Social Media for Law Firms: An Overview
By Jennifer Ellis

Social media has become a crucial part of the average American’s life. As a result, whether they want to or not, attorneys must, at the very least, appreciate the impact of social media on their clients. Failure to understand how social media can impact clients’ cases could lead to serious damage to a case which might result in a malpractice complaint. Further, wise attorneys will take advantage of social media to develop their practices through the networking and marketing opportunities provided by both their own websites and the various social media sites and applications.

The best way to appreciate how important social media has become in people’s day-to-day lives is to look at some statistics for popular sites:

- Facebook – 1.3 billion users
- LinkedIn – 300 million users
- Pinterest – 70 million users
- YouTube – 4 billion views per day
- Instagram – 200 million users
- Google+ - Almost 600 million active users
- Tumblr – 200.5 million blogs
- Twitter – 550 million users

It is also important to know that the number of people accessing social media sites via mobile technology (smartphones and tables) is increasing to the point where the majority of people (71%) use mobile devices to access social media. This ease of access means people use social media on the go as a method to locate businesses they plan to hire. It also means people have a tendency to use social media to quickly share intimate details about their lives and

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2 http://instagram.com/press/
activities. The former shows the value of social media as a marketing tool. The latter shows the amount of information people are sharing which can be harmful to their cases.

Attorneys who seek to begin using social media should keep in mind that the ethical risks involved with social media, both in terms of evidence collection and marketing, are very real. Therefore a proper understanding of appropriate and ethical behavior is extremely important.

It is also important to understand that in certain areas of practice, it is now verging on malpractice, and the author would argue it is malpractice, to fail to communicate with clients about whether and how they use social media. Failing to warn the client to halt or at least limit social media use could result in that client posting materials that will harm his case. Failure to warn a client about evidence preservation could result in substantial sanctions for spoliation. In addition, it is quite conceivable that the opposing party will post harmful information to his case and failure on the part of the attorney to seek out possible harmful posts can result in loss of a substantially greater bargaining position, or even loss of a case that might have been won.

**Specific Sites and Applications**

Social media essentially includes sites and applications that enable people to share information, pictures, videos, and the like at a rapid rate, and, in return, allows other people to respond to the shared content. In some cases social media is referred to as Web 2.0. Web 1.0 refers to sites that serve to provide one way communication, much like a newsletter or a book. Traditional websites are Web 1.0.

Currently, the most popular social media sites and applications in the United States include Facebook, Twitter, LinkedIn, Google+, Pinterest, YouTube and Instagram. Further, blogs are sometimes considered part of social media and so will be included in the discussion. At this point, there are over 150 million blogs on the web.

**Marketing and Networking**

It is not always easy to understand how social media can increase the potential for bringing in new clients. It is therefore important to think of social media as having uses for practice building.

**Advertising**

Social media includes straight forward advertising. Sites such as Facebook, YouTube, LinkedIn and others provide the opportunity to purchase small ads which appear on the top or side of the page. These ads are controlled through varying means, demographics, keywords, areas of

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7 See Lester v. Allied Concrete Co., et al; order dated September 1, 2011.
interest, and so on. Generally, the cost of the ads is controlled through a bidding process known as pay-per-click. The site provides a suggested fee that its algorithm suggests will be successful. The purchaser identifies the amount he is willing to pay and competes against those who are seeking to advertise to the same individuals. Normally, the purchaser only pays when someone clicks on an ad.

**Networking**

Social media provides substantial opportunities for networking. It simply moves the networking from the bar association or educational program, to networking online. Providing information about interests, sharing day-to-day activities, responding to the posts of others - each of these behaviors is simply a way to connect with other people. Those people, in turn, may need an attorney or may need to refer someone else to an attorney just as in the offline world. Further, people tend to recommend individuals who they know, or feel they know, and social media allows the formation of that kind of relationship.

**Content**

Sharing useful content is a crucial part of social media for attorneys. Providing high quality content that informs users about the areas of law in which an attorney practices is an excellent way to bring attention to that attorney. The content can be as simple as commenting on a case on Facebook, sharing a useful link on Twitter, or providing a detailed analysis of a certain specific issue on a blog. This content shows potential clients that the attorney is knowledgeable in her area(s) of practice. Further, well-written content provides a substantial boost to search engine optimization and online reputation.

**Specific Sites**

Different social media sites provide different tools. Further, some sites are better utilized by attorneys who tend to represent businesses, while others are better utilized by attorneys who represent individuals. It is important to target the correct site or mixture of sites for the best return on investment of time and/or money.

**Content of Posts**

When you post on social media, you need to consider whether you are causing any ethical problems for yourself. Given the open nature of social media, a number of issues can arise when lawyers post. Two important issues to focus on include: Is social media advertising and are you forming an attorney/client relationship by answering questions?
Is Social Media Advertising?

When choosing what to write on social media, it is important to determine whether your post is advertising under model rule 7.2 (or whatever rule applies in your jurisdiction.) If your account is completely private and you share only with friends and family, chances are very good that your posts would not be considered advertising. However, the question becomes cloudier when you open up your account to a larger group. My position is that if you are not certain whether your post is advertising, assume it is and act accordingly as far as your jurisdiction’s rules. Some jurisdictions define advertising very clearly. Others do not.

As noted previously, Twitter is a site that is problematic for states such as Florida, where any posting might be considered advertising. In its guidelines on social media, Florida’s advertising standing committee states about Twitter that Pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules. Pages appearing on networking sites that are used to promote the lawyer or law firm’s practice are subject to the lawyer advertising rules. These pages must therefore comply with all of the general regulations set forth in Rules 4-7.11 through 4-7.18 and 4-7.21." This language means that many posts on Twitter would be considered advertising, simply because most people have their accounts entirely open and it is common for users to discuss a cross section of personal and work-related details of their lives.

Most problematic, given Twitter’s 140 character limit, is that, in Florida, the Tweet must include geographic information as well as “the name of at least 1 lawyer in the firm.” The attorney may use appropriate abbreviations for the geographic requirements which helps, to a degree. However, as soon as the poster puts both the full name of a lawyer and a geographic location, most of the allotted characters will be used up, substantially limiting the value of any tweet. Florida is not the only jurisdiction with special Twitter requirements, so be certain to check your state’s rules before you Tweet. That said, many jurisdictions have not placed onerous requirements on lawyer’s abilities to use Twitter and a well-written tweet can be an excellent way to drive traffic to your website or share useful information.

California’s Analysis

In Opinion 2012-176, the State Bar of California provides an excellent analysis of how to determine whether a post is advertising. While California’s determination of what constitutes

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advertising is likely to be different from other jurisdictions, many of its rules as to what is acceptable are commonly shared throughout the various jurisdictions.9

In California, a communication is considered to be, “any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present or prospective client.” Under the rules and articles of California, “[a]ny communication or solicitation shall not:

1. Contain any untrue statement; or
2. Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive or which trends to confuse, deceive, or mislead the public; or
3. Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, nor misleading to the public or
4. Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation as the case may be; or
5. Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.”

The bar, using its Rule and Article as a basis for analysis, next examines several hypothetical posts. They are:

1. “Case finally over. Unanimous verdict! Celebrating tonight.”
2. “Another great victory in court today! My client is delighted. Who wants to be next?”
3. “Won another personal injury case. Call me for a free consultation.”
4. “Just published an article on wage and hour breaks. Let me know if you would like a copy.”

In its analysis, the bar found posts 1 and 4 were not communications (i.e. advertising) but 2 and 3 did meet the requirements constituting a communication and therefore needed certain information that they lacked.

Post 1 was not considered a communication because it did not contain an offer concerning the availability for professional employment. Had the post used “Who wants to be next” as in hypothetical 2, the posting would have become advertising based on the attorney stating that he is seeking additional clients. Post 4 was not advertising because, again, it did not state that he was seeking clients, rather it was simply providing useful information.

Post 2 is a communication because it makes it clear that the lawyer is available for employment. Since the post is advertising, it now has several problems under California’s rules.

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9 California Rule 1-400 (Advertising and Solicitation,) California Article 9.5 (Legal Advertising.)
First, it does not contain a disclaimer. Second, it does not state it is an advertisement. Third, it offers a guarantee or prediction of winning. In order to make this particular post appropriate, a lawyer in California would need to add the required language. Such a post would become quite lengthy however, so a question would arise as to whether it would be worth it to share such information in the first place. It also would not be possible to share this particular post on Twitter in California. Post 3 is a communication/advertising for the same reason post 2 is. Asking for readers to call for a free consultation is clearly seeking employment from potential clients.

Remember, the rules in your jurisdiction(s) might be very different from California. However, the analysis in the bar opinion is one that you can apply to your posts. The first question is always going to be, is it advertising? The second question will be, if it is, does the post meet the ethical requirements. Be certain to give your posts the appropriate consideration.

Is a Social Media Post Legal Advice?

The line for what is and what is not legal advice is a bit blurry. Given this, it is important that you stay on the right side of the line to make certain you are not inadvertently creating an attorney/client relationship. An attorney/client relationship is formed when a client has reason to believe that the attorney is handling his legal interests. The relationship can be formed expressly or it can be implied. The implied relationship is the one that can cause trouble online. The standard in determining whether an attorney/client relationship has been formed is based on what is the objectively reasonable belief on the part of the client. If you answer questions online, make certain there is an appropriate disclaimer, such as can be found on sites like Avvo and Quora. In addition, limit yourself to providing broad answers that are educational in nature as opposed to providing specific advice that directly answers the asker’s question. At this point, there have been no lawsuits involving attempts to claim a lawyer has formed an attorney/client relationship through an ask/answer site. Keep in mind, not only could you inadvertently form an attorney/client relationship, but if you provide legal advice in a state in which you are not licensed, you could be engaging in the unauthorized practice of law.

Recommendations/Testimonials

The rules around recommendations and testimonials vary greatly across the United States. As a result, it is difficult to provide specific guidelines. Given this, it is crucial that you refer to the state(s) in which you are licensed to make certain you follow the rules. In most states, it is perfectly acceptable to ask for testimonials. However, those testimonials must follow all relevant rules. When clients write recommendations, those recommendations must not create false expectations and they must be correct. If a client writes a recommendation that violates the rules, it is the attorney’s obligation to correct it. In some cases, for example LinkedIn, the
attorney will be able to control whether an improper testimonial is posted. In other cases, for example Google+, Avvo and Facebook, the attorney is not able to approve the testimonial. In such cases the attorney must ask the client to remove the recommendation, or provide a correction in the comments.

Negative reviews are a serious problem on social media. A negative review can be very harmful to a law firm. That said, no matter how negative the review, it is crucial that lawyers respond appropriately if a past client attacks them online. Most importantly, attorneys may not share confidential information about the client in a response to a negative review. For example, a lawyer from Illinois responded to a negative review on Avvo by providing confidential information about her client. The Hearing board found that she engaged in misconduct which included:

1. Revealing information relating to the representation of a client without the client's informed consent, in violation of Rule 1.6(a) of the Illinois Rules of Professional Conduct (2010);
2. Using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person, in violation of Rule 4.4 of the Illinois Rules of Professional Conduct (2010); and
3. Conduct which is prejudicial to the administration of justice or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.10

The complaint against the attorney also involved a bounced check. For both the check and the comment on Avvo, the attorney was reprimanded by the disciplinary commission.11 The best way to deal with a negative review is to provide a polite response. If you are too angry to give a polite response, the best response is none at all.

**Specific Rules**

**7.1. Honest Communication & 8.x Integrity**

The first two rules for online behavior should be considered an umbrella under which all behavior is judged. First, attorneys should never be misleading in their communications in relation to their services. No communication should contain a material misrepresentation of either fact or law, nor should any statement omit facts necessary to make the statement appropriate under rule 7.1. This concept flows throughout all communications by attorneys when discussing their services. The second set of rules, 8.x, involve maintaining the integrity of

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10 In the Matter of Betty Tsamis, Commission No. 2013PR00095 (August 26, 2013.)
http://www.iardc.org/13PR0095CM.html
11 http://www.iardc.org/HB_RB_Disp_Html.asp?id=11221
the profession; in other words, not holding the profession up to ridicule through one’s behavior.

7.2. Advertising

The first rule of which attorneys need to be aware relates directly to advertising and it is Model Rule 7.2. One of the issues that can be a problem under Rule 7.2 is that various states require attorneys to keep all ads for a certain period of time. In Pennsylvania, for example, attorneys must keep copies of ads for 2 years. Other states have longer requirements. It is also important to note that a specific attorney must take responsibility for the ad and its placement, so make certain that a specific attorney is responsible for every action, even if performed by a non-attorney. Fortunately, the various accounts are meant to stay intact, so it is easy to keep records. If a post needs to be deleted, grab a screenshot of it and store it where it will be easily located. Make certain to identify the attorney responsible for the item.

Various states have other requirements, so attorneys should check Rule 7.2 in every state in which they are licensed.

Rule 7.3. Solicitation of Clients

Also implicated by use of social media for communication with potential clients is Model Rule 7.3. Attorneys may not solicit potential clients through real-time communication. This aspect of the rule does not apply to family members, current clients or other attorneys. Real-time communication includes telephone, in-person and real-time electronic chat. There is disagreement as to whether attorneys may solicit new clients through large chat rooms in which a large number of people are present, versus instant messages which are more personal and direct. Given this, it is safe to assume that starting a chat on Facebook is real-time communication and should be avoided. E-mail is considered written communication. To obey the rule, at a minimum, attorneys must label advertising as such and comply with Rule 7.1.

Attorneys may not solicit a client who has already made it clear he does not wish to be contacted, or if, “the solicitation involves coercion, duress or harassment.” This means if someone has made it clear through social media that he desires not to be contacted, it would be a violation of the rule to contact him. The tone of writing matters as well. If the content is seen as inappropriate, it violates the rule.

Multi-State Practice – Rule 8.5

An area in which it is easy to get in trouble, due to the vast and multi-jurisdictional nature of the internet, is multi-state practice. Attorneys must comply with their home states’ rules in relation to:
• Where the office is located
• Where the attorneys’ are admitted
• How they are seeking clients
• How they engage in advertising
• All states’ rules in which they market

Additional Ethical Issues

Aside from advertising, communication with potential clients, and inappropriate use of social media in discovery, there are other ways in which legal professionals have gotten themselves in trouble using social media.

Confidentiality and Honesty

One potential area of trouble involves confidentiality, Rule 1.6. An attorney got herself in trouble by sharing share confidential information about a case in such a way as to make it possible to identify her client. She also provided information that suggested that she knew her client had lied on the stand and did nothing about it. In addition to Rule 1.6, the attorney was accused of violating other rules involving honesty, fraud, and more.\textsuperscript{12} In the end, the attorney lost her job of 19 years\textsuperscript{13} and was suspended for 90 days by two different jurisdictions.\textsuperscript{14,15}

Another serious consequence the attorney suffered is that when searching her name online; page after page of results show her disciplinary problems. Though she has since opened her own firm, it is difficult to find anything positive about her on the web in a Google search.

While it is perfectly acceptable to discuss one’s life, and even one’s professional activities, it is important to obey the ethical rules while doing so. Discussing a case on a blog while it is going on, outside of appropriate PR, is a bad idea. Failing to protect a client’s confidentiality is even worse. And, of course, failing to properly inform the court of inappropriate conduct by the client was a serious mistake. Judgment is a critical part of both practicing law and posting online.

Jokes & Satire

\textsuperscript{12} In the Matter of Kristine Ann Peshek, Commission No. 09 CH 89, Illinois Attorney Registration and Disciplinary Commission (2009.)
\textsuperscript{14} Illinois Supreme Court disbars 12, suspends 26, http://iln.isba.org/2010/05/18/illinois-supreme-court-disbars-12-suspends-26
\textsuperscript{15} Office of Lawyer Regulation v. Peshek, 2011 WI 47 (2011.)
Jokes can also be a serious problem online. It is impossible to see body language or hear the tone in a person’s voice. Something one person might find amusing might not be so funny to another. As a result, joking through social media can be problematic, especially on a politically charged topic. An Indiana deputy attorney general learned this the hard way when he tweeted an unfortunate joke surrounding protests in Wisconsin in 2011. His tweet led to an argument with the editor of Mother Jones Magazine. In turn, the magazine researched the attorney and found similar comments on his blog. In the end, the price of the attorney’s online behavior was his job.\(^{16}\) The attorney general’s office stated that it chose to fire the attorney after a “thorough and expeditious review;” noting that it respects First Amendment rights, but expects civility from its public servants.

