

**THE MINEFIELD OF SOCIAL MEDIA AND LEGAL ETHICS: HOW TO PROVIDE
COMPETENT REPRESENTATION AND AVOID THE PITFALLS OF MODERN
TECHNOLOGY**

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I. Introduction

In the midst of the digital age, it is hard to image a business operating without an Internet presence. With 239.58 million Internet users in the United States,¹ more businesses are adapting to the demands of our internet-driven society with the fear that any resistance to modern technologies may result in the disruption, if not the complete elimination of certain business models.² One type of disrupting technology is social media.

Social media has been defined as “forms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”³ Through online messaging and cell phone apps, Internet blogs, and social networking websites like LinkedIn, Facebook, Twitter, Google+, YouTube, Pinterest, and Instagram, social media users are publishing electronic biographies and sharing information to connect and communicate with other online users.⁴ As employees increasingly use social media for work and for personal use,⁵ social media activity has become a “major player in almost every successful business model” and requires an active presence.⁶ The legal profession is no exception.

¹ See Central Intelligence Agency, *The World Fact Book: United States* (Jan. 31, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (listing the number of Internet users within the United States, including the percentage of the population).

² Adam Hayes, *20 Industries Threatened by Tech Disruption*, INVESTOPEDIA (Feb. 6, 2015, 6:01PM), <http://www.investopedia.com/articles/investing/020615/20-industries-threatened-tech-disruption.asp>.

³ *Social Media*, MERRIAM WEBSTER (11th ed. 2003).

⁴ Jennifer Ellis, *Social Media for Law Firms: An Overview*, A.B.A. (Sept. 2014), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/session11_print_all.authcheckdam.pdf (stating that “[c]urrently, the most popular social media sites and applications in the United States include Facebook, Twitter, LinkedIn, Google+, Pinterest, YouTube, and Instagram”).

⁵ Dorothy M. Bollinger, *Social Media and Employment Law: A Practitioner’s Primer*, 20 TEMP. POL. & CIV. RTS. L. REV. 323 (2011).

⁶ Cortney Roark, *Five Ways to Improve Your Business’ Social Media Presence*, USA TODAY (Feb. 7, 2017), <http://www.usatoday.com/story/money/nation-now/2017/02/07/improve-business-social-media-presence/97586500/>.

To generate business and compete with other firms in a professional industry with over 1.3 million licensed attorneys across the United States,⁷ law firms are changing from the traditional law firm model and abandoning the antiquated notion that social media is an “Internet-based fad for kids.”⁸ The social media disruption of the legal industry is quite simple to explain: the way we communicate has changed and potential clients are no longer flipping through the Yellow Pages, cold calling, or going door-to-door to look for legal services. With 76% of law firms now maintaining an online presence,⁹ it can come as no surprise that potential clients are looking online to find legal representation. Widely recognized as an efficient marketing and client development tool, social media unquestionably has its benefits when it comes to the practice of law, but it also serves as a virtual minefield for potential ethical violations.

With some attorneys focusing on whether they have an effective online presence rather than considering the ethical issues that lurk beneath the social media platforms, growing concerns about the uncertainty for potential violations exist. Making matters worse, the American Bar Association (“ABA”) Model Rules of Professional Conduct are silent on the ethical implications of social media use and published decisions are few and far between.¹⁰ As the use of social media rises within the legal profession, it is likely that the ethics rules will

⁷ *Lawyer Demographics: Year 2016*, A.B.A. SEC. LEGAL EDUCATION & ADMISSIONS TO THE BAR (Jan. 31, 2017), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

⁸ Nicole Black, *A Lawyer’s Guide to Social Media Marketing: What You Need to Know About Social Media for Business Development*, ATTORNEY AT WORK (Jan. 18, 2015), <https://www.attorneyatwork.com/connected-lawyers-guide-social-media-marketing/>.

⁹ *The Social Network: How Top U.S. Intellectual Property Firms Are Utilizing Social Media*, THE FASHION L. BLOG (Jan. 10, 2017), <http://www.thefashionlaw.com/home/the-social-network-how-the-top-intellectual-property-firms-are-utilizing-social-media>.

¹⁰ Ethan J. Wall, *Navigating the Uncharted Waters of Social Media Marketing and Ethics*, A.B.A. LAW PRACTICE TODAY (June 2012), http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/june12/navigating-the-uncharted-waters-of-social-media-marketing-and-ethics.html.

evolve and adapt to this popular marketing and client development tool. Until then, lawyers must find a balance between using common sense and acknowledging the warnings from state ethical guidelines and advisory opinions seeking to bridge the gap between the existing rules of professional conduct and the ethical use of social media in the legal profession.

II. Ethical Duties Implicated by Social Media Use in the Legal Profession

Law is a service-oriented profession. To achieve superior client service, law firms and individual legal practitioners must maintain high ethical standards when fulfilling professional responsibilities. The American Bar Association (“ABA”) Model Rules of Professional Conduct provide advisory rules setting minimum guidelines for attorneys to engage in ethical conduct across all jurisdictions and since these rules were established in 1983, nearly every state has adopted the Model Rules.

Even though the ABA has articulated these minimum code of conduct recommendations, uncertainty exists as to how these rules may be implicated by the use of social media in the legal profession. With the proliferation of social media use in law offices and corporate legal departments nationwide, legal ethics committees are beginning to pay close attention to what legal professionals are doing on social media and how they are doing it to clarify how the rules of professional conduct apply to social media activities.¹¹ Regardless of how state legal ethics regulators establish the ethical boundaries for social media use in the legal profession, a lawyer’s misuse or failure to use social media may result in ethical violations.

A. Competence

When it comes to the client-lawyer relationship, every lawyer has an ethical duty to be competent in the practice of law. According to Rule 1.1 of the ABA Model Rules of

¹¹ Christina Vassiliou Harvey et al., 10 Tips for Avoiding Ethical Lapses When Using Social Media, BUS. L. TODAY: A.B.A. (Jan. 2014), http://www.americanbar.org/publications/blt/2014/01/03_harvey.html.

Professional Conduct, competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.¹² In addition to acquiring this competence, every lawyer must also *maintain* it. Comment 8 to Rule 1.1 requires lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”¹³ Therefore, the duty of competence requires lawyers to not only stay informed about the changes in the substantive law, but it also requires lawyers to maintain the knowledge and awareness about technological changes that could impact the legal profession. These changes unquestionably include social media technology and other social networking platforms, especially as these technologies continue to change the way lawyers communicate with clients.

