ETHICS IN THE USE OF SOCIAL MEDIA AND TECHNOLOGY

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More than 70% of Americans use social media, with most users visiting these sites as least once a day.[1] Even if you do not use social media sites for personal use, lawyers and their staff must be educated regarding social media. As the use of social media and technology has increased, so has their relevance in civil proceedings. Websites and applications such as Facebook, Twitter and Instagram allow users to post photographs and information about their mood, thoughts, interests and activities. A thorough social media investigation is one of the first steps defense counsel should undertake when notified of a claim. These platforms, if used properly, can be devastating to the other side's case in discovery and at trial.

While these sites are potential gold mines of useful information, there are pitfalls. Even the most seasoned attorneys well-versed in the ethical rules governing the legal profession may struggle in applying these traditional principles to the ever-changing world of social media and technology. Lawyers must adopt best practices for optimizing the use of social media and technology in the courtroom while avoiding the ethical pitfalls.

I. Duty of Competence

Rule 1.1 of the Virginia Rules of Professional Conduct:

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

This Rule tracks the American Bar Association's Model Rule 1.1. In 2012, the ABA added a comment to its Model Rule stating that "[t]o 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."

Therefore, it is not enough for lawyers to keep abreast on new statutes or the latest opinions from the Supreme Court of Virginia; the duty of competence

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[1] https://www.pewinternet.org/fact-sheet/social-media/

also requires lawyers to understand the evolving use of social media and technology in our practices.

NORTH CAROLINA FORMAL ETHICS OPINION 5 (2014)

> ABA Model Rules of Professional Conduct 1.1 and 1.3 suggest that a lawyer must have knowledge of social media and an understanding of how it may impact the client's case, and should advise the client, both before and after the suit is filed, of the legal ramifications of existing posts, future posts, and third-party comments.

What Should Lawyers Know About Social Media? The Basics:

- What are the most popular social media sites?

  Facebook

  Instagram

  Twitter

  LinkedIn

  Pinterest

  YouTube

  Snapchat

  TikTok

- How to search social media sites

  Obtain necessary background information to search effectively

  Search terms and tips

  Begin searching as soon as you receive notice of the claim or lawsuit

  Review and document websites early before a party realizes they need to "go private"

  Re-check websites frequently, as the content may change often

- What to request in discovery

Specific material you should request: profiles, posts, messages (including DMs, forwards and replies), tweets, retweets, comments, status updates, blog entries, videos, and photographs.

> For Facebook, provide instruction to the plaintiff on how download his or her information. Example:
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> > You may download and print your Facebook data by logging on to the Facebook account, selecting "Settings," then selecting "Your Facebook Information," and then selecting "Download Your Information."

Interrogatories and document requests. Examples:

> Identify all online accounts registered to or used by you within the last three (3) years including, but not limited to, any and all e-mail accounts, social media accounts (e.g., Facebook, Twitter, Instagram, LinkedIn, etc.), blogs, instant messaging, or any other online social networking or communication services. Please identify each such account by service provider, user name, account number, and any other identifying information regarding said accounts.
>
> Any and all emails, messages, or other electronic data, including attachments, sent from or to any accounts registered to or used by Plaintiff, from [DATE] until the present, relating in any way to the allegations set forth in the Complaint, the incident and/or your injuries.
>
> Any and all emails, messages or other electronic data, including all computers, laptops, cell phones, smart phones, or any similar electronic devices used by, owned by, or in any way accessible by Plaintiff to gain access to or post any material on any social networking sites or blogs, including but not limited to Facebook, Twitter, Instagram, LinkedIn, etc.

Depositions

Subpoenas

- Limitations on discovery of social media

  Stored Communication Act ("SCA"), 18 U.S.C. § 2701 *et seq.* The SCA generally prohibits a "person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). The SCA further prohibits a "person or entity providing remote computing service to the public" from "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service." 18 U.S.C. § 2702(a)(2). Disclosure in violation of the SCA can expose the record holder to civil liability. *Theofel v Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), *cert denied*, 125 S. Ct. 48 (2004). The SCA does **not** include an exception for civil subpoenas.

  Facebook's position is that the user, not Facebook, is obligated to produce his or her own content, citing *Suzion Energy Ltd. v. Microsoft*, 2011 WL 4537843 at *5 (9th Cir. 2011) ; *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 at *3 m. 3 (M.D. Pa. 2011). Facebook will not comply with out-of-state subpoenas and will not product any content (posts, photos, etc.). It is only required to provide basic subscriber information to a party in a civil matter if the information is indispensable to the case and not within the party's possession. Facebook will not produce the requested information **even if** you have a signed release from the plaintiff. If the user cannot access the account because he or she is disabled or deleted the account, Facebook will, to the extent possible, provide "reasonably available data" to the user. However, it will charge a fee for retrieval of the user's records.