**Personal v. Private**

Sometimes attorneys will develop both a private and public persona on the web, believing the two will remain separate. Unfortunately, this is simply not the case. It takes very little effort to perform research on the web and to connect the public and private behaviors of someone who has written something offensive or upsetting. In an infamous case, an assistant Michigan attorney general was fired due to his online (and perhaps offline) behavior surrounding the student body president of the University of Michigan. The attorney argued that his speech was political and also had nothing to do with his work as an assistant attorney general. But in the end, the public and private became much too intertwined, and the attorney general was left with no choice but to fire him. Recently the student won a verdict of $4.5 million for invasion of privacy, defamation, abuse of process, and intentional infliction of emotional distress.\(^{17}\)

The attorney in this case did not hide who he was, but he did try to argue that his actions had nothing to do with his work. However, as a public servant and as an attorney, it was simply impossible to separate the public employee from the (not so) private behavior, and that cost him his job. He was fired for, “violate[ing] office policies, engage[ing] in borderline stalking behavior;” and more. The attorney sometimes posted his online attacks while at work, and engaged in behavior that was, “not protected by the First Amendment…”\(^{18}\) Much of his behavior was offline, but it was his online behavior that brought an incredible amount of

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attention to what he was doing, so much so that he ended up on TV shows including Anderson Cooper on CNN.\(^\text{19}\)

It is unwise to believe that anyone can live two separate lives online. If one engages in controversial behavior, the result will be a magnifying glass of attention. In turn, it is virtually impossible for the individual to keep his private and public online lives from colliding.

**Discovery of Social Media**

Given the value of the information contained within social media accounts, it is no surprise that attorneys desire to obtain access to the information. It is not at all uncommon, for example, for an individual to say one thing in person to her attorney or a judge and to post completely contradictory information on Facebook. An individual might claim in court or interrogatories that she cannot leave her home due to emotional harm from an injury, but in turn post a video on Facebook showing her dancing at a party. In the past, it was necessary to hire a private investigator to prove someone was lying about his injury for a workers’ compensation claim; now the plaintiff frequently posts a picture of himself chopping wood or carrying a heavy couch, the exact evidence the defense attorney needs to prove her case.

**Privacy Settings Are Important**

Privacy settings control what an individual shares on social media sites. However, many users never change their privacy settings, or simply find the settings too complicated to alter. Many social media sites barely have any privacy settings at all. Twitter, for example, is either open, limited or private.\(^\text{20}\) Facebook’s settings are extremely complicated and confusing\(^\text{21}\). Blogs are meant to be open, and people frequently believe they are private when they are not.\(^\text{22}\) Since many people do not change their settings, attorneys should and do look through the social media sites in an ethical manner and view and preserve the information they can find.\(^\text{23}\) Keep in mind, if the attorney does the preservation, and authentication becomes an issue, the

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20 https://support.twitter.com/entries/14016#
21 Approximately 13 million US users never change their Facebook privacy settings. Of those that do, the majority are unaware that their privacy settings can be compromised by allowing additional applications access to their accounts and do not take the steps necessary to further protect their data. 13 million US Facebook users don’t change privacy settings, http://www.zdnet.com/blog/facebook/13-million-us-facebook-users-dont-change-privacy-settings/12398
22 Natalie Munroe was a teacher in Pennsylvania who blogged about her students. She believed her blog was only being read by a few people, apparently unaware that it could be widely read. http://tinyurl.com/8hx95c6. Munroe was suspended, brought back, and eventually fired. She claims she was fired due to the blog. The District claims she was fired for incompetence. Munroe has since brought a lawsuit against the district. Blogging Central Bucks Teacher is Fired, http://www.philly.com/philly/blogs/bucksinq/160413996.html
23 New York State Bar Association, Committee on Professional Ethics, Opinion 843, (September 10, 2010.)
attorney could be forced to become a witness in her own case. It is best to have someone else in the firm do the preservation.

**The Client’s Social Media**

The first step when a new client walks through the door is to ask if he uses any social media. The next step, in some cases, is to inform the client that he must stop posting immediately. Unfortunately, the addiction and use of social media can be so great that the client will be unwilling to stop. As a result, the attorney should also advise her client that if he does post, he should not post anything that deals with the case. The attorney must be clear about what “deals with the case” means, since many clients will simply think it means specifics about how the case is going, as opposed to comments about giving money to his mistress, lifting a heavy couch, attending a party, and so on. Make certain to ask the client not only about his own accounts, but his comments on blogs and websites that might be relevant to the case. Social media and other online surprises can be very harmful. It is also important to remind the client that he may not delete any content from his account, even if it is potentially harmful to his case.

The first meeting with a client is also the time to speak with him about changing his privacy settings to make certain that his account is secure. Providing instructions on how to change privacy settings in written form or a video can be very helpful. It is also a good idea to have the client sign a document making it clear that he was told not to delete any content. This will protect the attorney from accusations of spoliation later on. In some cases it might be wise to ask for access to the account(s). Asking to friend the client is not enough, the password is necessary for a complete review of the client’s online conduct. You will have to make a decision as to whether connecting with the client and reviewing his account is wise. Remember, if you become aware of any content which shows the client is lying or will lie before the court, you will be in an ethical quandary.

Also, if the client has a personal relationship with the opposing party, ask about whether he is connected to the other side’s social media, for example as a friend on Facebook. In addition, ask the client if any potential witnesses are using social media. Find out if the client is connected to those witnesses and therefore has access to private areas of the accounts.

Last, it is important that attorneys speak with not only with their clients, but other relevant individuals about their online conduct. In a recent case, the daughter of the plaintiff caused an $80,000 settlement to be overturned because she posted about the result on Facebook.24

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the end, what matters is proper communication with the client in order to protect both the client’s case and your ethical obligations.

**Opposing Party and Witnesses**

Immediately view the opposing party’s accounts and witness accounts if they are freely accessible. It is permissible to view the accounts if the client has access. It is also permissible to ask witnesses to provide access to their accounts, though the attorney or other individual asking for access must be honest about her relationship to the case.

Also send a Notice of Preservation to opposing Counsel. Fortunately, the amendments to the federal discovery rules from 2006 allow for discovery of electronic data to begin very early in the litigation process. Make it clear to opposing counsel that all data must be preserved. Do not just name specific social media sites, but be clear in the preservation that it means all sites and all accounts. Unfortunately, exactly what preservation is required is not yet clear. Does preservation mean keeping the privacy settings as is, so if an account was open it remains such? Does it simply mean that data may not be deleted? Be clear about expectations and do not be surprised if the matter ends up before a judge.25

Send out the Interrogatories relating to social media as quickly as possible and ask the right questions. Again, do not give the opposing client a chance to wiggle out by asking simply for Facebook when the client might have a Plaxo Account. Ask for everything. Ask for all e-mail addresses as well, because the opposing party might have several accounts under various e-mail addresses. Further, keep in mind that with strict privacy settings the opposing party can all but hide the existence of his account(s).

**Trouble for Failure to Preserve**

In the past, some have believed that it is acceptable to delete posts from social media accounts. A Virginia decision from 2011 puts the debate to rest. It is spoliation to delete relevant posts. In the case, the attorney instructed his client to “‘clean up’ his Facebook because we don’t want blowups of this stuff at trial.” The attorney further instructed the client to delete or deactivate the account, and then responded to discovery requests by informing opposing counsel that his client had no Facebook account. The client deactivated the account instead of deleting it. Upon reactivating the account, the client deleted 16 photographs, following his attorney’s instructions. Based on the spoliation, the court held that sanctions should be granted against

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25 In a recent opinion, the Philadelphia Bar Association made it clear that not only is it acceptable to change privacy settings, but to delete content, as long as that content is properly preserved prior to deletion. In addition, the 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.” The Philadelphia Bar Association Professional Guidance Committee, Opinion 2014-5, July 2014.
both the attorney and the client. The sanctions amounted to $722,000 in legal fees, over $500,000 of which was payable by the attorney. In addition, the judge in the case reported the attorney to the Virginia State Bar.\textsuperscript{26} In the end, the attorney agreed to a five year suspension of his license and ultimately left the practice of law.\textsuperscript{27}

A recent New Jersey case shows the serious consequences of deleting content from Facebook. In that case the plaintiff claimed that he deactivated his Facebook account and did not restore it quickly enough, resulting in deletion of his account. Leaving aside that this is not how Facebook deactivations and deletions actually work\textsuperscript{28}, the end result was that the court found that deletion of the account was spoliation of evidence and granted an adverse inference against.\textsuperscript{29} Given the cases and the trend, it seems to be straightforward that deleting posts, pictures or videos is unacceptable and likely to lead to serious sanctions.

\textbf{Ethical Pitfalls in Research, Discovery and Communications}

There are a number of relevant guidance opinions from the New York City and State Bars,\textsuperscript{30} the Philadelphia Bar\textsuperscript{31} and the San Diego County Bar\textsuperscript{32} Associations surrounding issues related to performing research utilizing social media.

\textit{General Research}

First, as already noted, it is perfectly acceptable to search and access social media sites that are freely accessible. The New York Guidance Opinion states, “[an attorney] may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.”\textsuperscript{33} On the other hand, the 2009 Philadelphia Opinion makes it clear that an effort to obtain access to the account through deceptive or illegal means is unacceptable.\textsuperscript{34}

\textsuperscript{26} See \textit{Lester v. Allied Concrete Co., et al}; order dated September 1, 2011.
\textsuperscript{27} “On July 17, 2013, the Virginia State Bar Disciplinary Board suspended Matthew B. Murray’s license to practice law for five years for violating professional rules that govern candor toward the tribunal, fairness to opposing party and counsel, and misconduct. This was an agreed disposition of misconduct charges.” VSB Docket Nos. 11-070-088405,11-070-0884222.
\textsuperscript{28} In the author’s experience, when a Facebook account is deactivated it is not deleted. When the owner logs into his account again, it is restored. In order for a Facebook account to be deleted, specific actions requesting deletion must be taken on the part of the account owner.
\textsuperscript{29} \textit{Gatto v. United Air Lines, Inc., et al.}, Case No. 10-cv-1090-ES-SCM (D.N.J. Mar. 25, 2013),
\textsuperscript{30} New York State Bar Association Guidance Opinion 843 (2010.)
\textsuperscript{31} Philadelphia Bar Association Guidance Opinion 2009-02 (2009.)
\textsuperscript{32} SDCBA Ethics Opinion 2011-2 (May 24, 2011.)
\textsuperscript{33} New York State Bar Association Guidance Opinion 843
\textsuperscript{34} Philadelphia Bar Association Guidance Opinion 2009-02
Friending a Witness

In the 2009 Philadelphia opinion, the attorney asked whether it would be acceptable for the attorney to have a third party request a witness to “friend” the opposing client. The third party did not intend to lie, but neither did he intend to reveal his relationship to the attorney.

The opinion noted that such behavior would violate several rules of ethical conduct. The lawyer would be “procuring conduct [and be] responsible for [that] conduct” in violation of Pennsylvania Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants.) Also, the lawyer would be violating rule 8.4 (Misconduct) by engaging in “deceptive” conduct. In addition, the attorney would be encouraging a third party to violate Rule 4.1 (Truthfulness in Statements to Others) by having the third party “omit a highly material fact.” Based upon the Philadelphia Bar Association’s 2009 Guidance Opinion, it is very clear that having a third party (or the attorney herself) friend a witness without revealing her relationship to the case would be highly inappropriate.

A real world example of what can happen when an attorney lies to potential witnesses comes from a lawyer who is learning a hard lesson in negative publicity. This attorney, a prosecutor in Ohio, posed as the ex-girlfriend of a murder defendant on Facebook. The attorney’s stated goal was to convince the two female alibi witnesses to change their stories. In the end, the prosecutor was fired and has seen numerous stories written about this conduct online. The lesson from this case is that lawyers may not lie when communicating with anyone through social media, including witnesses.

Communicating with a Represented Party

The San Diego County Bar Association took on the issue of communicating with a represented party. In short, as is the case offline, it is inappropriate to communicate with a represented party online. In the instant case, the attorney did not identify himself as the attorney, which made the effort to communicate all the more grievous. An additional issue, of concern for those

35 Friend is Facebook’s term for two people who are connected to each other on the service. Different social media providers use different terms. For example, LinkedIn uses “contact” and “connection.” Friending someone requires the affirmative action of a request on the part of the individual seeking the connection and an affirmative action on the part of the individual accepting the connection. See Facebook, “How do I add a Friend?” http://www.facebook.com/help/?faq=12062.
36 Philadelphia Bar Association Guidance Opinion 2009-02 (2009.)
37 Martha Neil, Prosecutor fired after posing as ex-girlfriend in Facebook chat with defendant’s alibi witnesses (June 2013.) http://www.abajournal.com/news/article/prosecutor_is_fired_after_posing_as_woman_in_facebook_chat_with_murder_defe/
involved in employee cases, includes an analysis of whether the contacted employees were represented parties.\(^{38}\)

In 2012, the issue of friending represented parties came up in New Jersey where two attorneys are likely to face sanctions due to their paralegal friending the opposing party in a case.\(^ {39}\) The issue came to light during a deposition when it became clear that the attorneys had access to the private areas of the plaintiff’s Facebook account. The attorneys denied responsibility because they asked the paralegal simply to perform a general search of the web. The issue with this defense is that attorneys are responsible for the behavior of their staff. The attorneys are charged with violating New Jersey rules 4.2 (communications with represented parties,) 5.3(a), (b), and (c) (failure to supervise a nonlawyer assistant,) 8.4(c) (conduct involving dishonesty and violation of ethics rules through someone else’s actions or inducing those violations,) and 8.4(d) (conduct prejudicial to the administration of justice.) In addition, the more senior of the two attorneys is charged with RPC 5.1(b) and (c) (ethical obligation in relation to supervising another attorney.) These are all very serious charges, and regardless of the outcome, the publicity, which will spread rapidly through social media, will no doubt be very harmful to the two attorneys in question.

At this point it seems well-settled that the action of friending someone or seeking to access their accounts through some form of communication, is contact. Therefore attorneys should never seek to friend or obtain access to the account of an opposing party through any form of communication with a represented party. If seeking to friend a witness, the attorney or individual assisting the attorney must make clear her relationship to the case.

**How to Obtain Access**

If an attorney believes that there is useful information contained within a social media account, she should seek to obtain access to the information hidden therein. There are a number of ethical ways to do so, aside from just looking to see what is freely available.

*See if the Client or a Friendly Witness has Access*

In family law cases especially, the parties or witnesses might have access to each other’s accounts. It is perfectly acceptable to view and use any information that is freely available through this method. Be cautious though where it looks like a witness might be sharing the information under duress. For example, in an employer/employee case, if another employee is friends with a plaintiff on Facebook, he might feel he has no choice but to share the

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\(^{38}\) SDCBA Ethics Opinion 2011-2, May 24, 2011

\(^{39}\) Eric Meyer, Ethics charges for two lawyers over Facebook friending a litigant (2012.)  
information. If that employee complains later and says he was forced to share the access, it is uncertain how a court will look upon it.

**Ask for Access to the Account**

During the discovery process, unless there is a reason not to do so, ask for access to any and all social media accounts. In terms of Facebook, it is possible to download an entire account, so request that the opposing party do so and provide a copy. Be sure to ask for continuing access as well. The opposing party will likely refuse this request, and wisely so. Social media postings can provide a plethora of private information, some of which may be harmful to a case. It is possible to simply ask the opposing party to adjust privacy settings so the account is viewable, but again, it is likely this request will be refused. It is always best to ask though because during the discovery process the judge will certainly ask if the request was made.

**Send a Subpoena to the Site**

Though generally the social media sites will not cooperate with a civil subpoena, from time to time they will be surprisingly helpful. As a result, it never hurts to send the subpoena. Even if the site won’t provide content, citing the Stored Communications Act, it will normally provide assistance in connecting an account with an e-mail address. This can be helpful if ownership of the account will be in issue. For example, in a criminal case the prosecution’s verdict was overturned when it was shown that prosecution had failed to tie the account in question to the defendant’s girlfriend. Proof of ownership could have been shown with MySpace’s assistance.

