased Client's Files) (2004); Swidler & Berlin v. United States, 524 U.S. 399 (1998). *See also* GILLERS, *supra* note 4, at 34 ("[w]hether the [attorney-client] privilege survives death depends on the jurisdiction but in most places it does").

[23] See generally Preamble to ABA Model Rules for a general discussion of the purposes underlying the duty of confidentiality. *See also* GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, §§ 9.2 & 9.3 at 9-6, 9-14 (3d ed. Supp. 2012).

[24] *See, e.g.*, *In re* Joyce Nanine McCool 2015-B-0284 (Sup. Ct. La. 2015) (lawyer disciplined for violation of Rule 3.5 by attempting to communicate with potential jurors through public commentary); *see also* The Florida Bar v. Sean William Conway, No. SC08-326 (2008) (Sup. Ct. Fla.) (lawyer found to have violated Rules 8.4(a) and (d) for posting on the internet statements about a judge's qualifications that lawyer knew were false or with reckless disregard as to their truth or falsity).

Lawyers engaged in an investigation or litigation of a matter are subject to Model Rule 3.6, Trial Publicity. Paragraph (a) of Rule 3.6 (subject to the exceptions provided in paragraphs (b) or (c)) provides that:

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

Thus any public commentary about an investigation or ongoing litigation of a matter made by a lawyer would also violate Rule 3.6(a) if it has a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter, and does not otherwise fall within the exceptions in paragraphs (b) or (c) of Model Rule 3.6.[25]

Conclusion

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules.

[25] Pa. Bar Ass'n Formal Op. 2014-300 (2014) (lawyer involved in pending matter may not post about matter on social media). This opinion does not address whether a particular statement "will have a substantial likelihood of materially prejudicing an adjudicative proceeding" within the meaning of Model Rule 3.6.