As of 2015, fourteen states have formally adopted Comment 8 and currently recognize that the competency requirement extends specifically to social media.¹⁴ While most states have yet to adopt Comment 8, the proliferation of social media use in the legal profession has created new ethical challenges for lawyers, which has resulted in more state bar associations providing guidance on how competency should extend to social media. For example, both the D.C. Bar Association and a section of the New York State Bar Association have released advisory materials on social media competence since these two jurisdictions have adopted rules that continue to remain silent on the ethical obligations relating to the use of modern technology in the legal profession.¹⁵

In its ethics opinion, the D.C. Bar acknowledged the applicability of social media to the practice of law and emphasized the importance for lawyers to understand the basic components

¹² MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 1983).

¹³ MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 1983).

¹⁴ Matt Kobler, *Social Media and Legal Ethics*, SLIDESHARE: LINKEDIN (Aug. 28, 2015), <https://www.slideshare.net/mjkolber/2015-legal-ethics-of-social-media-lpba>.

¹⁵ See D.C. Bar Ethics Op. 371; N.Y. St. Bar. Ass’n Com. & Fed. Litig. Sec., *Social Media Ethics Guidelines* (2015).

of social media and how the technology may be used to influence a case.¹⁶ Specifically, the D.C. Bar concluded that because the practice of law involves the use or potential use of social media in a variety of ways, a lawyer's ignorance or disregard of social media and other modern technologies may create the potential for ethical misconduct, including violating Rule 1.1 regarding competent representation.¹⁷ The Commercial and Federal Litigation Section of the New York State Bar Association took it one step further when it concluded that a lawyer cannot be sufficiently competent without a working knowledge of the benefits and risks associated with the use of social media.¹⁸ As social media becomes a popular tool for attorneys to conduct "digital digging" on a client's behalf, it is becoming increasingly more difficult for lawyers to meet the duty of competence if they fail to understand or embrace the use of social media when providing legal services.¹⁹

Therefore, to ensure continuing compliance with the applicable rules of professional conduct, every lawyer must adapt to the changing technologies and acknowledge the efficiencies that the use of social media may bring when providing competent representation. In order to avoid ethical violations or potential malpractice charges, lawyers must be able to understand social media technology, regardless if they choose to use the technology themselves when providing legal services. The mere fact that a majority of Americans use social media in their day-to-day lives makes it relevant to providing competent representation, especially when it may require a lawyer to communicate to his or her client about not posting information related to a case, not communicating with the opposing party on social media, or not deleting evidence that could result in potential spoliation sanctions. So, while an attorney's technological

¹⁶ D.C. Bar Ethics Op. 371.

¹⁷ *Id.*

¹⁸ N.Y. St. Bar. Ass'n Com. & Fed. Litig. Sec., Social Media Ethics Guidelines (2015).

¹⁹ John Browning, *Legal Ethics and Social Media: It's Complicated*, Dallas Bar Ass'n (Jul. 1, 2015), <http://www.dallasbar.org/book-page/legal-ethics-and-social-media-it's-complicated>.

incompetence may have been a mere competitive disadvantage a few years ago, with the proliferation of social media use, it is now a potential legal ethics violation.²⁰

B. Diligence

While there may be some uncertainty as to whether a lawyer has a duty to achieve social media competence, it would seem that a lawyer's duty of diligence requires that he or she take a more active approach towards the use of social media in the fulfillment of his or her duties to a client. Rule 1.3 of the ABA Model Rules of Professional Conduct provides that a lawyer shall act with reasonable diligence and promptness in representing a client.²¹ Because a diligent attorney must act with "zeal in advocacy upon the client's behalf," it seems possible that more than just a basic understanding or familiarity with social media may be required.²² Therefore, diligent and prompt representation may actually require the actual use of social media to screen a client's social media page or an opposing party's social media account in order to gather the relevant information and take the steps necessary to vindicate a client's cause or endeavor.²³

A mere search of a person's social media page can unlock a treasure trove of information and with seventy-eight percent of Americans having a social media profile in 2016,²⁴ social media is becoming a tool for lawyers to better represent their clients.²⁵ According to an article in the ABA Journal of the Section for Litigation, social media has the potential to offer "rich repositories of potential pre-litigation intelligence and fodder for cross-examination."²⁶ As such,

²⁰ Megan Zavieh, *Luddite Lawyers Are Ethical Violations Waiting to Happen*, Lawyerist Blog (Jul. 10, 2015), <https://lawyerist.com/71071/luddite-lawyers-ethical-violations-waiting-happen/>.

²¹ MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983).

²² MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1983).

²³ *Id.*

²⁴ *Percentage of U.S. Population with a Social Media Profile from 2008 to 2016*, Statista (2017), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/>.

²⁵ Nicole Black, *How Are Lawyers Using Social Media in 2016*, MyCase Blog (Feb. 2, 2016), <http://www.mycase.com/blog/2016/02/how-are-lawyers-using-social-media-in-2016-infographic/>.

²⁶ Andy Radhakant & Matthew Diskin, *How Social Media Are Transforming Litigation*, 39 A.B.A. J. SEC. LITIG. 3 (2013).

a basic search of social media profiles associated with clients, opponents, and witnesses is now considered to be a minimum level of due diligence expected of a competent litigator.²⁷ For example, a Maryland court has recognized that both prosecutors and criminal defense attorneys are increasingly looking at social media for potential evidence and in its opinion, the court considered it a “matter of professional competence” that lawyers take the time to investigate social networking sites in the performance of due diligence.²⁸

Because anything posted on a social media account could be equally harmful or helpful to a client’s case,²⁹ it is imperative that lawyers exercise due diligence by actively using social media, rather than just obtaining a mere understanding of how to use social media. With the vast amount of information readily available on a variety of social media platforms, attorneys are expected to utilize modern technology like social media, to provide competent and diligent representation to a client.³⁰ To meet the duty of diligence, attorneys must recognize that the most effective way to serve clients may include the use of social media. Moreover, it is very likely that the attorneys who have yet to incorporate this modern technology into their practices are placing their clients at a distinct competitive disadvantage.³¹

C. Confidentiality

²⁷ *Id.*

²⁸ *Griffin v. Maryland*, 192 Md. App. 518, 535 (2010); *See Zavieh, supra* note 20 (explaining that the holding in *Griffin v. Maryland* regarding the “authentication of the social media evidence was overruled on appeal, but the appellate court took no issue with the idea that attorneys have an obligation to review social media evidence as part of their due diligence.”)

²⁹ *Your Social Media Posts May Impact Your Worker’s Comp or Injury Case*, DEUTERMAN LAW GROUP Blog (April 5, 2016), <http://deutermanlaw.com/social-media-court-case/>.