**Compel Discovery**

This is where things get tricky. Different judges tend to have different responses to the request to compel discovery of a social media account. The best approach, and the one that has shown the most results, is to capture what is already viewable (through appropriate ethical means) and to show it to the judge. If the judge can see that the account has relevant and contradictory information, she is likely to provide access to the account. If the judge has concerns about the privacy of those other than the account holder, request that the court review the data first to help resolve the issue. Some judges do not feel that there are any privacy rights in social media content.

40 Facebook’s “Download your information” tool is located under Account Settings.
41 See Won’t the Social Media Provider Help, infra.
Case Law

There are a number of opinions related to discovery of social media when the account itself is not a part of the case, in other words when opposing counsel believes that she might find useful data in the account but the online behavior is not at the center of the dispute. At this point the trend in such cases is to provide access to social media accounts only when the opposing party can show that there is relevant and/or contradictory information contained therein. For example, in *McMillen v. Hummingbird Speedway, Inc.* a review of the public areas of McMillen’s Facebook page revealed information contradictory to what he was claiming in terms of his injuries. The judge provided access noting specifically that the Facebook information was not privileged.

Another case is simply the paragraph long *Piccolo v. Paterson.* The judge denied access to the Facebook pages the defense desired. The judge noted that the defense already had many pictures, and that no pictures or other data were freely available that showed contradictory information to what the plaintiff was claiming. It is interesting to note that the plaintiff actually changed her privacy settings early in the case, to preclude anyone other than a friend viewing her pictures.

In *Zimmerman v. Weis Markets Inc.*, the judge granted discovery due to the public availability of pictures that contradicted the plaintiff’s claim that he did not wear shorts due to his embarrassment about a scar. The plaintiff posted pictures on his MySpace profile which clearly showed him wearing shorts after his injury (the scar was visible.) Due to the public availability of this contradictory information the judge found that there was clearly relevant data to be found within the MySpace account and therefore access to the account was properly compelled.

Another important case comes from Judge R. Stanton Wettick. Judge Wettick is known as a discovery judge in Pennsylvania, so his view on the discovery of social media was quite welcome. Judge Wettick denied mutual requests for access to Facebook accounts in the case of *Trail v Lesko* because he was not going to allow a fishing expedition when there was no evidence that contradictory or useful information could be found in either Facebook account.

Therefore Judge Wettick used the same reasoning as in many of the other cases on this issue.

45 Gina Passerella, Facebook Postings Barred From Discovery in Accident Case (2013.)
http://www.thelegalintelligencer.com/id=1202493920630/Facebook-Postings-Barred-From-Discovery-in-Accident-Case#ixzz3COUstMur
47 Trail v. Lesko, No GD-10-017249.
In a Florida case, the Judge granted in part and denied in part the request by defense in a personal injury case for complete access to the plaintiff’s social media network. He held that the plaintiff must provide copies of all pictures depicting her since her injury, rather than provide access to the entire social media account in question. He further held that in requesting that the plaintiff provide every device on which she accessed her social media accounts, the defense had overreached. 48 In reaching his decision the judge noted that social media sites are “neither privileged nor protected by any right of privacy.” He also noted though that the discovery request must be properly tailored, and to support both assertions, he cited the decision in Tompkins v. Detroit Metropolitan Airport.

In Tompkins 49 the court found that while social media is discoverable, and “generally not privileged,” the opposing party still may not, “have a generalized right to rummage through information that Plaintiff has limited from public view.” The court required a “threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.” As in the other cited cases, the court wanted to see some evidence that justified the defendant, “delving into the non-public section of [plaintiff’s] account.” The court noted specifically that if the public segment of plaintiff’s account had “contained pictures of her playing golf or riding horseback,” that the defendant would have had a better case to access the private portions of her account.

The conclusion to be drawn thus far about the majority of social media discovery decisions is that, while courts are willing to provide access to private sections of social media accounts, they are not willing to allow fishing expeditions simply based on the view that the accounts might have useful information. Some evidence showing that relevant information can be found in the account must be offered before discovery will be granted.

Won’t the Social Media Provider Help?

Social media providers will not provide content from a social media account in civil cases. As recently as 2007 some providers did respond to civil subpoenas with content, but now the providers state unequivocally that due to the Stored Communications Act, 18 U.S.C. § 2701 et seq, they may not provide content 50. The providers will respond to a subpoena only with information about who owns the account, perhaps dates and times of connections, IP addresses, etc. 51 This means the only way to get the data is to have the owner of the account cooperate. In criminal cases, most social media providers will assist when provided with an

49 Tompkins v. Detroit Metropolitan Airport, Case No. 10-10413, 2012 WL 179320 (E.D. Mi. 2012)
50 Facebook states, “Federal law prohibits Facebook from disclosing user content (such as messages, wall posts, photos, etc.) in response to a civil subpoena.” http://www.facebook.com/help/?faq=17158
51 For Facebook this requires the e-mail address that the attorney desires to connect to the account. https://www.facebook.com/help/?page=211462112226850
appropriate subpoena or warrant. On occasion a social media site will be surprising, go against its stated rules, and provide the evidence. Therefore, it never hurts to ask with a subpoena in a civil case. Just be prepared for a no.\footnote{See Send a Subpoena to the Site \textit{supra}.}

The various social media sites generally have details on the subpoena process, and what they will provide. Review each site to learn the appropriate steps.

\textit{What Happens if the Owner of the Account Deletes the Data?}

Most social media providers claim that when a user deletes information from his account, it is gone forever. Facebook, for example, explains that its deletion system works much like a recycling bin. In essence, when a user deletes data, that data is stored on Facebook’s server briefly until the system writes over it; this means, unfortunately, if someone is savvy and starts deleting harmful data, there is nothing that can be done to bring it back, once it is overwritten. Facebook does state, “[i]f a user cannot access content because he or she disables or deleted his or her account, Facebook will, to the extent possible, restore access to allow the user to collect and produce the account’s content. Facebook preserves user content only in response to a valid law enforcement request.”\footnote{See Information on a Civil Summons, https://www.facebook.com/help/?page=211462112226850} Of course, if there is nothing to find because it has been deleted and destroyed, than the site cannot restore the data. And outside of criminal cases, it must be the account’s owner who requests the data be restored.

\textit{Authentication}

Authentication is another troubling issue when it comes to social media. Facebook states that the owner or someone familiar with the account can authenticate it. The issue however is that it is impossible to know whether the user deleted something in the account, leaving only helpful items. This is why it is extremely important to perform research early in the process, and to take screen shots of any evidence discovered immediately. Be certain to keep records as to how the evidence was preserved.

In terms of proving who owns the account, remember, it is very easy to create a fake social media account. Just because an account looks like it belongs to someone does not mean that it does. That is why it might be important to at least subpoena the account identifying information from the social media site, if there is any question as to ability to prove ownership of an account.

The case law on authentication and admissibility of social media sites is contradictory. In \textit{State v. Bell} the court found that the level of admissibility is low and accepted as good enough...
testimony from a witness familiar with the MySpace account and e-mail address of the party the information was to be used against. Also the evidence showed that the defendant used certain code words and that those words were contained within the account. The court also noted that the witness agreed that the provided print-outs seemed to be an accurate reflection of the MySpace account in question.54

On the other side, in *Griffin v State*, the court was concerned about how easy it is to create a fake account and noted that information such as birthdate, picture, and residence were not enough to prove ownership.55

*The Other Side – Responding to Social Media Requests*

It is important to be prepared to respond appropriately to requests for social media content. All businesses (including law firms) should have a social media policy that controls who may (and may not) speak on behalf of the company. The policy should also consider addressing whether supervisors may be connected to employees on the more social sites (as opposed to professional sites liked LinkedIn,) and remind employees about the fact that policies online are the same as policies off line; specifically in relation to sexual harassment and other such issues. Employees should also be reminded not to discuss private information and/or litigation on their social media accounts. Employers should train employees on social media privacy settings to assist in security. As already explained, individuals should be warned not to post anything that can be harmful to their cases on social media.

Social media evidence needs to be preserved appropriately. For a business with a great deal of social media evidence to preserve, it is wise to involve a company that can help in the preservation process during litigation. An individual can simply print out the pages or download the account. If the account is large (and is not on Facebook where it can be downloaded) and it is likely the history of the account will enter into the lawsuit, it might be wise to arrange for preservation of the account through a third party, to avoid any accusations of spoliation later on.

In the end, it is crucial for clients, indeed for everyone, to remember that any content posted on a social media site, even back in 2004 when Facebook was first created and the client might have been in college, could come up later during litigation. Therefore everyone needs to be careful to think before they post. This does not mean that people should go back and clean up their accounts just because some day they might, by chance, be sued. But it does mean they might want to give some thought to their online reputations due to their past and current postings.

Other Issues: Judges and Juries

Judges

Many judges enjoy having an online presence as well. This has led to questions over whether judges should be friends with attorneys, and what happens if a judge is a friend with a defendant.

In attempting to resolve the first issue, the Florida Supreme Court Judicial Ethics Advisory Committee determined that judges may not be friends on Facebook with attorneys who appear before them.\(^{56}\) In turn, a defendant sought to disqualify a judge based on his Facebook friendship with the prosecutor. The trial judge denied the request, but upon appeal the motion was granted. The court held that the Facebook friendship “conveys the impression that the lawyer is in a position to influence the judge.”\(^{57}\) Ohio came down on the other side, noting that it is acceptable for judges to friend lawyers who appear before them. However the judges must comport themselves properly, follow all ethical rules, and must be careful to disqualify themselves should the online friendship cause a bias.\(^{58}\)

Other states have seen issues arise when the judge learns he is Facebook friends with a defendant. Two cases occurred in Pennsylvania. In the first, the judge was asked to recuse himself, and eventually did so when it turned out he knew the defendant’s father. He was, however, unaware of the Facebook friendship prior to being alerted to it. Like many people, the judge simply friended anyone who asked and thought nothing of it.\(^{59}\) Another controversy arose when a judge suppressed evidence against a defendant resulting in dismissal of the case. After the fact the prosecution realized that the judge was Facebook friends with the defendant, though the defendant and the judge did not know each other. The prosecutor asked the judge to reverse the suppression and recuse himself. The judge decided not to recuse himself due to concern about setting a dangerous precedent.\(^{60}\)

On February 21, 2013, the American Bar Association released Formal Opinion 462, Judge’s Use of Electronic Social Networking Media. It offers a new acronym, ESM, meaning electronic social media. Judges are allowed to participate in ESM so long as they "comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity or impartiality, or create an appearance of impropriety."

\(^{56}\) Florida Supreme Court Judicial Ethics Advisory Committee, Opinion Number 2009-20 (November 17, 2009.)
\(^{57}\) \textit{Domville v. State}, No. 4D12-556 (Fla. 4th DCA 2012).
\(^{58}\) Supreme Court of Ohio Disciplinary Board, Advisory Opinion: Judges May ‘Friend’ ‘Tweet’ if Proper Caution Exercised. (December 8, 2010.)
\(^{60}\) Judge refuses to recuse himself from Parker DUI case, state plans an appeal (2011.) http://www.newsworks.org/index.php/neighborhoods/mt-airychestnut-hill/-item/30248-hayden-denial-story-
In the end, the best advice for judges is that they be careful who they friend, and also, be aware of who they friend. Friending everyone is not a good idea for a judge, since it is easy enough, as shown above, for the judge to end up being friends with a defendant, and to be completely unaware of their online relationship. Judges who have many friends on social media sites might want to take a look at who those friends are, and determine whether they should remain friends. On the other hand, judges who prefer to have many friends online might find it wise to be certain they know who those friends are and at the least make both sides aware of the Facebook friendship prior to the trial beginning. If necessary, perhaps the judge could have a clerk make a quick check of his account to make certain that he is not friends with defendants who appear before him.

**Jurors**

These days it is extremely common to look over to the seats behind the prosecution, plaintiff or defense, and see individuals hard at work on their computers during the *voir dire* process. ⁶¹ This is because jurors, like almost everyone else, provide an immense amount of information about themselves online. Some of this information might well disqualify an individual from serving on a jury, or simply show a particular side that it would be unwise to seat a potential juror.

While there are currently no conclusive decisions on the issue of researching jurors via social media, there is guidance on the subject. ⁶² A New York opinion, quite reasonably, makes it clear that it is acceptable to research jurors online, including viewing their social media accounts under several conditions. First, the accounts must be accessed appropriately, i.e. only looking at accounts and information that have been left freely accessible by the jurors. Also, it remains impermissible to communicate with the jurors in any fashion. That means no friending (or having a third party friend) a juror in order to obtain access to the private sections of an account. ⁶³ However, the American Bar Association does not bar visiting the public portions of a site even if it makes the juror aware that an attorney looked at a profile. Such contact might include using LinkedIn to look at a juror’s profile. Unless set properly, LinkedIn will show the name of a person who looks at a profile, under certain circumstances.

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⁶² NYCLA Committee on Professional Ethics, Formal Opinion 743 (May 18, 2011.)

⁶³ The American Bar Association Standing Committee on Ethics and Professional Responsibility released an opinion, Lawyer Reviewing Jurors’ Internet Presence, Formal Opinion 466, 2014, which agrees with previously stated guidelines from other states.
Of late, jurors have been engaging in social media or other Internet use that has caused serious trouble for the court system. Judges, prosecutors and defense attorneys frequently find themselves throwing their hands up in the air due to the frustration caused by jurors who refuse to follow the instructions. While it might seem beyond belief that a juror would choose to engage in social media discussion or Internet research after being specifically told not to do so, the reality is that they do.64 In response to juror behavior, many judges and court systems are developing instructions to provide to jurors to warn them away from social media use. For example, the Judicial Conference Committee on Court Administration and Case Management recently created, “Proposed Model Jury Instructions [on] The Use of Electronic Technology to Conduct Research on or Communicate about a Case.”65 Regardless of the language, it is crucial that judges warn the jury right at the outset of a case of the serious ramifications, and potential punishments, for violating court orders on use of social media during a trial.

Conclusion

Understanding how the public uses social media is important for attorneys so they can appreciate the types of evidence they might find online to help their cases, and so they can appropriately warn their clients about social media use. Knowing the benefits and risks of social media in terms of networking and marketing can help an attorney grow her firm without harming her hard-earned reputation through improper online activities. Being aware of how judges and juries use social media and how that use might affect a case is important, so attorneys can be prepared to respond accordingly.

There is no doubt that social media can be a serious minefield in terms of day-to-day practice and ethical requirements. On the other hand, the substantial benefits available in terms of evidence, research, marketing, and networking cannot be overstated. With the number of people using social media increasing every day, social media will continue to impact the legal profession in every imaginable way, and perhaps some unimaginable ways too. As a result it is crucial for attorneys to embrace the technology and determine how they can use it both in their practice of law and in their efforts to grow their client base.
In the Matter of  

SVITLANA E. SANGARY,  
Member No. 232282,  
A Member of the State Bar.  

Case Nos.: 13-O-13838-DFM  
(13-O-14282); 13-O-17014 (Cons.)  

INTRODUCTION  

Respondent Svitlana E. Sangary (Respondent) is charged here with four counts of misconduct, involving three separate matters. It is alleged that Respondent willfully violated rule 1-400(D)(2) of the Rules of Professional Conduct\(^1\) (deceptive advertising); rule 3-700(D)(1) (failing to promptly release a client file); and two counts of section 6068, subdivision (i) (failing to cooperate with a disciplinary investigation). The State Bar had the burden of proving the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY  

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 21, 2013, in case Nos. 13-O-13838 and 13-O-14282. On January 21, 2014, a status conference was held in this  

\(^1\) Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.
matter. The State Bar was represented by Eli Morgenstern. Respondent did not appear.

Because the court had not received a response by Respondent to the NDC, the State Bar was ordered to file a motion for entry of Respondent’s default by February 14, 2014, in the event that a response was not filed.