- How to ethically access "private" social media evidence

  Generally, courts will allow discovery of material posted on social networking sites if it is relevant to the litigation and the discovery request is narrowly tailored. A "fishing expedition" is not permitted. To obtain access to private material, most courts require a threshold showing that the material is likely to contain information relevant to the lawsuit. Examples:

  - *Davenport v. State Farm*, 2012 U.S. Dist. LEXIS 20944 (M.D. FL. 2012) (ordered plaintiff to produce any photographs of her taken since the date of the accident and posted to social networking site).

  - *Chauvin v. State Farm*, 2011 U.S. Dist. LEXIS 121600 (E.D. Mich. 2011) (denying request for production of plaintiff's Facebook account

because there was "no indication that granting access . . . would be reasonably calculated to lead to the discovery of admissible information.").

- *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018 (D. Colo. 2009) (denying the plaintiff's request for a protective order regarding social media content).

- *Barnes v. CUS Nashville, LLC*, 2010 WL 2265668, *1 (M.D. Tenn. 2010) (magistrate judge offered to create a Facebook account to "friend" plaintiffs in order to review subpoenaed material).

- Authenticating social media evidence

  Knowing who decides: judge or jury?

  Methods of authentication

- Ethical limitations on use of social media

II. Duty to Preserve Evidence

Rule 3.4(a) of the Virginia Rules of Professional Conduct:

> A lawyer shall not: (a) obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

Lawyers should never participate in the destruction of evidence or advise a client to destroy evidence. This includes deleting relevant information from social media accounts or instructing a client to delete information.

In fact, lawyers have an affirmative duty to preserve any evidence within their possession or control and advise their clients of their duty to preserve evidence. For social media evidence, this includes anything the party has authority or ability to access. The duty to preserve evidence is triggered when a party reasonably foresees that evidence may be relevant and probative to the litigation. When social media evidence is destroyed, the court must determine whether the party knew or should have known that the social media posts were relevant to the case at the time they were deleted. Attorneys must inform their

clients of their duty to preserve evidence. Consequences for failing to preserve evidence may include dismissal of the claim or defense, or an adverse inference instruction.

- Do not direct your client to delete incriminating posts or photos. You may suggest that your client activate the privacy settings his or her account, but you and your client still have an obligation to preserve and produce the material if it is relevant or reasonably calculated to lead to the discovery of admissible evidence.

- *Lester v. Allied Concrete Co.*, Case No. CL09-223 (Va. Cir. Ct. Sep. 1, 2011), *Lester v. Allied Concrete Co.*, Case Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 21, 2011) (sanctioning plaintiff and his attorney for knowingly deleting potentially incriminating photographs on Facebook).

- Facebook profiles are not usually "deleted," only deactivated. Even if a party elects to deactivate his or her profile, Facebook saves all profile information including friend lists, photographs, interests, etc. The user may reactivate the account at any time. To permanently delete a Facebook account, the user must submit an official request to Facebook. Once this request is processed, the page is deleted with no option for recovery.

PHILADELPHIA BAR ETHICS Op. 2014-5 (2014)

A lawyer may instruct a client to change security and privacy settings on social media pages to the highest level of restricted access so long as it is not in violation of a law or court order, but must take steps to see that the information is preserved.

III. Communications with Represented Persons

Rule 4.2 of the Virginia Rules of Professional Conduct:

> 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 by law to do so.

- Do not send a Facebook friend request to an adverse party. This constitutes an indirect *ex parte* communication with a represented party.

- Do not create a "fake" account to send the party a friend request. Do not use any deceptive practices in obtaining information through social networking sites.

  Rule 8.4(c) of the Virginia Rules of Professional Conduct:

  > It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentations which reflects adversely on the lawyer's fitness to practice law; . . . .

- Do not direct someone else to submit a Facebook friend request to the plaintiff for you.

  - You may obtain information concerning the plaintiff's Facebook page through an existing Facebook friend.

N.Y. STATE BAR ASS'N COMM. ON PROF'L ETHICS, OP. 843 (2010)

A lawyer may view and access the other party's social networking sites as long as the party's profile is available to all members of the network and the lawyer neither "friends" the other party nor directs someone else to do so. Do not obtain information under false pretenses. You may not "create" a person to be someone's friend on Facebook to access their private information.