³⁰ Angela M. Scafuri, *Tips for Young Lawyers: Ethics and Social Media*, A.B.A. SEC. COMM. & BUS. LITIG. (Feb. 23, 2015), <http://apps.americanbar.org/litigation/committees/commercial/articles/winter2015-0215-tips-young-lawyers-ethics-social-media.html>.

³¹ Robert Keeling, *Social Media is a Powerful Tool, But Be Wary of Ethical Pitfalls*, *Corporate Counsel* (Jan. 13, 2016), <http://www.corpcounsel.com/id=1202746988835/Social-Media-Is-a-Powerful-Tool-But-Be-Wary-of-Ethical-Pitfalls?sreturn=20170124100011> (explaining that “... attorneys who have yet to incorporate comprehensive social media searches into their practices place their clients at a distinct competitive disadvantage”).

Whether inadvertent or intentional, social media use by lawyers may pose a potential risk of disclosing confidential information. Preserving confidential or privileged information is at the very heart of a lawyer's ethical duties.³² According to Rule 1.6, lawyers are required to maintain the confidentiality of information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.³³ Confidential information is broadly defined in the comments to Rule 1.6 and includes "not only matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."³⁴

Attorneys who use social media sites for both professional and personal use may risk violating attorney-client confidentiality and as a result, they may lose their jobs or face disciplinary action.³⁵ For example, a complaint was filed against an Illinois assistant public defender for her blog posts on social media, which revealed confidential client information.³⁶ As a public defender, the Illinois attorney had access to information about clients that would otherwise be confidential and used the information to discuss her work at the public defender's office on her social media blog.³⁷ The Administrator of the Illinois Attorney Registration and Disciplinary Commission submitted a complaint that the public defender engaged in misconduct and violated Rule 1.6(a) of the Illinois Rules of Professional Conduct when her posts 1) contained "sufficient identifying information" as to the identity of her clients, 2) included

³² Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use Of (And Refusal To Use) Social Media*, 12 DEL. L. REV. 187 (2011).

³³ MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

³⁴ MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 1983).

³⁵ See Ed Silverstein, *Social Media Can Cause Problems for Lawyers When It Comes to Ethics, Professional Responsibility*, INSIDE COUNSEL (April 29, 2014), <http://www.insidecounsel.com/2014/04/29/social-media-can-cause-problems-for-lawyers-when-i> ("Attorneys who post on sites like Facebook also have to worry about violating attorney-client privilege, disciplinary action, losing jobs, or engaging in unauthorized or inadvertent practice of law...").

³⁶ Complaint Before the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission at 1, *In re Kristine Ann Peshek Matter* (2009) (No. 6201779).

³⁷*Id.*

confidential information gained in the professional relationship, and 3) the revelation of the information would be embarrassing or detrimental to her client.³⁸

This complaint before the hearing board in Illinois is just one example of how an attorney can lose her job or face disciplinary action for revealing confidential client information when using social media. According to Larry Doyle, a member of the California Bar’s Committee on Professional Responsibility and Conduct, lawyers are never truly “off duty” from their ethical obligations to clients, especially due to the “fiduciary nature of the legal profession”.³⁹ In opining that an attorney’s duty of confidentiality is the ethical standard most at risk of being violated when using social media, Larry Doyle concluded that attorneys should proceed with caution when using client information in social media postings and should, ideally, obtain the consent of the client or former client prior to posting potential confidential information.⁴⁰

D. Supervision

When it comes to the potential ethical risks of using social media in the legal profession, lawyers may not avoid these ethical issues merely by delegating social media activities to others in a firm or within a legal department. No matter how tempted a lawyer may be to assign certain social media tasks to a paralegal or assistant, lawyers have an ethical obligation to supervise the work of subordinate lawyers and non-lawyers in their firm and ensure that these employees meet the same ethical standards that govern lawyers’ conduct.⁴¹ Rules 5.1 through 5.3 of the ABA Model Rules of Professional Conduct provide that a lawyer having direct supervisory authority over subordinate lawyers or non-lawyer staff shall make reasonable efforts to ensure that these

³⁸ *Id.* at 2-3.

³⁹ Larry Doyle, *Client Confidentiality and Social Media*, Cal. Bar J. (Sept.. 2015).

⁴⁰ *Id.* (“Using client information in social media is something best done with caution – and ideally with the consent of the client or former client”).

⁴¹ Keeling, *supra* note –, (“Of course a lawyer may be tempted to avoid these concerns by farming out social media research to a paralegal or assistant ... However, lawyers have an ethical obligation not only to supervise the work of non-lawyers assisting them, but also to ensure that non-lawyers meet the same ethical standards governing lawyers”).

employees conform to the rules of professional conduct.⁴² Should the supervising or managing lawyer order or have knowledge of the specific conduct or know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action, the managing and supervising lawyer shall be responsible for the other lawyer's violation.⁴³

These rules make it clear that managing and supervising lawyers must take responsibility for the various employees that work under the lawyer's direction.⁴⁴ This ethical duty to supervise employees regarding social media use extends to conduct that deceitfully sending a "friend request" to search a person's social media account for information. For example, the Philadelphia Bar Association Ethics Committee, the New York City Bar Association, and the New York State Bar Association have each held in separate opinions that a lawyer or administrative staff member could not "friend" a witness under false pretenses.⁴⁵

More recently, the New Jersey Supreme Court ruled that legal ethics regulators could proceed with a case against two attorneys accused of instructing a paralegal to "friend" a litigant in order to access nonpublic social media pages.⁴⁶ By instructing the paralegal to use social media as an investigatory tool, the lawyers' disciplinary case provides a warning to lawyers across all jurisdictions to supervise employees and be cautious when instructing or having

⁴² MODEL RULES OF PROF'L CONDUCT r. 5.1-5.3 (AM. BAR ASS'N 1983).

⁴³ MODEL RULES OF PROF'L CONDUCT r. 5.1(c) (AM. BAR ASS'N 1983).

⁴⁴ See Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 Alb. L. Rev. 117 (2009) ("Further, Rules 5.1 through 5.3 make clear that lawyers must take responsibility to supervise paraprofessionals and administrative staff that work under their direction"); see also Gina Hendryx, *Lawyer's Duty to Supervise Non-Lawyer Assistants*, 82 OKLA. B. J. 1305 (2011) ("Therefore, the rules require lawyers to make reasonable efforts to ensure that the conduct of non-lawyer employees or independent contractors is compatible with the professional obligations of the lawyer").