On January 27, 2014, Respondent, acting as her own counsel, filed a response to the NDC. In her response, Respondent denied the allegations contained in the NDC and then wrote a 16-page soliloquy with little to no rational connection to the charges at hand. In one portion of her response, Respondent wrote:

Also, with regard to false statements and misleading advertisement, none other than Natalie Portman comes to mind. The online media extensively covers the controversy surrounding Natalie Portman’s performance in the film Black Swan. The ballet dancer who performed in the Black Swan, Sarah Lane, has come forward to revel [sic] a “cover-up” and says that Natalie Portman’s head was superimposed on to Sarah Lane’s body, and that Natalie Portman lied. Please see Exhibit [sic] 21, 3 articles that appeared on www.theguardian.com, http://news.softpedia.com and www.thehuffingtonpost.com.

Despite the foregoing, Natalie Portman has won an Oscar for her performance in Black Swan.

[Respondent’s January 27, 2014 response, p. 12.]

Later in her response, Respondent concluded by stating:

There is a popular expression, ‘sweet sixteen’. The foregoing 16 pages can be characterized as bitter-sweet sixteen, in SANGARY’s view. It goes without saying as to why they are bitter. Can one envision the acts in the civil arena, more unseemly than the ones described above? But what SANGARY views as sweet is that this country, the United States of America, is truly the land of opportunity, where anything and everything is possible. SVITLANA SANGARY came to this country in her twenties, with nothing, and married another immigrant, who also had nothing. SANGARY passed LSAT [sic] without taking the preparation course, graduated cum laude from the Pepperdine University School of Law, and passed the bar without even taking the Barbri course. SANGARY’s American dream has come true, as she has been able to achieve a point wherein now, in her thirties,
SANGARY is a prominent donor and philanthropist, supporting important social causes, who had recently received the email from President Obama, with the subject line ‘I need your help today’, asking SVITLANA SANGARY for an additional donation. Please see Exhibit 30.

God Bless America!

[Respondent’s January 27, 2014 response, p. 17.]

Respondent attached 30 exhibits to her response, including an extensive write-up on Natalie Portman and an email from Barack Obama requesting that Respondent “[c]hip in $3 or more” to help the Democratic Party. (Respondent’s January 27, 2014 response, Exhibit 30.)

On January 28, 2014, this court issued a trial-setting order, setting a trial date of March 12, 2014.

On March 6, 2014, this court issued an order staying the proceeding based on the State Bar’s pursuit of an interim appeal regarding portions of this court’s case management order. On March 26, 2014, the Review Department ruled on the State Bar’s interim appeal and the matter was remanded to this court with instructions to modify the case management order.

On April 15, 2014, this court issued an order lifting the existing stay and scheduling a status conference on May 5, 2014, for the purpose of setting new trial and pretrial dates. That status conference went forward as scheduled. Respondent did not appear at the status conference; instead, Frank Lincoln made a special appearance on her behalf. At the status conference, a new trial date of June 10, 2014 was scheduled.

On May 6, 2014, this court issued an order setting forth the new trial date, together with deadlines for the parties to comply with their pretrial obligations and to file a pretrial statement. In addition, the court ordered the parties to participate in a settlement conference with Judge Pro tem George Scott on May 19, 2014. A copy of that order was mailed to both Respondent and to attorney Frank Lincoln.
On May 22, 2014, the State Bar filed an NDC in case No. 13-O-17014. The NDC consists of a single count, alleging Respondent’s failure to cooperate in the State Bar’s investigation in that matter, including failing to appear for an investigative deposition on April 4, 2014. The new case was assigned to the undersigned.

A status conference was held on June 2, 2014. Respondent did not appear at the status conference; instead, Frank Lincoln made a special appearance on her behalf. At the status conference, the two proceedings were consolidated and a new trial date of July 8, 2014, was scheduled. On June 3, 2014, this court issued a new trial-setting order, providing new dates for the parties to comply with various pretrial disclosure obligations and file pretrial conference statements. In addition, the court ordered the parties to participate in a settlement conference with Judge Pro tem George Scott. The order was explicit in stating that unless excused by the court Respondent was obligated to attend the settlement conference, even if represented by counsel. A copy of that order was mailed to both Respondent and to attorney Frank Lincoln. Despite this order and the fact that Respondent was not excused by the court, Respondent did not attend the scheduled settlement conference, although attorney Lincoln was present. The assigned judge then issued an order stating, “Respondent did not appear. Settlement discussions would not be fruitful.”

On June 30, 2014, Respondent, acting as her own counsel, filed her response to the NDC in case No. 13-O-17014. The response denied the alleged misconduct and included a lengthy presentation of various facts and documents that Respondent “finds highly disturbing, and that have caused and continue to cause [Respondent] a significant level of turbulence, dismay, and even shock.” (Respondent’s June 30, 2014 response, pp. 1-2.) Instead of focusing on the only allegation in the NDC, i.e. whether or not Respondent failed to cooperate with a State Bar
investigation, Respondent denied the allegation and proceeded to compose another bizarre soliloquy, at one point stating:

What is also unbelievable is that SVETLANA KONOVIITCH, a woman in her forties, living in the United States, is “milking” her mother, living in Ukraine, for money! SVETLANA KONOVIITCH’s mother, as stated by SVETLANA KONOVIITCH herself in the said posting on www.yelp.com, is “90% blind 73 year old lady”. Can you imagine this? Can you believe this? Instead of a young daughter living in the United States supporting her elderly 90% blind mother living in the Ukraine, it is the mother, who is 73 years old and blind, living in the Ukraine, who supports her daughter, who is in her forties and lives in the United States. Wow!! And, after all, having received her mother’s money from SVITLANA SANGARY, the daughter SVETLANA KONOVIITCH has the audacity to make a posting on www.yelp.com, explaining to the whole world that she is sucking the last dollars (or maybe even pennies) from her elderly disabled mother, and falsely claiming that SVITLANA SANGARY stole the money. If this is not perverse, sick and ridiculous, what is?!

[Respondent’s June 30, 2014 response, p. 6.]

Respondent ultimately concluded her response by writing:

SVITLANA SANGARY did not have to deal with lemon law. She is dealing with other type [sic] of “lemons”, such as the ones revealed here. And a proverbial phrase comes to mind. “When life gives you lemons, make lemonade”. Wikipedia says that it is a proverbial phrase used to encourage optimism and a can-do attitude in the face of adversity or misfortune.

Wikipedia describes it. SANGARY exemplifies it.

And, such lemonade tastes great. It may have blood, sweat, and tears in it, but it is so enjoyable. The more challenges, the more lemons – the more lemonade!

God bless America, the land of opportunity!!!

[Respondent’s June 30, 2014 response, p. 12.]

On the same day, June 30, 2014, the pretrial conference in this consolidated matter was held, as previously scheduled in this court’s trial-setting order of June 3, 2014. Neither
Respondent nor Frank Lincoln appeared for it. Respondent also did not file a pretrial conference statement, despite this court’s prior order.

On July 1, 2014, this court issued an order noting (1) that no substitution of attorneys had been filed by Respondent or Frank Lincoln; (2) that Respondent must comply with the pretrial disclosure requirements or her evidence at trial will be excluded; and (3) that the trial would commence as previously scheduled.

On the morning of the scheduled trial, July 8, 2014, Respondent filed a motion to continue the trial, alleging that Frank Lincoln had terminated his legal services to her prior to the “4th of July holidays” and requesting a continuance so that she could hire new counsel. The State Bar made an oral objection to the requested continuance, and this court denied the motion.

Throughout the balance of the trial, Respondent refused to participate, other than stating that she wanted a continuance and was not prepared to try the case. When called as a witness by the State Bar, she took the same position and declined even to take the witness’s oath until ordered to do so by this court. She then refused to answer any questions, claiming a First Amendment right to remain silent. This refusal continued despite this court’s instruction to her that, subject to her Fifth Amendment right to refuse to answer specific questions that were potentially incriminating, she had an obligation to cooperate with the disciplinary proceeding and that an unjustified refusal by her to do so could be treated by this court as an aggravating factor in the event of a finding of culpability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent’s responses to the two NDCs and the documentary and testimonial evidence admitted at trial.
Jurisdiction

Respondent was admitted to the practice of law in California on November 24, 2004, and has been a member of the State Bar at all relevant times.

Case No. 13-O-13838

Respondent has a website that features a large number of “Publicity” photos. Each of these photos shows Respondent with at least one other celebrity or political figure, including Barack Obama, Bill Clinton, Hillary Clinton, Al Gore, Arnold Schwarzenegger, Antonio Villaraigosa, George Clooney, Paris Hilton, and Bill Maher, to name a few. At trial, the State Bar elicited credible and persuasive expert testimony, and this court finds, that many, and perhaps all, of these photos were created by taking original celebrity photos and then overlaying Respondent’s image in order to make it appear as though Respondent was in the presence of that celebrity. These photographs were part of an advertisement and solicitation for future work, directed by Respondent to the general public through her website, and they were false, deceptive, and intended to confuse, deceive and mislead the public.

These “publicity” photos still remained on Respondent’s website at the time of the trial of this matter, notwithstanding both the State Bar’s ongoing inquiries to Respondent since December 2012 regarding the deceptive nature of these photos and the filing of the instant charges against Respondent under rule 1-400 in November 2013.

Count One - Rule 1-400(D)(2) [Deceptive Advertising]

Rule 1-400(D)(2) provides that attorney communications or solicitations shall not contain any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public. By posting and maintaining several images on her website falsely depicting Respondent posing with various public figures, when in fact Respondent was not actually photographed in the company of those public figures, Respondent communicated an
advertisement or solicitation directed to the general public that was false and deceptive, in willful violation of rule 1-400(D)(2).

**Count Two - Section 6068, subd. (i) [Failure to Cooperate]**

A State Bar investigator sent Respondent a letter on August 20, 2014, informing Respondent that a previously closed investigation (12-21669) was being re-opened and re-numbered as 13-O-13838, and asking Respondent to provide a response to the allegations made by the complainant in that matter. Included within the listed allegations was the allegation that Respondent’s website “depicts numerous photographs of [her] standing next to various public figures, including politicians, actors, musicians and other celebrities. It appears that many of these photos appear to be ‘photo shopped.’ The photos appear to be misleading [sic] and false advertisement.” Respondent was directed to provide a written response, including providing specified documents, regarding the challenged “Publicity” photos, by September 3, 2013. The letter noted that “it is the duty of an attorney to cooperate and participate in any State Bar investigation.”

On August 30, 2013, Respondent was given a one-week extension of the September 3, 2013 deadline. On September 11, 2013, Respondent requested, but was denied, an additional two-week extension of the deadline. Thereafter, on October 7, 2013, Respondent sent an email to the State Bar, indicating that she was “still working” on her response. Despite that assurance, no response was ever provided by Respondent to the State Bar’s letter.

Section 6068, subdivision (i), of the Business and Professions Code, subject to constitutional and statutory privileges, requires attorneys to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against that attorney. Respondent’s failure to respond to investigator’s August 20, 2014 letter constituted a willful violation of her duties under section 6068, subdivision (i). *In the Matter of Bach*
(Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 644 [attorney may be found culpable of violating § 6068, subd. (i), for failing to respond to State Bar investigator’s letter, even if attorney later appears and fully participates in formal disciplinary proceeding].)

**Case No. 13-O-14282**

Respondent represented Armando Soto (Soto) in seeking to set aside a significant default judgment against him. When Respondent was terminated as the attorney for Soto, Respondent declined to discuss with Soto the status of his case. Then, when Soto hired a new attorney, Respondent refused requests that Soto’s file be transmitted to the new attorney. The first request was made in writing on March 7, 2013, and was followed by numerous telephone calls and voicemail messages by the new attorney’s office. Respondent merely ignored these requests until after Soto complained to the State Bar. Finally, in late June 2013, Respondent sent a portion of the file to the new attorney, but withheld many pertinent documents. It was only on August 30, 2013, after the new attorney’s office had again contacted the State Bar, that Respondent delivered the balance of the file. The effect of this delay was to cause additional expense to Soto in attorney’s fees and to delay the filing of the motion to set aside the existing default judgment.

**Count Three - Rule 3-700(D)(1) [Failure to Release Client File]**

Respondent’s response to the NDC makes clear that she was well aware of her obligation under rule 3-700(D)(1) to promptly release all client papers and property to the client upon termination of employment. In fact, as an attachment to that response, she included a letter she had sent to an attorney in June 2011, in which she provided a lengthy discourse on an attorney’s obligations under rule 3-700(D)(1). That discourse included the following:

The California case law is also clear that upon discharge by the client, an attorney is required to return the client’s case file or forwards [sic] the case file to a successor attorney, since the attorney’s work product belongs absolutely to the client whether or

In other words, the requirement to return all client’s papers and properties applies when the attorney ceases to provide legal services to the client. *Baker v. State Bar* (1989) 49 Cal. 3d 804.


Furthermore, please be advised that unreasonable delay in releasing or refusal to turn over a client’s file after being notified of the substitution is ground for disciplinary action. See CRPC 3-700(D) & 4-100(B)(4); Los Angeles Bar Ass’n. Form Opns. 48, 103, 197, 253 and 330 (1972); *Rosenthal v. State Bar* (1987) 43 C3d 612, 621-622 (attorney disciplined for (among other things) failing to return client files or provide access to records; *Bernstein v. State Bar* (1990) 50 Cal. 3d 221, 232 (discipline for failure to turn over client files and documents); *Matter of Phillips* (Rev. Dept 2001) 4 Cal. State Bar Ct. Rptr. 315, 325-326 (discipline for failure to release file documents after discharge by client).

[Respondent’s January 27, 2014 response, Exhibit 29.]

Respondent’s failure to respond promptly to the request for the transfer of her file to Soto’s new attorney constituted a willful violation of rule 3-700(D)(1).

**Case No. 13-O-17014**

On January 16, 2014, a State Bar investigator sent Respondent a letter as a result of a complaint received from Hasmik Jasmine Ohanian, Esq. In that letter, the investigator informed Respondent that Ohanian had complained that Respondent had sued a former client for fees without first offering to arbitrate the matter. In addition, Ohanian had complained that Respondent’s website, including the various “Publicity” photos and numerous purported testimonials, was false and misleading. Respondent was directed to provide a written response, including providing specified documents, regarding the Ohanian complaints by January 30, 2014. This letter also reminded Respondent that “it is the duty of an attorney to cooperate and participate in any State Bar investigation.”
On January 29, 2014, Respondent requested and was subsequently granted a two-week extension. On February 17, 2014, after the extended deadline had passed, Respondent sent an email to the State Bar, indicating that she was “working” on her response and needed another extension. That request was denied, and Respondent was admonished to provide her response as soon as possible. Despite that admonition, no response was ever provided by Respondent to the State Bar’s January 16, 2014 investigation letter.

**Count One - Section 6068, subd. (i) [Failure to Cooperate]**

Respondent’s failure to respond to the investigator’s letter in the Ohanian investigation constituted a willful violation of her duties under section 6068, subdivision (i).

**Aggravating Circumstances**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.5.) The court finds the following with respect to aggravating circumstances.

**Multiple Acts of Misconduct**

Respondent’s multiple acts of misconduct is an aggravating factor. (Std. 1.5(b)).

**Lack of Insight**

Respondent has demonstrated a persistent lack of insight regarding her need to comply with her professional obligations and her ongoing failures to do so. Although charges were pending against her in January 2014 for her failure to respond to a State Bar’s investigation letter regarding her website, she failed to respond to a new investigation launched by the State Bar as a result of another complaint against her by a different individual. Similarly, although she scolded another attorney in 2012 regarding that attorney’s duty to turn over a former client’s file to a successor attorney for the client, she then violated that duty the following year.

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2 All further references to standard(s) or std. are to this source.
Contempt for Disciplinary Proceedings

Respondent’s conduct during the course of this proceeding demonstrated her contempt for these proceedings and further calls into question her fitness to practice law. ([*Weber v. State Bar* (1988) 47 Cal.3d 492, 507 [“an attorney’s contemptuous attitude toward the disciplinary proceedings is relevant to the determination of an appropriate sanction”].)

Respondent failed to appear for a court-ordered settlement conference; she failed to comply with her pretrial disclosure obligations; she filed her responses to the NDCs only after this court had directed the State Bar to file motions for entry of her default; and, although she was physically present during the trial of this matter, she refused to provide any functional participation in it, whether as a self-represented party or as a witness. Instead, she sat throughout the proceeding at counsel table, obviously engaged in some other activity (which she described at one point as writing her request for an interim appeal of this court’s denial of her request for a continuance).