IV. Jury Research

Rule 3.5(a)(1) of the Virginia Rules of Professional Conduct:

> A lawyer shall not: (1) before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law; . . .

Although this varies by venue, many courts will provide the parties with information on potential jurors, including age, race, address and employer.

Depending on the type of case you have, additional information may be helpful to show bias or particular leanings. For example, a juror who posts pictures of her dog on her Facebook page may be someone you want on a jury if you are defending a dog bite case. A juror who "likes" CSI and NCIS on Facebook may be someone who will have certain TV-driven expectations regarding evidence. You can learn about a potential juror's hobbies, interests and political affiliations. However, there are ethical limitations on using social media for jury research.

- Do not send an invite or "friend" request to potential juror.
- Do not create a "fake" account to send to a potential juror
- Do not direct someone else to send an invite or "friend" request to potential juror for you.
- Even an accidental communication with a potential juror (i.e., liking a post; LinkedIn's "Who Viewed My Profile Page") may constitute a violation of the Rules of Professional Conduct.
- You may view a public information and posts on a potential juror's social media profile.
- You must inform the Court and opposing counsel of any information regarding a juror's misconduct or fitness to serve.

Rule 3.5(c) of the Virginia Rules of Professional Conduct:

> A lawyer shall reveal promptly to the court improper conduct by a member of a venire or a juror, or by another toward a venireman or a juror or a member of the juror's family, of which the lawyer has knowledge.

ABA FORMAL OPINION 466

An attorney may passively "look up" jurors on social media but may not attempt to contact them directly.

V. Social Media Use By Attorneys

- You must maintain confidentiality of client information. Do not discuss clients or cases on social media without the client's permission. Do not communicate any confidential information over social media.

  Rule 1.6(a) of the Virginia Rules of Professional Conduct:

  > A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client unless the client consent after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.

- Do not comment on other parties, opposing counsel or judges on social media.

- Do not send an invite or "friend" request to a judge before whom you appear.

  KENTUCKY JUDICIAL ETHICS OPINION JE-119

  > "[A] Kentucky judge or justice's participation in social networking site is permissible, but that judge or justice should be **extremely cautious** that such participate does not otherwise result in violations of the Code of Judicial Conduct." (emphasis in original).

  MASSACHUSETTS COMMITTEE ON JUDICIAL ETHICS OPINION NO. 2011-6

  > "A judge 'friending' attorneys on social networking sites creates the impression that those attorneys are in a social position to influence the judge. Therefore, the Code does not permit you to 'friend' any attorney who may appear before you."

NEW YORK ADVISORY OPINION 13-39

> Holding "that the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal."

FLORIDA ETHICS OPINION NO. 2009-20

> Concluding that "listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonable conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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

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

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

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

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

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

Juror Internet Presence

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

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

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

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

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

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

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

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

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

Trial Management and Jury Instructions

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

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

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

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

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

Reviewing Juror Internet Presence

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

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

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

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

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

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

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

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

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

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

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

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

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

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

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

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

Discovery of Juror Misconduct

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

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

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

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

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

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

11. *Id.* at 66.

12. *Id.* at 87.

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

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

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

Model Rule 3.3(b) reads:

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

Comment [12] to Rule 3.3 provides:

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

ETHICS OPINION 843

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion # 843 (09/10/2010)

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

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

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

QUESTION

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

OPINION

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

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

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)

(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (i.e., that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

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

(76-09)

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

Related Files

Lawyers access to public pages of another partys social networking site for the purpose of gathering information for client in pending litigation. (http://old.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions826900/EO_843.pdf)(PDF File)

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THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2014-5
(July 2014)

I. Introduction

The inquirer requests an opinion concerning the following issues relating to a client's Facebook account[1]:

(1) Whether a lawyer may advise a client to change the privacy settings on a Facebook page so that only the client or the client's "friends" may access the content. This question assumes that all information relevant or discoverable in the client's matter is retained.

(2) Whether a lawyer may instruct a client to remove a photo, link or other content that the lawyer believes is damaging to the client's case from the client's Facebook page.

(3) Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by the client, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.

(4) Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by someone other than the client on the client's Facebook page, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download. For the purposes of this inquiry, we will assume that the request is not overly broad.

It is this Committee's opinion that, subject to the limitations described below[2]:

(1) A lawyer may advise a client to change the privacy settings on the client's Facebook Page.

(2) A lawyer may instruct a client to make information on the social media website "private," but may not not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.

[1] Although the inquiry focuses on Facebook (www.facebook.com), the response applies to all social media or other websites on which individuals or businesses post or otherwise disseminate information to friends, the public and others. The questions raised have been minimally reframed to address social media websites generally.