⁴⁵ John G. Browning, *Ethical Considerations in Lawyers' Use of Social Media*, ATTPRO ALLY 2 (Winter 2012), <https://www.attorneyprotective.com/documents/914459/914527/EthicalConsiderationsinLawyersAttProAllyIssue11Winter2012.pdf>.

⁴⁶ See Debra Cassens Weiss, *Top State Court to Hear Case of Lawyers Accused of Asking Paralegal to 'Friend' Litigant on Facebook*, A.B.A. J. (June 25, 2015, 5:45AM), http://www.abajournal.com/news/article/lawyers_accused_of_directing_paralegal_to_friend_litigant_will_get_new_jers.

knowledge of their employees' use of social media to investigate a represented adverse party.⁴⁷ The complaint filed against these two New Jersey lawyers alleged misconduct violating the New Jersey Disciplinary Rules of Professional Conduct for failure to supervise a subordinate employee and inducing another person to violate the ethics rules.⁴⁸ Because it is "inherently misleading to 'friend' a litigation opponent represented by counsel, when the true purpose of the communication is to secure evidence for an adversarial proceeding," there seems to be a bright line as to when it is ethically appropriate to use social media in the course of litigation, especially when the lawyer's supervisory role is implicated by an instruction to a subordinate employee to use social media with the purpose to further a client's interest.

With 450 million LinkedIn users and 1.13 billion daily active Facebook users, social media is virtually inescapable for lawyers in the legal profession.⁴⁹ While the majority of states' rules of professional conduct continue to remain silent on how social media use implicates a lawyer's ethical duties, the growing number of advisory opinions and guidelines indicate that the duties of competency, diligence, confidentiality, and supervision impliedly extend to social media use as an increasingly large number of attorneys use social media in the performance of legal services. To avoid violating ethical rules and risking malpractice charges, lawyers must learn to accept the efficiencies that social media use may bring to the representation of clients. With the endless capabilities of social media to search for and share information with others, more lawyers are beginning to embrace social media as a tool for client development and

⁴⁷ See Onika K. Williams, *High Court Oks Ethics Case Based on Paralegal's Improper Use of Facebook*, A.B.A. LITIG. NEWS (Aug. 31, 2016), https://apps.americanbar.org/litigation/litigationnews/top_stories/083116-ethics-paralegal-facebook.html. ("Robertelli v. N.J. Office of Attorney Ethics serves as a warning for attorneys to be cautious when using social media as an investigatory tool, even if only procedurally specific to the New Jersey ethics system").

⁴⁸ Robertelli v. N.J. Office of Atty. Ethics, 134 A.3d 963,966 (N.J. 2016).

⁴⁹ Peggy Gruenke, *A Lawyer's Guide to Avoiding Ethical Pitfalls in Social Media*, OHIO ST. B. ASS'N SOLO, SMALL FIRMS & GEN. PRAC. NEWS (Aug. 16, 2016), <https://www.ohiobar.org/Member-Center/Business-Development/Pages/A-lawyers-guide-to-avoiding-ethical-pitfalls-in-social-media.aspx>.

networking, not just for investigating opposing parties. However, much like how the refusal to use social media in the legal profession can risk violations of ethics rules, the misuse of social media may create equally dangerous risks, misconduct and ethical violations.

III. Attorney Conduct and Social Media Use: What Are the Ethical Issues?

As social media continues to change the way lawyers and clients communicate it would seem that social media technology is a double-edged sword for attorneys in the legal profession; attorneys may violate the rules of professional responsibility either by *refusing* to use social media or by *misusing* social media. With more lawyers beginning to use social media for business purposes,⁵⁰ attorney misuse of social media is arguably more likely to occur given that the majority of states have yet to acknowledge the ethical risks and potential professional conduct violations that may result when lawyers use social media to investigate cases, provide educational commentary, develop a larger client base, or engage in career networking.

To date, there is little guidance for attorneys navigating the ethical minefield when it comes to social media use in the legal profession. The uncertain ethical boundaries of lawyers' social media use are only "underscored by the lack of charges filed for ethics violations arising out of attorney's use of social media for marketing and promoting their practice."⁵¹ To provide insight as to how the current rules of professional conduct apply to an attorney's conduct and social media use, some attorneys and state ethics commissions have published guidelines and advisory opinions on how the current ethics rules extend to social media in the context of advertising, misrepresentation, and communicating with others. The overall consensus is that no matter how attorneys use social media, they must be careful to avoid potential ethical violations.

⁵⁰ Relying on the 2015 A.B.A. Legal Technology Survey Report, Shields explained that lawyers continue to use social media platforms for professional purposes, regardless of whether the lawyer's firms are establishing an online presence. See Allison Shields, *Social Media*, A.B.A. TECHREPORT 3 (2015).

⁵¹Wall, *supra* note 10.

A. Advertising

With seventy-one percent of lawyers using social media for career development and advertising in 2015,⁵² it is hard to imagine that the ABA once prohibited lawyer advertising for sixty-nine years.⁵³ Today, legal advertising involves an active quest for clients and its purpose is to assist the public in learning about and obtaining legal services.⁵⁴ As a permissible method for developing a strong client base, legal advertising continues to be regulated by the applicable rules of professional conduct within each state.⁵⁵ According to Rule 7.2 of the ABA Model Rules of Professional Conduct, a lawyer may advertise legal services through written, recorded, or electronic communication, *including* public media.⁵⁶

Within the legal industry, social media has become a powerful marketing tool for lawyers because it combines “personalized observation with facts and insights from the lawyer’s area of focus in order to help create new client relationships.”⁵⁷ By creating new opportunities for lawyers to advertise and grow their legal practices, the development of new social media platforms is forcing ethics regulators to reconsider the current ethics rules in order to accommodate social media in the legal profession. Until ethics regulators and state bar associations decide to make a change in the rules, it is generally accepted that the existing rules

⁵² Shields, *supra* note 50 (explaining that career development was the top reason for lawyers’ social media based on the 2015 A.B.A. Legal Technology Survey Report and has been the top reason since 2011).

⁵³ Geoffrey C. Hazard, Jr. ET. AL, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U.L. REV 1084 (1983).

⁵⁴ MODEL RULES OF PROF’L CONDUCT r. 7.2 cmt. 1 (AM. BAR ASS’N 1983).

⁵⁵ *See generally Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, A.B.A. add. (June 2, 2016).