Respondent’s disregard and disrespect for this disciplinary proceeding is a significant aggravating factor.

**Mitigating Circumstances**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating circumstances.

**No Prior Record of Discipline**

Respondent had no prior record of discipline for approximately eight years prior to the misconduct in this case.³ Respondent’s discipline-free record warrants some consideration in

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³ The court takes judicial notice of the fact that Respondent has no previous record of discipline.
mitigation. (Std. 1.6(a); In the Matter of DeMassa (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 [eight years of unblemished practice not a significant mitigating circumstance].)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; Chadwick v. State Bar (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (Drociak v. State Bar (1991) 52 Cal.3d 1085, 1090; In the Matter of Koehler (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (In re Silverton (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (In the Matter of Van Sickle (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; Howard v. State Bar (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See Snyder v. State Bar (1990) 49 Cal.3d 1302, 1310-1311; In the Matter of Frazier (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (Connor v. State Bar (1990) 50 Cal.3d 1047, 1059; In the Matter of Oheb (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most
severe sanction for Respondent’s misconduct is found in standard 2.15, which provides that suspension not to exceed three years or reproval is appropriate for a violation of the Business and Professions Code or the Rules of Professional Conduct not otherwise specified in the Standards.

The State Bar, in its pretrial conference statement, requested a one-year stayed suspension and a two-year probation, with conditions of probation including 60-days actual suspension. At trial, it increased that request to 90-days of actual suspension and a requirement that Respondent comply with California Rules of Court, rule 9.20.

Looking to the case law, the court finds some guidance in In re Morse (1995) 11 Cal.4th 184, and In the Matter of Mitchell (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332. In Morse, the attorney mailed business solicitations in envelopes labeled to make the recipient believe that the communication came from his or her lender, rather than from the attorney. The attorney continued this practice for nearly five years and sent over four million deceptive letters. Despite requests from the Attorney General and district attorney, the attorney refused to stop misleading the public, ultimately forcing the authorities to obtain an injunction. In aggravation, the attorney committed multiple acts of misconduct, demonstrated bad faith, was indifferent toward rectification, and was found to have committed other misconduct stemming from additional uncharged mailings. In mitigation, the attorney received minimal weight for having no prior record of discipline in six years of practice. Considering the broad scope of the misconduct and numerous aggravating factors, the Supreme Court ordered, among other things, a three-year period of actual suspension.

In Mitchell, an attorney seeking employment distributed his resume containing misleading information about his education to various law firms over a three-year period. The attorney also provided dishonest responses to the State Bar’s interrogatories. In aggravation, the attorney committed multiple acts of misconduct and demonstrated a lack of insight into his
misconduct. In mitigation, the attorney was experiencing emotional stress at the time of the misconduct. Specifically, the attorney’s wife, who had previously experienced a late-term miscarriage, was again pregnant. The attorney’s judgment was clouded by his fear that the stress associated with his unemployment could result in a second miscarriage. Considering that there was no evidence that the false resumes affected any hiring decisions, the Review Department recommended that the attorney be actually suspended for 60 days.

Considering the totality of the circumstances, the present case falls between Morse and Mitchell. While there is no indication that the scope of the present matter is anywhere near the over four million deceptive letters distributed by the attorney in Morse, the true impact of Respondent’s deceptive pictures on her website is difficult to gauge, as the volume of internet traffic going to Respondent’s website remains unclear. That said, Respondent’s deceptive photographs have remained on her website for public consumption from at least December 2012 to July 8, 2014, the date of trial in this matter.⁴

While the scope of the present matter appears to be more on par with Mitchell, the present matter involves significantly more aggravation. Particularly, the court has grave concerns regarding Respondent’s demonstrated lack of insight and her contemptuous conduct during these proceedings. Respondent’s failure to remove the deceptive images from her website, even after the State Bar brought this issue to her attention, and her demonstrated disregard for the disciplinary process give little reason to believe that her misconduct will not continue.

Accordingly, the court finds that a six-month period of actual suspension is necessary and appropriate to achieve the primary purposes of attorney discipline, most notably public protection.

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⁴ There is no indication that these images have since been removed from Respondent’s website.
Recommendations

The court recommends that respondent Svitlana E. Sangary be suspended from the practice of law for two years, that execution of the suspension be stayed, and that she be placed on probation for a period of three years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first six months of probation.

2. Respondent must also comply with the following additional conditions of probation:
   
i. During the period of probation, Respondent must comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California.

   ii. Respondent must submit written quarterly reports to the State Bar’s Office of Probation (Office of Probation) on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether she has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, the report must be submitted on the next following quarter date, and cover the extended period.

   In addition to all the quarterly reports, a final report, containing the same information is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probationary period.

   iii. Subject to the assertion of applicable privileges, Respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to her personally or in writing, relating to whether she is complying or has complied with the conditions contained herein.

   iv. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including Respondent’s current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, Respondent must report such change in writing to the Membership Records Office and the State Bar’s Office of Probation.

   v. Within 30 days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with her assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in person or by telephone. During the period of
probation, Respondent must promptly meet with the probation deputy as directed and upon request.

vi. Within one year after the effective date of the discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar’s Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

3. At the expiration of the period of this probation, if Respondent has complied with all the terms of probation, the order of the Supreme Court suspending Respondent from the practice of law for two years will be satisfied and that suspension will be terminated.

**California Rules of Court, Rule 9.20**

It is recommended that Respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

**Multistate Professional Responsibility Examination**

It is recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of Respondent’s suspension, whichever is longer and provide satisfactory proof of such passage to the State Bar’s Office of Probation in Los Angeles within the same period.

**Costs**

It is recommended that costs be awarded to the State Bar in accordance with Business

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and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: September _____, 2014

DONALD F. MILES
Judge of the State Bar Court
TOPIC: The ethical implications of attorney profiles on LinkedIn

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

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

RULES OF PROFESSIONAL CONDUCT: 7.1 and 7.4

OPINION

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

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

1 This opinion addresses the fields, headings, and protocols of LinkedIn as they exist on the date of this opinion. The committee cannot anticipate changes or additions to this or other social networking sites, and limits this analysis to the site as of the date of this opinion.
This opinion addresses the ethical implications of LinkedIn profiles: specifically, whether a LinkedIn Profile is considered “Attorney Advertising,” when it is appropriate for an attorney to accept endorsements and recommendations, and what information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct.2

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

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

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

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

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

a. Specialization

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

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

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3 Of course, as with all statements made by an attorney, either to a client, an adversary, or a judge, the biographical information must be truthful and not misleading. See RPC 7.1, Cmt. [6].
With respect to skills or practice areas on lawyers’ profiles under a heading, such as “Experience” or “Skills,” this Committee is of the opinion that such information does not constitute a claim to be a specialist under Rule 7.4. The rule contemplates advertising regarding an attorney’s practice areas, noting that an attorney may “publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).” RPC 7.4(a). This provision contemplates the distinction between claims that an attorney has certain experience or skills and an attorney’s claim to be a “specialist” under Rule 7.4. Categorizing one’s practice areas or experience under a heading such as “Skills” or “Experience” therefore, does not run afoul of RPC 7.4, provided that the word “specialist” is not used or endorsed by the attorney, directly or indirectly. Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists.

b. Endorsements and Recommendations

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

Because LinkedIn gives users control over the entire content of their profiles, including “Endorsements” and “Recommendations” by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals. To that end, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to Rule 7.1. For example, if a distant acquaintance endorses a matrimonial lawyer for international transactional law, and the attorney has no actual experience in that area, the attorney should remove the endorsement from his or her profile within a reasonable period of time, once the attorney becomes aware of the inaccurate posting. If a colleague or former client, however, endorses that attorney for matrimonial law, a field in which the attorney has actual experience, the endorsement would not be considered misleading. The Pennsylvania Bar Association, interpreting the Pennsylvania Rules of Professional Conduct, reached a similar conclusion in a 2014 opinion, emphasizing that an attorney must “monitor his or her social networking websites, [] verify the accuracy of any information posted, [and] remove or correct any inaccurate endorsements. . . . This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party.”
Pennsylvania Bar Association Formal Op. 2014-300, “Ethical Obligations for Attorneys Using Social Media,” at 12. While we do not believe that attorneys are ethically obligated to review, monitor and revise their LinkedIn sites on a daily or even a weekly basis, there is a duty to review social networking sites and confirm their accuracy periodically, at reasonable intervals.

c. LinkedIn Profiles as “Attorney Advertising” and Appropriate Disclaimers

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

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

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

Conclusion

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

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

FORMAL OPINION 2014-200

The PBA Legal Ethics and Professional Responsibility Committee has been asked whether the Pennsylvania Rules of Professional Conduct (“PA RPC”) impose restrictions upon a lawyer who wishes to publicly respond to a client’s adverse comments on the internet about the lawyer’s representation of the client. The Committee concludes that the lawyer’s responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that a lawyer cannot reveal client confidential information in response to a negative online review without the client’s informed consent.

We further believe that any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, “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 presents a fair and accurate picture of the events.”

Applicable Ethics Rules

PA RPC 1.6 provides, in pertinent part:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

. . .

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

. . .

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the
lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

Comment [14] to Rule 1.6 states:

[14] Fifth, where a legal claim or disciplinary charge alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. If the lawyer is charged with wrongdoing in which the client’s conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

Under PA RPC 1.6(e), the duty of confidentiality survives the termination of the client-lawyer relationship.

Scope of Restricted Information

Rule 1.6(a) prohibits lawyers who do not have the client’s informed consent from revealing information relating to “representation of a client” with certain limited exceptions. “Information relating to representation” is generally recognized to be very broad and is not limited to secrets or confidences.” Pennsylvania Ethics Handbook, 2011 Ed., § 3.3 at 51; Iowa Supreme Court Att’y Discipline Bd. v. Marzen, 779 N.W.2d 757, 765–67 (Iowa 2010) (concluding that” the rule of confidentiality is breached when an lawyer discloses information learned through the lawyer-client relationship even if that information is otherwise publicly available”).

Exceptions to Confidentiality

Among the exceptions to the rule of confidentiality is the “self-defense exception,” PA RPC 1.6(c)(4) (which is identical to 1.6(b)(5) in the Model Rules). That section permits, but does not require, a lawyer to reveal information to the extent the lawyer reasonably believes necessary:
- to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

- to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved; or

- to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

Oxford Dictionaries Online defines “controversy” as a “disagreement, typically when prolonged, public, and heated.” http://www.oxforddictionaries.com. A disagreement as to the quality of a lawyer’s services might qualify as a “controversy.” However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, Comment [14] makes clear that a lawyer’s disclosure of confidential information to “establish a claim or defense” only arises in the context of a civil, criminal, disciplinary or other proceeding. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a “controversy” in the sense contemplated by the rules to permit disclosures necessary to establish a “claim or defense.”

The literal language of Rule 1.6(c)(4) (the self-defense exception) does not authorize responding on the internet to criticism.

The Right to Defend Before an Action is Commenced

Comment [14] to Rule 1.6 states, in part:

Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.

While comment [14] provides that “[p]aragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity” (wrongdoing in which the client’s conduct is implicated), there must be an action or proceeding in contemplation.

The Restatement (Third) of the Law Governing Lawyers, Section 64 is the functional equivalent of PA RPC 1.6(c)(4). Comment c states: “A lawyer may act in self defense ... only to defend against charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification. Imminent threats arise not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.”

The Restatement (Third) of the Law Governing Lawyers, Section 64, comment e states: “Use or disclosure of confidential client information ... is warranted only if and to the extent that
the disclosing lawyer reasonably believes necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer’s position in the controversy.”

State Bar of Arizona Opinion 93-02 concluded that an attorney could disclose otherwise confidential information to the author of a book about the murder trial of a former client in response to assertions made by the former client that the attorney had acted incompetently. The opinion concluded that limiting the exception to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(c)(4) “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client” largely superfluous.

In Opinion 2014-1, the San Francisco Bar Association commented:

[The Arizona opinion] is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer’s self-defense which states: “Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information, except in response to a formal client charge of wrongdoing with a tribunal or similar agency. When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer.” State Bar of Arizona Op. 93-02, pp. 4-5 (Emphasis added). This language is not part of the Restatement as adopted.

ABA Formal Opinion 10-456 states:

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. The 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.”

... The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no
basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer’s firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages full and frank disclosure necessary to an effective representation. Consequently, it has been said that “[a] lawyer may act in self-defense under [the exception] only to defend against charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences. . . .”

Ethics Opinions

The New Hampshire Bar Association Ethics Committee was asked whether a lawyer could post a detailed response to a client’s online comment that the lawyer took the client’s money for a hearing that he knew he could not win. The Committee advised that “while you may be permitted to make some sort of limited response to your client’s postings, you are not authorized to make the disclosures that you propose.” NH Bar News, Feb. 19, 2014.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued Opinion 525 on December 6, 2012 on Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client. It concluded:

The lawyer may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

The San Francisco Bar Association opined:

Lawyer is not barred from responding generally to an online review by a former client where the former client’s matter has concluded. Although the residual duty of loyalty to the former client does not prohibit a response, Lawyer’s on-going duty of confidentiality prohibits Lawyer from disclosing any confidential information about the prior representation absent the former client’s informed consent or a waiver of confidentiality. California’s statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about a lawyer), or by an lawyer against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. San Francisco Bar Association Op. 2014-1.

Disciplinary Actions
In December 2006, the Supreme Court of Oregon approved a stipulation for discipline suspending a lawyer for 90 days for sending an email message to members of a bar listserv in which the lawyer disclosed confidential information about a former client who had fired the lawyer in an effort to warn colleagues that the former client was “attorney shopping.” In re Quillinan, 20 DB Rptr 288 (Or. 2006).

The Supreme Court of Wisconsin, in June 2011, suspended the license of a lawyer who wrote and published an Internet blog in which the lawyer revealed confidential information about current and former clients that was sufficiently detailed to identify those clients using public sources. Office of Lawyer Regulation v. Peshek, 798 N.W.2d 879 (Wis. 2011).

The Georgia Supreme Court in a March 2013 ruling rejected as inadequate a recommendation of the Georgia State Bar General Counsel seeking a review panel reprimand for lawyer for violating Rule 1.6. The lawyer admitted to posting on the internet confidential information about the lawyer’s former client in response to negative reviews about the lawyer the client had posted on consumer websites. In re Skinner, 740 S.E.2d 171 (Ga. 2013).

A Chicago lawyer was reprimanded by the Illinois Lawyer Registration and Disciplinary Commission for revealing client communications response to a former client who posted a negative review of the lawyer on Avvo. The parties’ stipulated that the lawyer exceeded what was necessary to respond to the client’s accusations by revealing in her response to a negative review that the client had beaten up a co-worker. In re Tsamis, Commission File No. 2013PR00095 (Ill. 2013).

Conclusion

While it is understandable that a lawyer would want to respond to a client’s negative online review about the lawyer’s representation, the lawyer’s responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer. We conclude that a lawyer cannot reveal client confidential information in a response to a client’s negative online review absent the client’s informed consent.

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

I. Introduction and Summary

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

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

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

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

¹ http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/
10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

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

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

II. Background

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

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to “friend” them) as well as to invite friends of friends or others.
Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the “public,” “friends,” and “others.” For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows “friends of friends” to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person’s posts and other items.

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

III. Discussion

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

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

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

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

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

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

Rule 1.1 provides:

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

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

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

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

It is professional misconduct for a lawyer to:

...  
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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

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

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

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

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

Tracking a client’s activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client’s legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client’s social media account.
For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer. However, he forfeited that settlement after his daughter posted on her Facebook page “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

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

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

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

Rule 3.3 states:

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

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal


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2 “Girl costs father $80,000 with ‘SUCK IT’ Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/
3 In the Matter of Matthew B. Murray, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)
4 Lester v. Allied Concrete Co., Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)
or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.4 states:

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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

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

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

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

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

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

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

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

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

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

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

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6 http://www.ncbar.com/ethics/printopinion.asp?id=894
3. **Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website**

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

Rule 4.2 states:

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

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

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

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

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

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


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

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

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

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

Rule 4.3 states in relevant part:

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

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

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

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11 Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.
Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, “[t]he underlying principles of fairness and honesty are the same, regardless of context.” The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

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

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

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

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

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

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

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

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14 *Id.* at 2.
this Opinion. As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client’s postings on social media may potentially be used against the client’s interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

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

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

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

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

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

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

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

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

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

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

Rule 7.2 states, in relevant part:

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\begin{align*}
\text{(d)} & \quad \text{No advertisement or public communication shall contain an endorsement by a celebrity or public figure.} \\
\text{(e)} & \quad \text{An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.}
\end{align*}
\]

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

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24 In Dwyer v. Cappell, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.
media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

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

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

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

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

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

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

26 Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.
certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

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

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

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


\(^{29}\) Id. at 59.