[2] The analyses for questions 1 and 2, and for questions 3 and 4, are merged into two discussions below.

(3) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a Request for Production or other discovery request.

(4) A lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.

II. Analysis

A. Introduction

"Social media" websites permit users to join online communities where they can share information, ideas, messages, and other content. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, Myspace and others, are designed to permit users to share information about personal and professional activities and interest. As of September 2013, an estimated 73 percent of adults age 18 and over use these sites.[3]

The issues raised by clients' use of social media websites, such as Facebook, raise ethical concerns. This opinion attempts to provide a broad overview of the issues, with the strong recommendation that you examine the Rules carefully and understand that, as social media evolves, so will the ethical issues related to it.

Moreover, the Committee reminds the inquirer that, at its most basic, this inquiry focuses on a party's and an attorney's duty to preserve evidence, and that this duty applies to information regardless of form, *i.e.,* discoverable information may not be concealed or destroyed regardless whether it is in paper, electronic or some other format. As noted by this Committee in Opinion 2000-5, "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like."

B. Relevant Pennsylvania Rules of Professional Conduct

Your inquiry implicates numerous Rules of Professional Conduct, including:

Rule 1.1. Competence

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

[3] http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/

Rule 3.3. Candor Toward the Tribunal

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

Rule 3.4. Fairness to Opposing Party and Counsel

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. Truthfulness in Statements to Others

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

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

C. Discussion

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, and their obligation to preserve information that may be relevant to specific proceedings. 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.

(1.) A lawyer may advise a client to change the privacy settings on the client's Facebook page, but may not instruct or knowingly allow a client to delete/destroy a relevant photo, link, text or other content;

A lawyer may advise a client about the privacy settings of the client's social media website, *i.e.,* a lawyer may counsel a client to restrict access to their social media information. Changing a client's profile to "private" simply restricts access to the content

of the page. While it may be more cumbersome for an opposing party to access the information, changing a client's settings does not violate the Rules of Professional Conduct.

Even though an opposing party may not be able to gain unrestricted access to a client's information after the privacy settings are changed, the opposing party may still obtain the information through discovery or subpoena. For example, in *McMillen v. Hummingbird Speedway, Inc.*[4], the Court of Common Pleas of Jefferson County, Pennsylvania approved 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.*[5], 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 information therein might be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

Conversely, in *McCann v. Harleysville Insurance Co.*[6], a New York court refused to permit 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*[7], Judge Wettick of the Court of Common Pleas of Allegheny County denied a party access to a plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant had not produced any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook profile would merely cause embarrassment, which is prohibited by the rule.

Recently, the Commercial and Federal Litigation Section of the New York State Bar Association released 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.

[4] *McMillen v. Hummingbird Speedway, Inc.*, No. 113 – 2010 CD (Pa.Ct.Com.Pl. Jefferson County 2010)
[5] *Romano v. Steelcase Inc.* (2010 NY Slip Op 20388)
[6] *McCann v. Harleysville Ins. Co. of N.Y.* (2010 NY Slip Op 08181)
[7] *Trail v. Lesko*, No. GD-10-017249 (Pa.Ct.Com.Pl. Allegheny County 2010)

- 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. [8]

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, but must take appropriate action to preserve the information in the event it should prove to be relevant and discoverable.

A lawyer must also be mindful of Rule 3.3(b), which requires the lawyer to take reasonable remedial measures, "including, if necessary, disclosure to the tribunal" if the lawyer learns that a client has destroyed evidence.

In 2013, the Virginia State Bar Disciplinary Board[9] 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 (*see* Rule. 3.3), fairness to opposing counsel (*see* Rule. 3.4), and misconduct (*see* Rule. 8.4). 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.[10]

(2) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a Request for Production, and 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.

In order to comply with a Request for Production of Documents, or any other discovery request, a lawyer must produce any social media content, such as photos and links, posted by the client, including posts that may be unfavorable to the client. Rule 4.1(a) provides that a lawyer shall not knowingly "make a false statement of material fact or law to a third person" while representing a client. When a lawyer provides another party

[8] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted)
[9] *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)
[10] *Lester v. Allied Concrete Co.,* Nos. CL08-150 and CL09-223 (Charlotte, Virginia Circuit Court, October 21, 2011)

with requested material, the lawyer is affirmatively representing that the information is full and complete to the best of his knowledge. If a lawyer purposefully omits information, or directs or countenances a client's destruction or omission of evidence, the lawyer has violated the Rules of Professional Conduct.