⁵⁶ MODEL RULES OF PROF’L CONDUCT r. 7.2 (AM. BAR ASS’N 1983); However, a lawyer must not use similar means to solicit clients. *See* MODEL RULES OF PROF’L CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

⁵⁷ Ed Poll, *The Slippery Ethical Slope of Social Media*, A.B.A. LAW PRACTICE TODAY (Nov. 2012), http://www.americanbar.org/content/dam/aba/publications/law_practice_today/the-slippery-ethical-slope-of-social-media.authcheckdam.pdf.

are equally applicable to social media, especially since the “advertising ethics rules govern the message, not the medium.”⁵⁸

To provide insight on how these ethics rules may apply to social media advertising, the Florida Bar Association changed its guidelines on social media to advise attorneys that social media profiles used to promote the lawyer or law firm’s practice are subject to all of the general regulations set forth in the state’s rules of professional conduct.⁵⁹ The Florida guidelines also concluded that “unsolicited invitations sent directly from one social media site to a third party to view the lawyer’s page would be considered as solicitations in violation of the rule, unless the recipient is the lawyer’s current client, former client, relative, or is another lawyer.”⁶⁰ In addition, the Florida guidelines specifically required that a Tweet or social media post must include geographic information as well as the name of at least one attorney in the law firm.⁶¹

Similarly, to Florida, the New York City Bar Association provided its own analysis relating to the ethical issues that may arise when lawyers use social media for legal advertising. In its guidelines, the association introduced a five-factor test to determine if a lawyer’s use of social media constitutes legal advertising.⁶² Extending the opinion to all social media platforms, the association identified five criteria: “the lawyer makes the content; the primary purpose is for client retention of the lawyer for pecuniary gain; the content relates to the lawyer’s legal services; new clients are the intended audience; and the content does not fall into an exception to

⁵⁸ Wall, *supra* note 10; *see* Browning, *supra* note 19 (recommending that lawyers “treat social media as forms of communication subject to the same rules and ethical constraints as more traditional modes ...”).

⁵⁹ *See* Wall, *supra* note 10 (explaining that the purpose of the state’s revised advertising guidelines were to “provide a helpful primer for practical application of these rules”).

⁶⁰ *Id.* (discussing the applicability of social media to Rule 4-7.4(a) of the Florida’s rules of professional conduct regarding solicitation). It may be noted that this ethics rule was deleted from the Florida code effective May 1, 2013. *See* RULES REGULATING THE FLA. BAR r. 4-7.4 (FLA. BAR ASS’N 2017).

⁶¹ *See* Ellis, *supra* note 4 (explaining that since many posts on Twitter would be considered advertising, it is especially problematic for lawyers in Florida, where the Tweet must include geographic information and “the name of at least 1 lawyer in the firm”).

⁶² N.Y. City Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2015-7.

the definition of attorney advertising.”⁶³ According to the New York City Bar Association, a lawyer’s social media profile constitutes legal advertising *only if* there is “clear evidence that a lawyer’s primary purpose is to attract paying clients.”⁶⁴

Because “more and more of the communication we do on social media and new technology is being characterized as advertising and almost anything we say that is self-promotional is being seen as advertising,” an increasing number of states are releasing ethics opinions and guidelines in order to start defining the ethical boundaries of permissible social media use for legal advertising.⁶⁵ While some have criticized the New York City Bar Association’s five-factor test as being highly subjective,⁶⁶ other states have taken alternative approaches when examining the ethical implications of social media and legal advertising. For example, in a 2012 advisory opinion the State Bar of California concluded that material posted by an attorney on social media will be subject to the state’s rules of professional conduct if the material is a communication for the purposes of the ethics rules regarding advertising and solicitation or if it is an advertising by electronic media as defined by state law.⁶⁷ Phrased differently, “an attorney may post information about her practice on Facebook, Twitter, or other social media websites, but those postings may be subject to compliance” with the ethics rules “if their content can be considered to be ‘concerning the availability for professional employment.’”⁶⁸

⁶³ Catherine McLeod Chiccine, *Ethics Opinion Draws Line On When Social Media Is Considered Advertising*, A.B.A. LITIG. NEWS (May 20, 2016), https://apps.americanbar.org/litigation/litigationnews/top_stories/052016-social-media-advertising.html.

⁶⁴ *Id.*

⁶⁵ G.M. Filisko, *The Ethics of Online Advertising*, A.B.A. FOR L. STUDENTS: BEFORE THE BAR BLOG (March 3, 2013), <http://abaforlawstudents.com/2013/03/03/ethics-online-advertising/>.

⁶⁶ Chiccine, *supra* note 63 (explaining the view of the A.B.A. Section of Litigation’s Ethics & Professionalism Committee regarding the New York City Bar’s five-factor test, Chiccine concluded that “while it provides detailed guidance, Section leaders say the five-factor test is highly subjective”).

⁶⁷ St. Bar of Cal. Standing Comm. on Prof’l Resp. & Conduct, Formal Op. 2012-186.

⁶⁸ *Id.*

While they may have different ways to determine what constitutes legal advertising, the overwhelming consensus by these state bar associations and ethics advisory opinions is that lawyers will continue to face ethical risks when it comes to legal marketing and these risks are even more likely to become a problem when lawyers use social media as an advertising tool. In other words, when the social media platforms are used to communicate information about legal services relating to advertising, soliciting clients, or communicating about a legal specialization, the existing rules of professional conduct are equally applicable to social media marketing as they are to traditional methods of marketing, like television advertisements or print ads in a newspaper.⁶⁹ Until states formally adopt new ethics rules specifically related to lawyer advertising on social media, it is recommended that lawyers review their jurisdiction's rules of professional conduct to ensure that all public communications including statements, claims, and advertisements on social media websites are in compliance with the rules.

B. Misrepresentation

Arguably one of the most significant ethical duties that a lawyer can have is “the duty to refrain from conduct involving dishonesty, fraud or deception.”⁷⁰ When it comes to providing legal services and using social media as a communication tool, it is imperative that lawyers avoid making any misrepresentations or statements that could be construed as a false or misleading communication.⁷¹ Rule 7.1 of the ABA Model Rules of Professional Conduct states that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.⁷² Because the rule also prohibits truthful statements that are misleading, lawyers must

⁶⁹ See Wall, *supra* note 10.

⁷⁰ Keeling, *supra* 31 (Explaining that it is “among the most elemental ethical obligations for attorneys”).

⁷¹ MODEL RULES OF PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 1983) (explaining what is a false or misleading communication, Rule 7.1 defines it as a statement that “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading”).