\(^{30}\) In Re Tsamis, Comm. File No. 2013PR00095 (Ill. 2013).
responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

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

Also relevant is Rule 3.6, which states:

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

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

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

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

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

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

\textsuperscript{31} In Re Peshek, No. M.R. 23794 (Il. 2010); Compl., In Re Peshek, Comm. No. 09 CH 89 (Il. 2009).
misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror’s Internet Presence

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

Rule 3.5 states:

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

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

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

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

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

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

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

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

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

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

IV. **Conclusion**

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

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

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

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

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.
The Twenty-First Century Lawyer’s Evolving Ethical Duty of Competence

By Andrew Perlman

Andrew Perlman is a professor at Suffolk University Law School, where he is the Director of the Institute on Law Practice Technology and Innovation. He was the Chief Reporter of the ABA Commission on Ethics 20/20 and is the Vice Chair of the newly created ABA Commission on the Future of Legal Services. This article contains the author’s own opinions and does not reflect the views of any ABA entity or any other organization with which he is or has been affiliated.

Just twenty years ago, lawyers were not expected to know how to protect confidential information from cybersecurity threats, use the Internet for marketing and investigations, employ cloud-based services to manage a practice and interact with clients, implement automated document assembly and expert systems to reduce costs, or engage in electronic discovery. Today, these skills are increasingly essential, and many lawyers want to know whether they are adapting quickly enough to satisfy their ethical duty of competence. This short article describes several relevant recent changes to the Model Rules of Professional Conduct and identifies new skills and knowledge that lawyers should have or develop.

The Duty of Competence in a Digital Age

The ABA Commission on Ethics 20/20 was created in 2009 to study how the Model Rules of Professional Conduct should be updated in light of globalization and changes in technology. The resulting amendments addressed (among other subjects) a lawyer’s duty of confidentiality in a digital age, numerous issues related to the use of Internet-based client development tools, the ethics of outsourcing, the facilitation of jurisdictional mobility for both US and foreign lawyers, and the scope of the duty of confidentiality when changing firms.

One overarching theme of the Commission’s work was that twenty-first century lawyers have a heightened duty to keep up with technology. An amendment to Model Rule 1.1 (Duty of Competence), Comment [8] captured the new reality (italicized language is new):

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.

The Model Rules had not previously mentioned technology, and the Commission concluded that the Rules should reflect technology’s growing importance to the delivery of legal and law-related services.
New Competencies for the Twenty-First Century Lawyer

The advice to keep abreast of relevant technology is vague, and the Commission intended for it to be so. The Commission understood that a competent lawyer’s skillset needs to evolve along with technology itself. After all, given the pace of change in the last twenty years, the specific skills lawyers will need in the decades ahead are difficult to imagine. In the meantime, a few new competencies appear to be critical.

Cybersecurity

Long gone are the days when lawyers could satisfy their duty of confidentiality by placing client documents in a locked file cabinet behind a locked office door. Lawyers now store a range of information in the “cloud” (both private and public) as well as on the “ground,” using smartphones, laptops, tablets, and flash drives. This information is easily lost or stolen; it can be accessed without authority (e.g., through hacking); it can be inadvertently sent; it can be intercepted while in transit; and it can even be accessed without permission by foreign governments or the National Security Agency.

In light of these dangers, lawyers need to understand how to competently safeguard confidential information. Newly adopted Model Rule 1.6(c) requires lawyers to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” New comments advise lawyers to examine a number of factors when determining whether their efforts are “reasonable,” including (but not limited to) “the sensitivity of the information, 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).”

The particular safeguards lawyers need to use will necessarily change with time. For now, and at a minimum, competent lawyers need to understand the importance of strong passwords (lengthy passwords that contain a mix of letters, numbers, and special characters; the word “password,” for example, is a lousy password), encryption (both for information stored in the “cloud” and on the “ground,” such as on flash drives and laptops), and multifactor authentication (ensuring that data can be accessed only if the lawyer has the correct password as well as another form of identification, such as a code sent by text message to the lawyer’s mobile phone). Lawyers also need to understand what metadata is and how to get rid of it, how to avoid phishing scams, the dangers of using public computers and Wi-Fi connections (including cloning and twinning of public Wi-Fi networks), the risks of using file sharing sites, and how to protect devices against malware.

Law firms with internal networks (also sometimes referred to as private clouds) should consult with competent data security experts to safeguard the information, and law firms that outsource these services (i.e., use a public cloud to store client data) need to ensure they select a service that uses appropriate security protocols. Recent changes to Rule 5.3, Comment [3] offer additional guidance on these issues, as do numerous ethics opinions related to cloud computing. A growing body of federal and state law also governs the area.
In sum, basic knowledge of cybersecurity has become an essential lawyer competency. Although lawyers cannot guard against every conceivable cybersecurity threat, they must take reasonable precautions. Failing to do so threatens the confidentiality of clients’ information and puts lawyers at a heightened risk of discipline or malpractice claims.

**Electronic Discovery**

A sound grasp of e-discovery has become a necessity, especially for litigators, and lawyers face discipline and sanctions if they do not understand the basics of electronically stored information (ESI) or fail to collaborate with those who do. For example, a Massachusetts lawyer was recently disciplined for failing to take appropriate steps to prevent a client’s spoliation of ESI.\(^4\) In addition to violating Rule 1.4 (for failing to communicate to his client the nature of the discovery obligations) and Rule 3.4 (for unlawfully obstructing access to evidence), the lawyer was found to have violated Rule 1.1 because he represented a client on “a matter that he was not competent to handle without adequate research or associating with or conferring with experienced counsel, and without any attempt to confirm the nature and content of the proposed deletions [of electronically stored information by the client].”\(^5\)

In New York, e-discovery competence is now mandated in section 202.12(b) of the Uniform Rules for the Supreme and County Courts:

Where a case is reasonably likely to include electronic discovery, counsel shall, prior to the preliminary conference, confer with regard to any anticipated electronic discovery issues. Further, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery: counsel may bring a client representative or outside expert to assist in such e-discovery discussions.\(^6\)

In California, a recently released draft of an ethics opinion covers similar ground and once again emphasizes the importance of e-discovery competence:

Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information (“ESI”). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI.\(^7\)

Competence is not the only ethical duty at stake. The California draft opinion (like the Massachusetts disciplinary case) observes that the improper handling of e-discovery “can also result, in certain circumstances, in ethical violations of an attorney’s duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.”\(^8\) The opinion concludes that, if lawyers want to handle matters involving e-discovery and do not have the requisite competence to do so, they can either “(1) acquire sufficient learning and skill before performance is required; [or] (2) associate with or consult technical consultants or competent counsel . . . .”\(^9\)
Related issues arise when lawyers advise their clients about social media content that might be discoverable. Recent opinions suggest that lawyers must competently advise clients about this content, such as whether they can change their privacy settings or remove posts, while avoiding any advice that might result in the spoliation of evidence. The bottom line is that e-discovery is a new and increasingly essential competency, and unless litigators understand it or associate with those who do, they risk court sanctions and discipline.

**Internet-Based Investigations**

Lawyers no longer need to rely exclusively on private investigators to uncover a wealth of factual information about a legal matter. Lawyers can learn a great deal from simple Internet searches.

Lawyers ignore this competency at their peril. Consider an Iowa lawyer whose client received an email from Nigeria, informing him that he stood to inherit nearly $19 million from a distant Nigerian relative by paying $177,660 in taxes owed to the Nigerian government. The client’s gullible lawyer raised the “tax” money from other clients in exchange for a promise to give them a cut of the inheritance. Unsurprisingly, the “inheritance” was a well-known scam, and the lawyer’s clients lost their money. The lawyer was disciplined for subjecting his clients to the fraud and was expressly criticized for failing to conduct a “cursory internet search” that would have uncovered the truth.

Internet research is also essential in more routine settings. For example, the Missouri Supreme Court recently held that lawyers should use “reasonable efforts,” including Internet-based tools, to uncover the litigation history of jurors prior to trial in order to preserve possible objections to the empanelment of those jurors. In Maryland, a court favorably cited a passage from a law review article that asserted that “[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.” Other cases have emphasized the importance of using simple Internet searches to find missing witnesses and parties. Simply put, lawyers cannot just stick their heads in the sand when it comes to Internet investigations.

At the same time, lawyers need to be aware of the ethics issues involved with these kinds of investigations, especially when researching opposing parties, witnesses, and jurors. If the information is publicly available, these investigations raise few concerns. But when lawyers want to view information that requires a request for access, such as by “friending” the target of the investigation, a number of potential ethics issues arise under Model Rules 4.1, 4.2, and 4.3. A rapidly growing body of ethics opinions addresses these issues, including a recent ABA Formal Opinion.

**Internet-Based Marketing**

A growing number of lawyers use Internet-based marketing, such as social media (e.g., blogs, Facebook, Twitter, and LinkedIn), pay-per-lead services (paying a third party for each new client lead generated), and pay-per-click tools (e.g., paying Google for clicks taking Internet users to the law firm’s website). Given the increasing prevalence of these tools, lawyers need to understand how to use them properly.
A recent Indiana disciplinary matter illustrates one potential risk. A lawyer with over 40 years of experience and no disciplinary record received a private reprimand for using a pay-per-lead service whose advertisements failed to comply with the Indiana Rules of Professional Conduct. The Indiana Supreme Court concluded that the lawyer should have known about the improper marketing methods and stopped using the company’s services.\(^{15}\) The takeaway message is that lawyers need to understand how these new marketing arrangements operate and cannot ignore how client leads are generated on their behalf.

Even when lawyers take control of their own online marketing, they need to tread carefully. Potential issues include the inadvertent creation of an attorney-client relationship under Rule 1.18, the unauthorized practice of law under Rule 5.5 (when the marketing attracts clients in states where the lawyer is not licensed), and allegations of improper solicitation under Rule 7.3. (Newly adopted comments in Rules 1.18 and 7.3 can help lawyers navigate some of these issues.)

**Leveraging New and Established Legal Technology/Innovation**

Technological competence is not just a disciplinary or malpractice concern. It is becoming essential in a marketplace where clients handle more of their own legal work and use non-traditional legal service providers (i.e., providers other than law firms). To compete, lawyers need to learn how to leverage “New Law” – technology and other innovations that facilitate the delivery of legal services in entirely new ways. Lawyers are also being pressed to make better use of well-established technologies, such as word processing.

Examples of “New Law” include automated document assembly, expert systems (e.g., automated processes that generate legal conclusions after users answer a series of branching questions), knowledge management (e.g., tools that enable lawyers to find information efficiently within a lawyer’s own firm, such as by locating a pre-existing document addressing a legal issue or identifying a lawyer who is already expert in the subject), legal analytics (e.g., using “big data” to help forecast the outcome of cases and determine their settlement value), virtual legal services, and cloud-based law practice management. These kinds of tools can be identified and implemented effectively through the sound application of legal project management and process improvement techniques (which reflect another set of important new competencies). Lawyers are not ethically required to use these tools and skills, at least not yet. But if lawyers want to remain competitive in a rapidly changing marketplace, these competencies are quickly becoming essential.

Clients also have less patience with lawyers who fail to use well-established legal technology appropriately.\(^{16}\) For instance, a corporate counsel at Kia Motors America (Casey Flaherty) has conducted “technology audits” of outside law firms to ensure they make efficient and effective use of available tools, such as word processing and spreadsheets. He has found they do not. On average, tasks that lawyers should have been able to perform in an hour took them five. (Casey Flaherty has partnered with my law school to automate the audit so that it can be used widely throughout the legal industry. I am working closely with Casey on the project.) Lawyers who fail to develop (or maintain) competence when using these established technologies risk alienating both existing and potential clients.
Conclusion
The seemingly minor change to a Comment to Rule 1.1 captures an important shift in thinking about competent twenty-first century lawyering. Technology is playing an ever more important role, and lawyers who fail to keep abreast of new developments face a heightened risk of discipline or malpractice as well as formidable new challenges in an increasingly crowded and competitive legal marketplace.

Endnotes
5. Id. at *2.
8. Id.
9. Id.
Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees

Committee on Codes of Conduct
Judicial Conference of the United States
Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees

Judicial Conference Committee on Codes of Conduct

April 2010
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The latest chapter in the evolution of online activities has involved an explosion in social media—also known as social computing and sometimes referred to as social networking. These diverse online media permit expression and interaction by multiple individual users, and participation in social computing is now a daily fact of life for more than 400 million people. Until recently, most Internet users were mere “consumers” of content; now many are creating their own content and interacting with other users.

For the courts, social media may provide valuable tools. For example, social media have been effectively used for recruiting, learning and employee development, posting benefits information and other announcements, and for information collection, sharing and dissemination. Other Judicial Conference committees are exploring the positive use of social media, e.g., the Judicial Branch Committee’s Ad Hoc Subcommittee on New Media.

Use of social media also raises ethical, security, and privacy concerns for courts and court employees. The ability to communicate immediately with exponential numbers of people—but with limited ability to effectively control or retrieve that communication—has increased traditional concerns regarding employee communications. Unlike other forms of communication, participation in social media offers everyone the opportunity to publish their thoughts; however, not everyone may be judicious about what they publish. User entries on blogs, wikis or any other form of user-generated media can never truly be
erased or deleted. The ability to preserve and replicate an
Internet message or image for many years exacerbates the
potential risks. Due to perceived anonymity, an employee
may engage in conduct online that the employee might
refrain from in person, without understanding that online
communications may be traced to a particular user.
Or the employee may not be fully aware of the ethical
implications of social media given the relative newness of
these online activities.

The Codes of Conduct Committee has designed this
resource packet, in consultation with other Judicial
Conference committees, to help courts and judges
consider whether and how to develop policies and
guidelines for the use of social media by judicial
employees. We encourage courts and judges to
incorporate social media issues into their orientation and
training for judicial employees.

This introduction briefly highlights the major ethics
implications of the use of social media by judicial
employees, and is accompanied by the following
documents:

Part 2. Social Media Primer

Part 3. Considerations for Development of Judicial
Employee Social Media Policies

Part 4. Sample Provisions for Judicial Employee Social
Media Policies; and

Part 5. Examples of Existing Policies.

The Code of Conduct for Judicial Employees applies to
all online activities, including social media. The advent
of social media does not broaden ethical restrictions;
rather, the existing Code extends to the use of social
media. The Committee has addressed ethics inquiries
that suggest that some judicial employees have crossed
or strayed close to the boundaries imposed by these Code requirements, such as referencing pending matters. Although these posts are not widespread, they highlight the importance of emphasizing ethical constraints. The main ethical considerations follow:

- Confidentiality
- Avoiding impropriety in all conduct
- Not lending the prestige of the office
- Not detracting from the dignity of the court or reflecting adversely on the court
- Not demonstrating special access to the court or favoritism
- Not commenting on pending matters
- Remaining within restrictions on fundraising
- Not engaging in prohibited political activity
- Avoiding association with certain social issues that may be litigated or with organizations that frequently litigate

Developing standards will require careful assessment so that guidelines achieve the goals of maintaining ethics and security standards without restricting private employee conduct that does not impinge on the mission of the courts. For example, courts and judges should consider whether different levels of restrictions are appropriate for different types of judicial employees. Concerns regarding the appearance of favoritism, for instance, may be especially high for an employee who works directly with a judge. As another example, only certain employees are prohibited from engaging in both partisan and nonpartisan political activity. Developing guidelines may also require consideration of factors specific to the court or the court’s locale.