Consistent with this conclusion, under Rule 4.1, "a lawyer is required to be truthful when dealing with others on a client's behalf," which includes the obligation to produce relevant information in counsel's possession and to make good faith efforts to obtain any other relevant information from the client. Thus, if a lawyer knows or has a reasonable belief that a client possesses relevant information, the lawyer must make reasonable efforts to obtain it. The lawyer is not obligated, however, to obtain information that was neither in counsel's possession nor in the client's possession.

In addition, Rule 8.4(c) states that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Providing an opposing party with incomplete information, without so noting, violates the Rules of Professional Conduct and the lawyer's obligations under various Rules of Procedure. Under the facts presented, the lawyer must produce all of the requested photographs and other information from Facebook, regardless whether it was favorable to the client.

Finally, a lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware *if the lawyer knows or reasonably believes it has not been produced by the client*. If the items were never in the possession of either the client or counsel, and were instead under the control of a third party, then the Rules do not require the attorney to take affirmative steps to obtain the requested information. Once, and if, the information comes into counsel's possession, then the obligation to preserve and produce arises.

III. Conclusion

When dealing with a client's use of social media, the Rules apply to electronic information in the same way that they apply to other forms of information. However, because social media websites change frequently, certain unique situations arise. A lawyer may advise a client about how to manage the content of the client's social media account, including the account's privacy settings. However, a lawyer may not advise a client to delete or destroy any information that has potential evidentiary value. Finally, in order to comply with a Request for Production of Documents, a lawyer must provide all information that the client has posted if the lawyer is aware that the information exists.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

2014 Formal Ethics Opinion 5

July 25, 2014

Advising a Civil Litigation Client about Social Media

Opinion rules a lawyer must advise a client about information on social media if information and postings on social media are relevant and material to the client's representation. The lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.

Facts:

A client has a legal matter that will probably be litigated although a law suit has not been filed. The client's postings and other information on a social media website (referred to collectively as "postings") could be used to impeach the client or are otherwise relevant to the issues in the law suit.

Inquiry #1:

Prior to filing a law suit, may the lawyer give the client advice about the legal implications of postings on social media websites and coach the client on what should and should not be shared on social media? May the lawyer give the same advice after a law suit is filed?

Opinion #1:

Yes. Lawyers must provide competent and diligent representation to clients. Rule 1.1 and Rule 1.3. To the extent relevant and material to a client's legal matter, competent representation includes knowledge of social media and an understanding of how it will impact the client's case including the client's credibility. If a client's postings on social media might impact the client's legal matter, the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments. Advice should be given before and after the law suit is filed.

Inquiry #2:

May the lawyer instruct the client to remove existing postings on social media? After a law suit is filed, may the lawyer give the client such advice?

Opinion #2:

No, in general, relevant social media postings must be preserved.

The New York State Bar opined that a lawyer may advise a client about posting on a social media website and may review and discuss the client's posts, including what posts may be removed, if the lawyer complies with the rules and law on preservation and spoliation of evidence. NY State Bar, Ethics Op. 745 (2013). We agree.

A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent. Rule 1.2(d). The lawyer therefore should examine the law on spoliation[1] and obstruction of justice and determine whether removing existing postings would be a violation of the law.

If removing postings does not constitute spoliation and is not otherwise illegal or a violation of a court order, the lawyer may instruct the client to remove existing postings on social media. If the lawyer advises the client to take down postings on social media, where there is a potential that destruction of the postings would constitute spoliation, the lawyer must also advise the client to preserve the postings by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology, including web-based technology, used to save documents, audio, and video. The lawyer may also take possession of the material for purposes of preserving the same. Advice should be given before and after the law suit is filed.

Inquiry #3:

May the lawyer instruct the client to change the security and privacy settings on social media pages to the highest level of restricted access? May the lawyer give the same advice after a law suit is filed?

Opinion #3:

Yes, if such advice is not a violation of law or a court order. Advice should be given before and after the law suit is filed.

Endnote

1. *Black's Law Dictionary* defines spoliation as the intentional concealment, destruction, alteration, or mutilation of evidence, usually documents, thereby making them unusable or invalid. The doctrine of spoliation of evidence holds that when "a party fails to introduce in evidence documents that are relevant to the matter in question and within his control...there is a presumption, or at least an inference, that the evidence withheld, if forthcoming, would injure his case." *Jones v. GMRI, Inc.*, 144 NC App. 558, 565, 551 S.E.2d 867, 872(2001) (quoting *Yarborough v. Hughes*, 139 NC 199, 209, 51 S.E. 904, 907-08 (1905)).

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