⁷² *Id.*

be extremely cautious as to what is posted on their social media profiles, especially when there is a substantial likelihood that the truthful statement “will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”⁷³

With lawyers increasingly relying on social media as an advertising and client development tool, the risk for misrepresentation is even greater when it comes to social media recommendations, endorsements, and testimonials. Today, these may come in the form of peer review ratings on Martindale-Hubbell, client ratings for lawyers on Avvo, or skill endorsements on LinkedIn.⁷⁴ While lawyers have traditionally been reviewed by their professional successes and established reputations, social media is presenting new ethical challenges for state bar associations when a lawyer’s colleagues and clients are flooding to social media to provide review and referrals.

If not carefully constructed and properly posted, these recommendations, endorsements, and testimonials may result in potential ethical violations for false or misleading communications on social media. For example, in a 2014 formal ethics opinion, the North Carolina State Bar established limitations for making and publishing recommendations and endorsements on social media.⁷⁵ Specifically, a lawyer may not display or even accept an endorsement or recommendation from a judge on a lawyer’s social media page when it would result in the appearance of judicial partiality.⁷⁶ However, the North Carolina State Bar did indicate that lawyers may post endorsements or recommendations that contain truthful and not misleading

⁷³ MODEL RULES OF PROF’L CONDUCT r. 7.2 cmt. 2 (AM. BAR ASS’N 1983).

⁷⁴ See Nicolas Gaffney, *The Lawyer Raters: In Their Own Words*, 37 A.B.A. L. PRACTICE MAGAZINE 1 (2011) (providing descriptions of various social media legal rating services and the overall rating process).

⁷⁵ N.C. St. Bar, Formal Op. 2014-8.

⁷⁶ *Id.*

content, so long as the endorsements or recommendations are coming from persons other than judges.⁷⁷

While this seemingly implies that client reviews and testimonials are acceptable under the rules of professional conduct, lawyers again must use caution to monitor what the social media communications say and what the ethics rules of their state bar association prohibit. In separate formal advertising opinions, the Virginia State Bar and the Pennsylvania Bar Association both expressly prohibited testimonials related to the results and/or comparisons of representation and only supported “soft endorsements.”⁷⁸ Similarly, the South Carolina Bar Association also prohibits testimonials and ordinarily prohibits client endorsements, especially when they may create unjustified expectations.⁷⁹ Even if the endorsement or recommendation is true, an unsubstantiated comparison of a lawyer’s services or fees with the services or fees of another lawyer may be misleading and could result in a reasonable person forming an unjustified expectation that the same results mentioned in the review could be obtained for another prospective client.⁸⁰

The takeaway from these varying ethical opinions is simple: all lawyers must familiarize themselves with their state’s position on recommendations and endorsements and must abide by the ethical rules formally adopted in their jurisdiction. Because the rules of professional conduct are state-specific, it is very likely that states may have a more restricting rule regarding misrepresentations and endorsements than the ABA Model Rules currently provide.⁸¹ Therefore, with social media websites like AVVO, LinkedIn, Facebook, Twitter, Google+, and Instagram, a

⁷⁷ *Id.*

⁷⁸ Va. St. Bar of Cal. Standing Comm. on Law. Advert. & Solicitation, Formal Op. 2001-1750 (providing that “examples of ‘soft endorsements’ include statements such as the lawyer always returned phone calls and the attorney always appeared concerned”).

⁷⁹ See RULES OF PROF’L CONDUCT r. 7.1 (S.C. BAR ASS’N 2017).

⁸⁰ MODEL RULES OF PROF’L CONDUCT r. 7.1 cmt. 3 (AM. BAR ASS’N 1983).

⁸¹ See generally *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, A.B.A. add. (June 2, 2016).

lawyer must acknowledge his or her responsibility for all of the social media content that is posted and to take reasonable measures to ensure that third-party social media posts do not violate ethics rules.⁸²

C. Legal Advice and Social Media Communications

Today, lawyers and law firms are using social media to establish an online presence with the purpose of engaging in social media advertising, client development, case research, and overall communication as discussed above. With the various ways lawyers use social media to communicate with prospective clients, it is important for lawyers to understand the ethical risks that may arise when giving legal advice or opinions on social media, especially when it may create an unintended attorney-client relationship.

When it comes to an attorney's social media use, the perception of what constitutes legal advice is very unclear and as social media changes the way lawyers communicate with the public, it is entirely possible that an attorney-client relationship may be created through social media communications. Through a Q&A session on Twitter or a social media blog post welcoming inquiries on legal matters, certain social media communications may create a prospective client-lawyer relationship under Rule 1.18 of the ABA Model Rules of Professional Responsibility.⁸³ Without a proper disclaimer or a reasonably understandable warning that would limit the lawyer's obligations, a consultation is likely to have occurred if a lawyer specifically requests or invites the submission of information about a potential representation.⁸⁴ This includes any lawyer request through the lawyer's advertising in any medium, including social media.⁸⁵

⁸² N.Y. St. Bar. Ass'n Com. & Fed. Litig. Sec., Social Media Ethics Guidelines 2.C-D (2015).

⁸³ MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR ASS'N 1983).

⁸⁴ MODEL RULES OF PROF'L CONDUCT r. 1.18 cmt. 2 (AM. BAR ASS'N 1983).

⁸⁵ *Id.*

To avoid creating an unintended lawyer-client relationship, lawyers must consider whether information advice on a blog or social media website would create an impression of giving legal advice that could be relied on by a person visiting the site.⁸⁶ Regardless of the type of social media communication used, it is an attorney's responsibility to make it clear to the website visitor or potential client that an attorney-client relationship either has or has not been created. To address this issue, the Virginia State Bar Standing Committee on Legal Ethics released an opinion regarding the obligations of a lawyer who receives confidential information on a law firm's website.⁸⁷ Based on the opinion, a lawyer does not owe a duty of confidentiality to a person who provides unsolicited confidential information. However, if the website invites the visitor to submit information by email to the firm for evaluation of his or her claim, a limited attorney-client relationship will have been created.⁸⁸

According to the ABA Standing Committee on Ethics and Professional Responsibility, no clear line exists to determine what is legal information and what is legal advice.⁸⁹ Therefore, lawyers must exercise caution and restraint when social media users seek to communicate and obtain legal advice on social media. For example, in the social media guidelines established by the Commercial and Federal Litigation Section of the New York State Bar Association in 2015, a lawyer may provide general answers to legal questions asked on social media, but "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

⁸⁶ James M. McCauley, *Blogging and Social Networking for Lawyers: Ethical Pitfalls*, 58 VA. LAW. 26 (2010).

⁸⁷ Va. St. Bar of Cal. Standing Comm. on Legal Ethics, Formal Op. 2008-1842 (regarding the obligations of a lawyer who receives confidential information through a law firm website or telephone voicemail).