The Codes of Conduct Committee (Judge McKeown, Chair, 619-557-5300), and the Committee’s counsel in the Administrative Office (Robert Deyling, 202-502-1100), are available to discuss social media issues and to review draft guidelines or policies.
Social media and social computing refer to the wide array of Internet-based tools and platforms that increase and enhance the sharing of information. The common goal of this media is to maximize user accessibility and self-publication through a variety of different formats. This “primer” briefly describes some major forms of social media.

Social and Professional Networking

Social networking refers to building online communities of people who share interests or activities, or who are interested in exploring the interests and activities of others. These web-based applications allow users to create and edit personal or professional “profiles” that contain information and content that can be viewed by others in electronic networks that the users can create or join. There is a distinction between social networks that offer personal connections and professional networks that market a business or accomplish other business-related goals.

**Examples:**

*Facebook*

Facebook is a social networking website that was originally designed for college students, but is now open to anyone 13 years of age or older. Facebook provides an easy way for people, particularly friends, to keep in touch, and for individuals to have a presence on the web without needing to build a website. Since Facebook makes it easy to upload pictures and videos, nearly anyone can create and publish a customized profile with photos, videos and information about themselves. Friends can browse the profiles of other
friends or any profiles with unrestricted access and write messages on a page known as a “wall” that constitutes a publicly visible threaded discussion. Facebook allows each user to set privacy settings.

LinkedIn
LinkedIn is a business-oriented social networking site used mainly for professional networking. LinkedIn enables people to build, maintain and track professional contacts. It also offers a means of self-promotion, providing users with space to publish their work experience, education, specialties or interests. The site has a “gated-access approach” (where contact with any professional requires either a preexisting relationship or the intervention of a contact of theirs) intended to build trust among the service’s users. One feature allows users to ask questions for the community to answer. Another searchable feature allows users to establish new business relationships by joining alumni, industry, or professional and other relevant groups. LinkedIn groups can be created in any subject and by any member of LinkedIn. Some groups are specialized groups dealing with a narrow domain or industry, whereas others are very broad and generic in nature. LinkedIn is reported to have more than 50 million registered users from over 200 countries around the world, including executives from every Fortune 500 company.

Blogs

A blog, a contraction of the term “weblog,” is a type of website maintained with regular entries of commentary, descriptions of events, or other material such as graphics or video. “Blog” can also be used as a verb, meaning “to maintain or add content to a blog.” Many blogs provide commentary or news on a particular subject; others function as more personal online diaries. A typical blog combines text, images, and links to other blogs, web pages and other media related to its topic. The ability for readers to leave comments in an interactive format is
an important part of many blogs. Entries are commonly displayed through “threaded discussions” in reverse chronological order.

**Micro-blogging (e.g., Twitter)**

Twitter is a micro-blogging application that is more or less a combination of instant messaging and blogging. Twitter has quickly established itself as a popular tool for communicating news, market trends, questions and answers and links with numerous benefits for both business and personal use. Twitter enables its users to send and read messages known as tweets. Tweets are text-based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers, who are known as followers. Senders can restrict delivery to those in their circle of friends or, by default, allow open access.

**Wiki**

A wiki (Hawaiian for “fast”) refers to a website that allows the site users themselves, as opposed to a centralized site manager, to control the content by adding or correcting the text of the site. Most wikis serve a specific purpose, and off-topic material is promptly removed by the user community. Such is the case of the collaborative encyclopedia Wikipedia, http://en.wikipedia.org/wiki/Main_Page.

**Social Bookmarking**

Social bookmarking sites allow users to save and share website bookmarks online instead of saving to a web browser’s favorites list. After joining the site, a user is able to save a bookmark, tag it with a comment, and categorize it. These saved bookmarks can be searched and viewed
by any user; registered users can in turn save, tag and categorize the bookmarks themselves. Any user can also search according to a registered user’s screen name and see all the registered user’s bookmarks. To facilitate browsing, the sites usually include categories of “most viewed,” “recently added,” etc. Delicious and Digg are examples of popular bookmarking sites.

**Video Sharing**

Video sharing sites allow registered users to upload video clips that can be searched, viewed and shared by other users. Registered users are identified by screen names, and other users can search by that screen name to see all of a user’s videos. Users do not need to be registered to view and search videos. YouTube is an example of a video sharing site. Facebook and other social networking sites enable direct sharing of videos posted on video sharing sites.

**Threaded Discussion, Discussion Group and/or Chat Room**

A “threaded discussion” is a running exchange of messages between two or more people in an online discussion group about a particular topic. Using a web or usenet service on the Internet, users can post messages that appear in chronological order or in question-answer order. The exchanges are then typically saved and searchable for later viewing.
Following is a checklist of issues to consider in the process of developing a court or chambers policy governing the use of social media by judicial employees. The list is not intended to be comprehensive or prescriptive, but to provide a starting point for developing a policy. Although these considerations are helpful prompts in thinking about scope and restrictions, the list is not meant to suggest that a policy necessarily should address each of these individual items.

**Definition of Social Media, or Social Computing:**

The range of potential types of social media, or social computing, is virtually without limit. The definition needs to accommodate new forms of online media and to have appropriate coverage of existing media. A court may want to consider whether to exclude activities that are functionally equivalent to other forms of private communication, such as email.

**Scope of Restrictions on the Use of Social Media:**

- Work-related only or including personal activity
- Timing: Whether the policy, or aspects of it, needs to cover a period before or following the judicial employee’s employment by the court
- Anonymous activities
- Professional network listings—such as LinkedIn, educational institutions, bar associations
• Because the range of social media is so broad, any restrictions should take into account whether all online activity should be treated similarly or whether certain activities merit separate treatment. Types of online activity to consider include the following:

• Blogging
• Maintaining a website
• Posting of comments or other text on any website
• Posting of any graphic or multimedia material on any website
• Posting of links to other websites or to materials on any website
• Micro-blogging, e.g., through Twitter
• Taking online surveys
• Posting or transmitting any information on a third-party hosted website (e.g., Facebook, YouTube, a chat room, a blog, or a wiki). Examples include: posting status updates, posting comments to other users’ profile pages, posting videos, taking surveys or playing games for which the results are posted, posting links, sending invitations to events, and sending individual messages to a friend or group of friends
• Developing or collaborating on wikis
• Posting instant messenger status updates
• Podcasting or webcasting of any form
• Engaging in any other online activities that involve postings that can either be viewed by others, or involve input that triggers a post that can be viewed by others

Ethics Concerns:

Does the policy address the primary ethics concerns implicated under the Code of Conduct for Judicial Employees? The five Canons of the Employee Code state:
1. A judicial employee should uphold the integrity and independence of the judiciary and of the judicial employee’s office.
2. A judicial employee should avoid impropriety and the appearance of impropriety in all activities.
3. A judicial employee should adhere to appropriate standards in performing the duties of office.
4. In engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with the disclosure requirements.
5. A judicial employee should refrain from inappropriate political activity.

Following is a list of the key ethics concerns related to employee use of social media. Also included are some concrete illustrative examples. These examples are neither comprehensive nor meant to recommend specific restrictions; they are listed simply to prompt consideration of the connection between particular social media activities and specific ethics concerns.

Confidentiality (Canon 3)
E.g., posting a “status update” on a social networking site that broadly hints at the likely outcome in a pending case; making a comment on a blog that reveals confidential case processing procedures; sending a Tweet that reveals non-public information about the status of jury deliberations

Avoiding impropriety in all conduct (Canons 2 and 4)
E.g., exchanging frequent “wall posts” with a social networking “friend” who is also counsel in a case pending before the court

Not lending prestige of office (Canon 2)
E.g., affiliating oneself on a social networking site as a “fan” of an organization that frequently litigates in court
Not detracting from the dignity of the court or reflecting adversely on the court (Canon 4)
   E.g., posting inappropriate photos or videos on social networking sites

Not demonstrating special access or favoritism (Canons 1 and 2)
   E.g., commenting favorably or unfavorably on a legal blog about the competence of a particular law firm

Not commenting on pending matters (Canon 3)
   E.g., posting a comment on a legal blog that pertains to issues in a pending case, even if the case is not directly mentioned

Fundraising only within limitations (Canon 4)
   E.g., circulating a pledge appeal for a charity walk to all of your social network site “friends,” which includes individuals who practice before your court

Not engaging in partisan political activity (or any political activity, for certain judicial employees) (Canon 5)
   E.g., circulating an online invitation for a partisan political event, even if the employee does not plan to attend him/herself; posting pictures on a social networking profile that affiliate the employee with a political party or a partisan political candidate

For certain judicial employees, avoiding activities that involve controversial issues that may appear before the court or that involve organizations that frequently litigate (Canon 4)
   E.g., circulating an online petition regarding a highly contentious state ballot measure
Application of Policy to Different Categories of Judicial Employees:

The categories of judicial employees in the court, and whether their online activities (or some of those activities) should be treated differently, for example:

- Personal staff and law clerks to judges
- Staff attorneys
- Court executive employees, such as the Clerk of Court or the Chief Pretrial Services Officer
- Court employees who are not executive employees and do not work directly for judges, for example employees in the clerk’s office
- Probation officers and other staff in the probation office

Identification with the Court:

Whether the employee may identify him or herself as employed by a specific court, and, if not, whether the employee may still include a job title (e.g., “federal law clerk” or “federal probation officer”) or any identification with the federal court system; whether identification should be more generic, such as “attorney” or “court clerk”

Disclosure of Certain Activities:

Whether the policy should require disclosure of certain ongoing social media activities for which the employee is the primary participant, for example, maintaining a website or a blog, and, if so, whether any restriction should apply to any type of website or blogs, or only those related to certain topics
Disclosure for Monitoring and Investigation:

Whether the policy will require access to the employee’s social media activities that are not public; when that access would be required (for example, for purposes of investigation following an alert by another employee); how/whether the policy will notify employees of this potential required disclosure

Security Concerns:

How the policy relates and conforms to the court’s practices regarding personal security; for example, does it consider:

- Posting of photos that compromise court security or security of individual judicial officers or employees
- Posting information through social networking that reveals confidential information about a judge or the court, such as a judge’s location at a certain time

Use of Court Facilities and Equipment:

How the policy relates to the Judicial Conference model policy on Personal Use of Government Office Equipment (available at http://jnet.ao.dcn/Information_Technology/Personal_Use_Policy.html) and the court’s policy regarding proper use of court computer equipment and services

Whether the policy will distinguish between activities that the employee performs using court computers or services and activities the employee performs not using court computers or services

Whether use of court computer equipment and services to participate in the activity reveals an identification or association with the court, for example, through a court email address
Potential Exceptions or Flexibility:

Whether the policy will allow for social networking through certain approved websites, for example, professional education websites; professional association websites; or career building websites (e.g., LinkedIn)

Whether the court itself is considering using (or already uses) an online format, such as a Facebook group, to communicate with employees

Whether the court would allow employees to create a closed online group only available to current court employees

Whether certain activities may be permissible when performed not using court computers or services, but not permissible when using court computers or services

Whether certain activities may be permissible if the scope of the potential audience is limited to the judicial employee’s family or close friends and privacy settings are employed

Orientation/Training:

Consider including the issue of social media in employee orientation and periodic training

Educate trainers about the policy so that in any training that touches on computer usage the explanation of the court’s restrictions on social media is consistent
With the advent of social networking, many courts have focused on the online social media activities of judicial employees, and have requested guidance on options to balance court considerations with employees’ personal activities. These sample provisions are not intended as recommended policies or procedures, but simply offer options that courts might use in crafting their own policies or guidelines. They are adaptable for use in individual chambers or for courts generally.

The following listing, which is not meant to be exclusive or exhaustive, serves as a “menu” of sample provisions, arranged according to specific concerns raised by social media. The listing does not include sample provisions related to other issues that may warrant inclusion in a social media policy, for example regarding court security or any potential for disciplinary action resulting from social media activity. The prior part, Considerations for Development of Judicial Employee Social Computing Guidelines, provides a framework for considering adoption of a policy or guidelines. In addition, the examples in the next part of existing social media policies provide useful principles to consider.

**Scope**

- *Long version*: For purposes of these guidelines, social media includes any activity on the Internet that involves posting by the individual employee user, either directly or as the result of individual input that results in a post, for example, blogging; hosting or updating any other form of website;
posting comments to any website; posting photos, other graphics, or multimedia materials; posting documents or links; saving website bookmarks to a public site; filling out surveys; posting status updates, comments, or links; posting materials or links, or sharing or participating in any other way on a social networking site like Facebook; microblogging, for example through Twitter; contributing to a wiki; and so on.

• **Short version:** Social media refers to the wide array of Internet-based tools and platforms that increase and enhance the sharing of information.

• These guidelines do not target messages sent through email or a social networking site directed to individuals or to small groups of personal friends or family members that are not available for viewing by anyone beyond the small number of addressee(s). In all online activities, however, the employee must abide by the restrictions on conduct imposed by the Code of Conduct for Judicial Employees, for example, the obligation of confidentiality.

• The restrictions on identification with the court and work-related postings do not apply to participation in court-related or professional education sites approved in advance or sponsored by the employee’s court.

**Compliance with Code of Conduct for Judicial Employees and Confidentiality Obligations (Canon 3)**

• In all online activities, the employee must abide by the Code of Conduct for Judicial Employees, including the obligation not to reveal any confidential, sensitive or non-public information
obtained through the course of employment by the court. Use of social media is permitted within the restrictions imposed by the social media policy and by the Code.

Common sense and the integrity of the judiciary—
Canons 1 and 2

- Judicial employees are expected to avoid impropriety and conduct themselves in a manner that does not detract from the dignity and independence of the judiciary. These principles extend to social media activities. Common sense counsels discretion in the nature and subject matter of Internet postings.

Identification with the Court (through self-description, use of a court email address, or any other manner); these options highlight that the employee’s identification reflects on the court and may lend the court’s prestige—
Canons 2 and 4

- Least restrictive—ID with federal courts: The judicial employee may identify her/himself as an employee of the federal courts generally, but may not specify which court or judge, e.g., “federal court law clerk,” “federal court clerk’s office,” or “federal court librarian.”

- Generic job title ID: The judicial employee may identify her/himself by a court-related job title, e.g., “law clerk,” “records clerk,” or “case processing manager,” but may not identify the federal court or a specific court or judge as the employer.

- Most restrictive—No ID with courts: The judicial employee may not identify her/himself in any way as employed by or associated with any court.
Work-related Posts–Canons 2 and 3

- **Work-related OK:** The judicial employee may participate in social media related to the law and employment by the court within the restrictions imposed by the Code of Conduct for Judicial Employees, including the obligation to maintain confidentiality.

- **Work-related restricted:** The judicial employee may not participate in any social media directly or indirectly related to the law or the individual’s employment by the court, except as approved by the employee’s supervisor or the court.

Posts Implicating Potential Future Cases–Canons 1 and 4

- For judicial employees who are judge’s personal staff and court executives: The judicial employee should not participate in any social media that relates to a matter likely to result in litigation or to any organization that frequently litigates in court.

Political Posts–Canon 5

- For judicial employees who are not members of the judge’s personal staff or court executives (these employees are permitted to participate in nonpartisan political activities): The judicial employee may not participate in any social media that relates to partisan politics, including political issues, events and politicians.

- For judicial employees who are judge’s personal staff and court executives (these employees may not participate in any political activities): The judicial
employee may not participate in any social media that relates to any political issue, political activity or politician, whether partisan or non-partisan.
The birth and advance of “Web 2.0” technologies and applications in recent years has the potential to revolutionize how individuals, corporations, government agencies, and non-profit organizations interact and communicate with one another. Web 2.0 refers to the second generation of web design and software development, which places heavy emphasis on communication, collaboration, and sharing among Internet users. Unlike the first generation of Internet (Web 1.0), this change is not grounded in major technical transformations; instead, this change is centered, chiefly, on the ways individuals use the Internet. Before Web 2.0, most Internet users were mainly consumers of information; now, these new technologies and applications allow users to be both producers and consumers of information and shift easily between those roles.

For many individuals, Web 2.0 applications (often called “social media”) are central to their daily computer usage. Users connect and communicate through social networking Internet sites; collaborate on, refine, and disseminate knowledge through wikis; share their perspective through blogs and microblogs; upload still and video images through videosharing and photosharing sites; broadcast via podcasts and vodcasts; and stay connected via RSS feeds beamed to email inboxes or displayed on smartphones.