⁸⁸ See McCauley, *supra* note 86 (expanding the Virginia Legal Ethics Opinion 1842).

⁸⁹ A.B.A. Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (concluding that "[a]lthough no exact line can be drawn between legal information and legal advice, both the context and content of the information offered are helpful in distinguishing between the two").

also may impermissibly disclose” privileged information.⁹⁰ To avoid the creation of any unintended attorney-client relationships, it is generally recommended that lawyers provide a clearly written warning or disclaimer on the social media website to avoid a potential misunderstanding regarding whether an attorney-client relationship has been created; whether the visitor’s information will be kept confidential; or whether legal advice has been given.⁹¹

IV. Social Media and Litigation

As the use of social media by lawyers and law firms continues to grow, the reality of managing legal ethics risks remains a very serious concern when social media serves as a tool for legal advertising, communicating with clients and members of the public, and investigating cases during litigation. In 2016, seventy-eight percent of the United States population had a social media profile and according to future estimates, the number of worldwide social media users is expected to reach nearly 2.5 billion users by 2018.⁹² With this proliferation of social media use, lawyers must learn how to use social media to their advantage, especially when social media is a treasure trove of potentially relevant information that would help prove a client’s case. For litigation purposes, lawyers have been using social media “for and against plaintiffs and defendants to prove their case” and with an increasing number of courts declaring social media evidence admissible, social media is transforming the way litigators practice law.⁹³

⁹⁰ N.Y. St. Bar. Ass’n Com. & Fed. Litig. Sec., Social Media Ethics Guidelines 3.A (2015).

⁹¹ See A.B.A. Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (advising that in order to “avoid misleading readers, lawyers should make sure that legal information is accurate and current, and should include qualifying statements or disclaimers that “may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client”); *but see* Harvey, *supra* note 11 (citing to a quote in the South Carolina Ethics Opinion 12-03, which states that “[a]ttempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice is patently unfair and misleading to laypersons”).

⁹² *Percentage of U.S. Population with a Social Media Profile From 2008 to 2016*, STATISTA: THE STATISTICS PORTAL (2017), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/>.

⁹³ Mike Wallagher, *How Can Lawyers Use Social Media to Their Advantage*, LLRX Blog (Oct. 23, 2015), <http://www.llrx.com/2015/10/how-can-lawyers-use-social-media-to-their-advantage/>.

As many social media users publish endless amounts of personal information, the basic task of conducting social media searches on clients, opponents, and witnesses is becoming a minimum level of due diligence expected of competent litigators.⁹⁴ One example of using social media as an investigatory tool occurred in 2010, when Wal-Mart obtained a subpoena to gain access to the Facebook and Myspace social networking profiles of the plaintiff's wife for every public and private message, contact, and photo for the previous two and a half years.⁹⁵ While the case was ultimately settled, it brought attention to the "openness of social media" and its service as a rich repository "of potential pre-litigation intelligence and fodder for cross-examination."⁹⁶

Unfortunately for litigators, the silence of the ABA and limited guidance from states on how a litigator may ethically use social media as an investigatory tool has resulted in uncertainty when it comes to establishing the ethical boundaries for accessing information about parties of interest through searches of social media websites.⁹⁷ These ethical dilemmas are only made worse by the different privacy settings a person may use, which would then severely limit what a litigator could learn without having to resort to sending a "friend request" to gain access to the social media page. This has led to issues relating to communication with represented clients and permissible research for jury selection.

A. Communications with Represented Clients

⁹⁴ Radhakant & Diskin, *supra* note 26 (explaining that running a social media search of these parties is now part of the "minimum level of due diligence expected as a competent litigator").

⁹⁵ Ariana Eunjung Cha, *What Sites Such as Facebook and Google Know and Whom They Tell*, WASH. POST FOREIGN SERV. (May 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052804853.html>.

⁹⁶ Radhakant & Diskin, *supra* note 26 ("The openness of social media—and–user's willingness to tweet and post things they would never dream of saying in a letter or an email—means that social networks offer rich repositories of potential pre-litigation intelligence and fodder for cross-examination").

⁹⁷ See Saleel V. Sabnis, *Attorney Ethics in the Age of Social Media*, A.B.A. SEC. OF LITIG. (June 8, 2016), <http://apps.americanbar.org/litigation/committees/professional/articles/spring2016-0616-attorney-ethics-age-social-media.html> (explaining how the "deafening silence" of the ABA Model Rules has left attorneys with "little national guidance regarding attorney ethics in the domain of social media").

In representing a client, Rule 4.2 of the ABA Model Rules of Professional Conduct expressly prohibits lawyers from communicating about the subject of representation with a person that the lawyer knows to be represented by another lawyer in the matter.⁹⁸ This rule arguably applies to social media communications when it applies to “communications with any person who is represented by counsel concerning the matter to which the communication relates.”⁹⁹

In a 2011 legal ethics opinion, the San Diego County Bar Association rejected the argument that “friending” or submitting an access request to a represented opposing party on social media is not an ethics violation because it is the same as accessing the public website of an opposing party.¹⁰⁰ While the San Diego County Bar Association noted that nothing prevents an attorney from accessing a represented party’s *public* social media page and that such access offends no ethics rules when it requires no communication to or permission from the represented party, the same cannot be said for when the privacy settings are active.¹⁰¹ Therefore, because an attorney must make a request to a represented party “outside of the actual or virtual presence of defense counsel” to “obtain access to *restricted* information” on a private social media page, the attorney will violate the rule of professional conduct prohibiting communications with a represented party when it makes this type of access request.¹⁰²

Similarly, the Pennsylvania Bar Association and the New York State Bar Association have separately reached the same conclusion when both released opinions instructing lawyers not to contact a represented person through social media websites.¹⁰³ Moreover, the lawyers may

⁹⁸ MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 1983).

⁹⁹ MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. 2 (AM. BAR ASS'N 1983).

¹⁰⁰ San Diego Cty. Bar Ass'n Legal Ethics Comm., Formal Op. 2011-2.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See* Penn. Bar Ass'n Ethics Comm., Formal Op. 2014-300 (discussing the ethical limitations regarding the lawyer's ability to contact relevant persons in a conflict through a social networking site); N.Y. St. Bar Ass'n

use information obtained by viewing an adverse party's profile for use in the lawsuit so long as the "lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network."¹⁰⁴ While some states have only released advisory opinions and social media guidelines relating to an attorney submitting social media access requests, the Philadelphia Bar Association extended an additional ethical obligation to lawyers when it concluded that an attorney will violate the rules of professional conduct when the attorney asks a non-lawyer employee to "friend" another party.¹⁰⁵

When it comes to communicating with represented persons, lawyers must exercise caution in how they use social media to access the information of an adverse party, witness, or even prospective clients through social media searches. Because it could be "ethically problematic for lawyers to 'friend' people just to get access to information in their social media profiles,"¹⁰⁶ lawyers must consider these ethical opinions and guidelines issued by the state bar associations and not try to circumvent any privacy settings that may restrict what a lawyer can learn from a person's social media page.