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1 Law Clerks and Interns of this Court are also bound by the First Circuit Judicial Council “Interim Policy--Use of Social Networking Sites by Law Clerks.” They should consult the First Circuit’s policy in addition to this policy.
As Web 2.0 has made communication instantaneous and allowed for greater collaboration and information sharing, there has been some downside. Many users adopting Web 2.0 seem less concerned, or at least mindful, of privacy and confidentiality as they navigate social media sites such as Facebook. Recent news stories illustrate the privacy and confidentiality concerns generated by the expansion of social media Internet usage: employment opportunities lost because of Facebook profiles; scandal precipitated by YouTube or Flickr postings, and judicial proceedings compromised by jurors’ Twitter postings.

The challenges and risks of such social media, though, are particularly acute for government employees who work in positions where discretion and confidentiality are imperative. Court employees work in such an environment. Court personnel are expected to keep sensitive information confidential, exercise discretion to avoid embarrassment to the Court, and take precautions to avoid unnecessary security risks for court personnel, especially the judges they serve.

The Court has set down a series of broad guidelines for employees to follow as they navigate these new, and ever-changing, technologies and applications

1. **Think before you post.** Internet postings—whether they be text, photos, videos, or audio—remain accessible long after they are forgotten by the user. Beyond that, remember that nothing is “private” on the Internet despite people’s best efforts to keep things private. Do not post anything on the Internet that you would not want to read on the front page of the Providence Journal.

2. **Speak for yourself, not your institution.** On social networking sites, many individuals list their occupations and/or places of employment. Considering the sensitive nature of the work that we do, Court employees should carefully evaluate
whether the listing of their place of employment on a social networking website poses a security risk. Also, remember that you are a representative of the Court and should conduct yourself in a way that avoids bringing embarrassment upon yourself and/or the Court. In the age of Facebook, YouTube, and Twitter, many often do not think through the implications of what they post. Users often believe that their postings are private because of a social networking website's privacy features or that their comments are untraceable because they were made under a screen name, but this information may not be private and could cause damage to your reputation and the Court’s if it becomes public. As such, Court employees should abide by a simple rule: if you are not speaking to someone directly or over a secure landline, you must assume that anything you say or write is available for public consumption.

3. **Keep secrets secret.** Make sure to abide by all of the court’s confidentiality and disclosure provisions. Court employees handle confidential and sensitive information and the restrictions that employees normally observe in the performance of their day-to-day duties should also apply to their use of social media. Just as court employees are prohibited from disclosing sensitive, non-public information to the media and general public in person or over the phone, the same applies to social media. Furthermore, Court employees should refrain from discussing any of the Court’s internal processes and procedures, whether they are of a non-confidential or confidential nature.

4. **Remember the Guide.** Any public postings are governed by the Judiciary’s Guide to Policies and Procedures. As Judiciary employees, we are expected to avoid impropriety and conduct
ourselves in a manner that does not detract from the dignity and independence of the judicial system. As such, Judiciary employees are restricted from engaging in partisan political activity and fundraising activities that could compromise judicial independence. Please keep these policies and procedures in mind as you participate on social media sites.

5. **Observe security protocol.** Court employees must also take care to avoid doing things that would compromise the security of the courthouse and personnel. To maintain security, do not post pictures of the courthouse, inside or outside; do not post pictures of court events and do not post pictures of the Court’s judicial officers. Also, be careful when disclosing your place of employment: social media sites are notoriously unsecure environments and knowledge of your place of employment could place employees in situations where pressure could be applied on them to corrupt the integrity of the judicial process.
1. AUTHORITY

This social media and social networking policy applies to all Clerk’s Office employees of the United States District Court, Central District of California, including those employees under its supervision or administration, such as capital habeas staff attorneys, pro se staff attorneys, and court reporters (collectively referred to as the employees). This policy should be read in conjunction with the Code of Conduct for Judicial Employees, the Court’s Employee Manual, the Clerk’s Office Employee Internet Access Agreement, and the Court’s Job Behavior and Conduct Expectations policy (Chapter 3, § 3.07 of the Employee Manual).

This policy is approved and administered by the Clerk of Court. The absence of, or lack of, explicit reference to a specific site does not limit the extent of the application of this policy. Where no policy or guideline exist, employees should use good judgment and take the most prudent action possible. Employees should consult with their manager or supervisor if uncertain.

2. USE OF SOCIAL MEDIA

Social media, professional networking sites, rapid-fire communications, blog sites, and personal web sites are all widespread, relatively new, communication technologies. The rules for use of this social media with respect to Court employment, however, are identical to the rules for use of other communication methods (such as writing or publishing, telephoning, or even conversation).

Many users of social media identify their employer or occupation. An employee clearly identifies association with the Court by using the employee’s court email address to engage in social media or professional social
networking activity. As stated in Section 6, the use of the employee’s court email address to engage in social media or professional social networking activity is prohibited.

Employees must use good judgement and careful discretion about the material or information posted online.

3. PRINCIPLES

The Court’s reputation for impartiality and objectivity is crucial. The public must be able to trust the integrity of the Court. The public needs to be confident that the outside activities of our employees do not undermine the Court’s impartiality or reputation and that the manner in which the Court’s business is conducted is not influenced by any commercial, political, or personal interests.

Do not identify yourself as a Court employee. By identifying oneself as an employee of the United States District Court, a social networker becomes, to some extent, a representative of the Court, and everything he/she posts has the potential to reflect upon the Court and its image. It is acknowledged that without identifying oneself as a Court employee, an employee may intentionally or unintentionally reveal information that will allow the inference of Court employment. If this occurs, the employee assumes the responsibility for representing the Court in a professional manner.

4. RESPONSIBILITY

Any material, including photographs, presented online on a Court employee website, social media, or email or blog, that pertains to the Court by any poster is the responsibility of the Court employee, even if Court employment can only be indirectly inferred or deduced. Personal blogs should not identify Court employment even indirectly; if possible, use your first name only. Do not reference or cite other Court employees without their express consent, and even then, do not identify them as Court employees.
5. RELEVANT TECHNOLOGIES

This policy includes (but is not limited to) the following specific technologies:

- Classmates
- Digg
- Facebook
- Flickr
- LinkedIn
- LiveJournal
- MySpace
- Personal Blogs
- Personal Websites
- Twitter
- Yahoo! Groups
- YouTube

6. RULES

- Use of the court email address for social networking (for example, blogs, Facebook, Twitter) is not permitted. Use of an employee’s court email address is subject to the same appropriate use policies pertaining to the use of the telephone, namely, limited personal use not interfering with the performance of work responsibilities. Email addresses should not be used for “chain” correspondence, solicitation of donations, transmittal of large audio, video or other large files, or any business enterprise.

- The Court policy is not to identify yourself as a court employee at all in social media. While you can control what you post, you cannot predict nor control what others, even family members or friends, might post on your page or in a blog. Their actions, while
harmless in intent, could end up embarrassing you, the Court, or worse yet, put you in some danger.

- Maintain professionalism, honesty, and respect. Consider your online dialogue as subject to the same bounds of civility required at work. Employees must comply with laws covering libel and defamation of character. Even non-Court specific behavior could have ramifications on your employment status (e.g. photographs in compromising or illegal situations).

- Do not discuss your job responsibilities for the Court on the Internet. Be careful to avoid leaking confidential information. Avoid negative commentary regarding the Court. Any commentary you post that could reveal an association with the Court must contain an explicit disclaimer that states: “These are my personal views and not those of my employer.” Again, remember that even harmless remarks could be misconstrued by litigants unfamiliar with court processes (such as pro se litigants).

- Observe security protocol. Employees must take care to avoid doing things that would compromise the security of the courthouse and personnel. To maintain security do not post pictures of the courthouse, inside or outside; do not post pictures of court events; and do not post pictures of the Court’s judicial officers.

- Regularly screen the social media or websites that you participate in to ensure nothing is posted which is contrary to the best interests of the Court. Should such items appear, it is your responsibility to contact your supervisor and then immediately delete the communication or information, even closing down your Facebook page, etc., as necessary.
• Further, if any employee becomes aware of social networking activity of other staff that would be deemed distasteful or fail the good judgment test, please contact your supervisor.

7. PRODUCTIVITY IMPACT

The use of Court assets (computers, Internet access, email, etc.) is intended for purposes relevant to the responsibilities assigned to each employee. Social networking sites are not deemed a requirement for any position, and certain job titles are not permitted to access these services at work. For employees that are allowed to access these services, social media activities should not interfere with work commitments, and must comply with the signed Internet Access Agreement. Unless otherwise authorized by the Judge, employees who work in the courtroom are prohibited from using computers, handheld wireless devices, blue-tooth enabled earpieces and headsets, and other hands-free wireless devices, for non-work related reasons when court is in session or the courtroom is otherwise occupied.

8. COPYRIGHT

Employees must comply with all copyright laws, and reference or cite sources appropriately. Plagiarism applies online as well.

9. TERMS OF SERVICE

Most social networking sites require that users, when they sign up, agree to abide by a Terms of Service document. Court employees are responsible for reading, knowing, and complying with the terms of service of the sites they use. It is not the policy of the Court to require employees to use pseudonyms when signing up for social networking sites; however, for some employees in sensitive positions, this might be wise. Employees should check with the Information Technology Department regarding any
questions about Terms of Service agreements when accessing the Internet at work.

10. OFF LIMITS MATERIAL

This policy sets forth the following items which are deemed off-limits for social networking whether used at Court or after work on personal computers, irrespective of whether Court employment is identified:

Seal and Logos

The United States District Court seal and logos may not be used in any manner.

Politically Sensitive Areas

Employees may not be seen to support any political party or cause. Employees should never indicate a political allegiance on social networking sites, either through profile information or through joining political groups. Employees should not express views for or against any policy which is a matter of current party political debate. Employees should not advocate any particular position on an issue of current public controversy or debate. If an employee is in doubt, they should refer immediately to their supervisor or manager.

The Hatch Act, 5 U.S.C. § 7324 et seq., regulates the participation of government employees, as defined in 5 U.S.C. § 7322(1), in certain types of partisan political activities. Although the Hatch Act is not applicable to the Judicial Branch, the Judicial Conference has adopted similar restrictions. Canon 5 of the Code of Conduct for Judicial Employees prohibits all active engagement in partisan political activities, including, but not limited to, public endorsement of a candidate or contribution to a political campaign. The Code of Conduct should be consulted for a thorough understanding of the specific prohibitions on political activity contained in Canon 5. In
addition, Advisory Opinion No. 92 provides guidelines for political activities.

Confidential Information

One of the most important obligations of employees is to ensure that non-public information learned in the course of employment is kept confidential. Confidential information is strictly forbidden from any discourse outside of the appropriate employees of the Court. Information published on blog(s) must comply with the Court’s confidentiality policies. This also applies to comments posted on other blogs, forums, and social networking sites. Confidential information is not to be discussed or referred to on such sites, even in private messages between site members who have authorized access to the information. Court employees should also refrain from discussing any of the Court’s internal processes and procedures, whether they are of a non-confidential or confidential nature.

Online Recommendations

Some sites, such as LinkedIn, allow members to “recommend” current or former co-workers. If an employee does this as a representative of the Court, it may give the appearance that the Court endorses the individual being recommended. This could create a liability situation if another entity hires the recommended person on the basis of the recommendation. Accordingly, the Court forbids employees to participate in employee recommendations for reasons of liability. All communication of this type should be referred to Human Resources for verification.

11. MONITORING EMPLOYEES’ USE OF SOCIAL MEDIA

The Court reserves the right to monitor its employees’ use of Social Media by monitoring its employees’ Internet activities as set forth in the Clerk’s Office Employee
Internet Access Agreement. The Court further reserves the right to visit and monitor Social Media sites to ensure that employees are not violating our Court’s Social Media Policy via Court or any other computers, including employees’ own personal computers.

12. DISCIPLINARY ACTION

Employees who participate in online communication deemed not to be in the best interest of the Court may be subject to disciplinary action. Inappropriate communication can include, but is not limited to:

- Confidential Court information or data leakage.
- Inaccurate, distasteful, or defamatory commentary about the Court.
- Behavior or communication encouraging behavior that is illegal, grossly unprofessional or in bad taste.

Disciplinary action can include termination or other intervention deemed appropriate by Human Resources. Please refer to the Employee Manual for information on the appeal procedures for disciplinary actions.

13. COURT REPORTER EXCEPTION

Official court reporters have an authorized business reason to establish and maintain websites that identify the Court as their place of employment.
Federal Judicial Center: Social Networking Guidelines

Center staff using or accessing social networking and similar Internet sites (e.g., Facebook, MySpace, LinkedIn, Twitter, blogs) should follow these guidelines.

1. Government time and government equipment are for official use only. Only limited exceptions are permitted: see Chapter 6, section C, of the FJC Personnel Manual at p. 73 (copy attached). Use of social networking sites for official purposes (e.g., research related to your work) is permitted, subject to these guidelines.

2. Even when using social networking services with nongovernment equipment on your own time, you should:

   a. Consider carefully whether identifying yourself as a Center employee (or an employee of the courts or of the U.S. Government) is necessary and appropriate. Whether or not you identify yourself as a Center employee, be aware that others may recognize you as such. So, in all cases, and especially if you have identified yourself as a Center employee:

      (1.) Be careful to avoid a perception that your communications represent the official position of the Center;

      (2.) Be careful to avoid communications that may adversely affect perceptions about the quality and objectivity of your or the Center’s work. (See also permissible political activities at Chapter 1, section M, of the FJC Personnel Manual, at pp. 11-14.)

      (3.) Do not use the Center’s seal, letterhead, or any other distinctive Center insignia.

   b. Not discuss confidential or sensitive information obtained as a result of working at the Center.
c. Protect the security of judges and judiciary employees; do not divulge the dates or locations of Center (or other judicial) programs or meetings; do not post pictures of, or personal information about, judges or judiciary employees without their express consent and do not post pictures of courthouses or other judiciary buildings.

d. Always think before you post. Notwithstanding privacy agreements or promises made by sites, services, or other users, anything posted may be, or may become, widely accessible, and is likely to remain so long after it is posted. Ask yourself, would it now, or will it someday, compromise or embarrass you or others if your post is seen by people beyond the immediate intended recipients?

3. If you have questions about what may be or should not be posted please discuss them with your division or office director or the Center’s deputy director.

Attachment

Chapter 6, section C, of the FJC Personnel Manual at p. 73:

C. Employee Responsibilities: Use of Government Equipment and Services

Center employees may use government equipment and services for authorized purposes only. Limited personal use is permitted provided that such use

• does not interfere with official business;
• occurs when the employee is not expected to be doing agency business;
• involves minimal additional expense to the government; and
• is not illegal, disruptive, offensive, or otherwise inappropriate.

Note, however, that an employee’s personal use of a government credit card or long-distance telephone service is forbidden. The Center makes Internet and email services available to all its employees in order to provide a supportive work environment. When using these services or other automation resources for official or personal purposes, Center employees should have no expectation of privacy, even when use occurs on their own time. Personal use of government-supplied equipment and services is a privilege of employees, not a right, and supervisors may limit employee access to or use of government equipment and services beyond the limits embodied in this policy. You should check with your supervisor before you make use of government equipment or services if you are at all unsure about how this policy might apply to such use.
Sample Law Clerk Policies for an Individual Judge’s Chambers

Sample Policy #1:

The Internet and social networking pose unique challenges for law clerks. Clerks are reminded of their ongoing duty of confidentiality and the importance of keeping all court information confidential until it is officially released by the court. Clerks should use common sense in their online activities during the clerkship. Think before you post and assume that nothing is private. Although clerks may engage in blogging, social networks and other online activity, none of the posts or messages may relate to the law, politics, or work or workplace related information. Finally, clerks should exercise discretion in identifying themselves in any way with the U.S. Courts and should remember that any such identification reflects on the courts and could be interpreted as speaking on behalf of the court.

Sample Policy #2:

No blog activity is permitted during the clerkship, including comments to the posts of others. Although use of Facebook, Twitter, and other Internet sites is permissible, your activity must be restricted. This means no postings, status updates, links, position statements, or messages related to law, politics, or work or workplace related information. Clerks may not identify themselves as an employee of the U.S. Courts or a law clerk on any website, nor should clerks join a U.S. Courts or law clerk network in social or professional networking utilities.