B. Social Media Research for Jury Selection

According to a formal opinion released by the ABA in 2014, it is ethically permissible for lawyers to research potential jurors online with no repercussions, so long as they do not send an access request when the privacy settings are active.¹⁰⁷ With more than sixty percent of

Comm. on Prof'l Ethics, Formal Op. 2010-843 (discussing a lawyer's "access to public pages of another party's social networking site for the purpose of gathering information for pending litigation").

¹⁰⁴ N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2010-843.

¹⁰⁵ Phila. Bar Ass'n Prof'l Guidance Comm., Formal Opinion 2009-02.

¹⁰⁶ Radhakant & Diskin, *supra* note 26 (explaining how social media sites are ethical minefields for lawyers).

¹⁰⁷ ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014) (explaining that "passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b)").

potential jurors having social media profiles,¹⁰⁸ information discovered on social media pages may be more revealing than answers on a juror questionnaire. Because jury selection can be significant to the outcome of a case, it is plausible to suggest that a litigator's duty of diligence requires a basic search of a potential juror's social media profile.

In 2012, the New York City Bar Association released a formal opinion on this issue and concluded that not only is it acceptable for lawyers to use social media as a research mechanism to learn as much as possible about potential jurors, but that "lawyers have been chastised for *not* conducting such research on potential jurors."¹⁰⁹ In using social media to research jurors, both the New York City Bar Association and the ABA, in separate opinions, provided a few ethical limitations to lawyers seeking to use social media for this purpose: 1) no ex parte communications with jurors, which is prohibited by Rule 3.5 of the ABA Model Rules for Professional Conduct; 2) no deception can be used by an attorney to gain access to a juror's website or to obtain information; and 3) lawyers have an obligation to report any juror misconduct that may be revealed during their social media searches, especially if the misconduct specifically violates the court's instructions.¹¹⁰

It is clear from the ABA opinions, state bar association opinions, and general commentary in the legal profession that using social media to research a potential juror will not trigger any potential ethical violations. However, as social media use continues to increase within the legal profession, the ethical concern will not be whether a lawyer may use social media to research jurors, but instead the question will likely become what may a lawyer do with

¹⁰⁸ Amanda Sexton, *How Lawyers Can Use Social Media in Investigations and Process Service*, ABA TECHSHOW (Jan 3, 2017), <http://www.techshow.com/2017/01/how-lawyers-can-use-social-media-in-investigations-and-process-service-3/>.

¹⁰⁹ N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-02 (discussing jury research and social media).

¹¹⁰ See Steven J. Boranian, *Respecting the Rules for Searching Jurors' Social Media*, LAW360 BLOG (Aug. 20, 2016), <https://www.law360.com/articles/830240/respecting-the-rules-for-searching-jurors-social-media> (discussing the ABA and New York City opinions regarding the ethical considerations for using social media to research jurors).

the information that he discovers.” With the ABA Model Rules of Professional Responsibility remaining silent on this question and the American College of Trial Lawyers’ Annotated Code of Trial Conduct addressing only the investigatory phase of juror research and not how lawyers may actually use the information, uncertainty remains.¹¹¹

V. Conclusion

The foundational ethical duties to provide competent and diligent representation require lawyers to work on behalf of their clients in the most efficient and effective ways possible. This undoubtedly includes the use of social media and the understanding of the ethical risks relating to social media and client confidentiality, legal advertising, misrepresentations, the unintentional creation of attorney-client relationships, and the risks relating to social media use during litigation. While the majority of states have formally adopted rules of professional conduct, most remain silent as to how social media use may implicate the existing ethical rules. Due to the unprecedented pace of social media developments and technological changes, ethics regulators “may be reluctant to amend ethics rules to incorporate social media use” due to the “legitimate concern that any such rules may become obsolete as social media platforms develop and change.”¹¹²

Despite the lack of formal rules, lawyers and law firms are not being prevented from establishing an online presence. As state bar associations and disciplinary commissions observe how social media is transforming the business practices of lawyers within the profession, more advisory opinions and guidelines are being released to help lawyers navigate the uncharted

¹¹¹ Sarah Grider Cronan & Neal F. Bailen, “*Should I Google the Jury?*” and *Other Ethical Considerations*, A.B.A. SEC. LITIG. PROD. LIAB. COMM. (2016), https://apps.americanbar.org/litigation/committees/products/articles/0407_cronan.html.

¹¹² Chiccine, *supra* note 63 (discussing the reluctance of ethical regulators to change the rules for social media); See Wall, *supra* note 10 (explaining that the reluctance to change the ethics rules continues and that “[w]hile some lawyers believe that specialized rules should be adopted for social media, such rules would inevitably become obsolete the moment a newer technology is introduced”).

waters of social media communications and marketing within the legal industry. Even though some opinions contradict each other and some guidelines provide more detail than others, there are certain measures that lawyers may take to protect themselves from protection ethical violations when using social media.

For example, lawyers should keep their professional social media pages separate from their personal profile pages.¹¹³ Also, lawyers should be cautious when it comes to social media features that allow Q&A sessions because these features can make it hard to distinguish whether a lawyer is giving a personal opinion or offering legal advice.¹¹⁴ Finally, and as always, when in doubt, every lawyer and legal professional should become familiar with the applicable rules of professional conduct, ethics opinions, and social media guidance issued by his or her licensing jurisdiction.

¹¹³ Simon Chester & Daniel Del Gobbo, *Social Media Networking For Lawyers: A Practical Guide to Facebook, LinkedIn, Twitter, and Blogging*, A.B.A. LAW PRACTICE TODAY (Jan 2012), http://www.americanbar.org/publications/law_practice_magazine/2012/january_february/social-media-networking-for-lawyers.html (discussing how some lawyers keep their social media accounts separate for personal and professional uses in order to avoid violating the ethics rules and to prevent an overlap of “their professional and personal worlds” on social media).

¹¹⁴ *Id.* (discussing the LinkedIn social networking site and how its “feature of asking questions of those within one’s network and responding with answers” can blur the “difficult dividing line between professional development and the provision of legal advice”).