



**SOCIAL MEDIA ETHICS GUIDELINES**

OF THE

**COMMERCIAL AND FEDERAL LITIGATION SECTION**

OF THE

**NEW YORK STATE BAR ASSOCIATION**

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

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

PREPARED BY  
THE SOCIAL MEDIA COMMITTEE OF  
THE COMMERCIAL AND FEDERAL LITIGATION SECTION

*CO-CHAIRS*

Mark A. Berman  
Ganfer & Shore, LLP

Ignatius A. Grande  
Hughes Hubbard & Reed LLP

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Farrell Fritz, PC

*TWITTER ACCOUNT MANAGER*

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*LAW SCHOOL INTERN*  
Zahava Moedler

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## INTRODUCTION

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

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

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

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

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

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

<sup>2</sup> <https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>

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

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

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

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

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

## 1. ATTORNEY COMPETENCE

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

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

NYRPC 1.1(a) and (b).

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

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

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

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

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<sup>4</sup> [American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-466 \(2014\).](#)

<sup>5</sup> Competence may require understanding the often lengthy and unclear “terms of service” of a social media platform and whether the platform’s features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such social media platform actually functions.

<sup>5</sup> [Ass’n of the Bar of the City of New York Comm. on Prof’l and Jud. Ethics \(“NYCBA”\), Formal Op. 2012-2 \(2012\).](#)

<sup>6</sup> [Id.](#)

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

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

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

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

## 2. ATTORNEY ADVERTISING

### Guideline No. 2.A: Applicability of Advertising Rules

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

NYRPC 1.0, 7.1, 7.3.

*Comment:* In the case of a lawyer’s profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.

The nature of the information posted on a lawyer’s LinkedIn profile may require that the profile be deemed “attorney advertising.” In general, a profile that contains basic biographical information, such as “only one’s education and a list of one’s current and past employment” does not constitute attorney advertising.<sup>10</sup> According to [NYCLA, Formal Op. 748](#), a lawyer’s LinkedIn profile that “includes subjective statements regarding an attorney’s skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising.”<sup>11</sup>

[NYCLA, Formal Op. 748](#) addresses the types of content on LinkedIn that may be considered “attorney advertising” and provides:

[i]f an attorney’s LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words “Attorney Advertising” on the lawyer’s LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer’s services with the services of other

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

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

<sup>10</sup> [New York County Lawyers’ Association \(“NYCLA”\), Formal Op. 748 \(2015\)](#).

<sup>11</sup> [Id.](#)



lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer’s or law firm’s services, the attorney should also include the disclaimer “Prior results do not guarantee a similar outcome.” *See* RPC 7.1(d) and (e). Because the rules contemplate “testimonials or endorsements,” attorneys who allow “Endorsements” from other users and “Recommendations” to appear on one’s profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).<sup>12</sup> 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).<sup>13</sup>

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

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

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

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<sup>12</sup> [NYRPC 7.1\(e\)\(3\)](#) provides: “[p]rior results do not guarantee a similar outcome”.

<sup>13</sup> [NYCLA, Formal Op. 748.](#)

<sup>14</sup> [New York State Bar Ass’n Comm. on Prof’l Ethics \(“NYSBA”\), Op. 1009 \(2014\).](#)

<sup>15</sup> [NYSBA, Op. 1009.](#)

<sup>16</sup> [Id.](#)

presences, and any attachments or links related thereto.”<sup>17</sup> Thus, social media posts that are deemed “advertisements,” are “computer-accessed communications, and their retention is required only for one year.”<sup>18</sup>

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

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

**Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms “specialist,” unless the lawyer is certified by the appropriate accrediting body in the particular area.**<sup>19</sup>

NYRPC 7.1, 7.4.

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

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

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<sup>17</sup> [Id.](#)

<sup>18</sup> [Id.](#)

<sup>19</sup> [See NYSBA, Op. 972 \(2013\).](#)

<sup>20</sup> [See also Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2012-8](#) (2012) (citing Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 85-170 (1985)).

<sup>21</sup> [NYCLA, Formal Op. 748.](#)

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

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

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

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

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

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<sup>22</sup> See [NYRPC Rule 7.4](#).

<sup>23</sup> See also [Fl. Bar Standing Comm. on Advertising, Guidelines for Networking Sites](#) (revised Apr. 16, 2013).

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

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

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

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

<sup>26</sup> [NYCLA, Formal Op. 748.](#)

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

### **3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA**

#### **Guideline No. 3.A: Provision of General Information**

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

#### **Guideline No. 3.B: Public Solicitation is Prohibited through “Live” Communications**

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

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

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

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

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

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

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

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

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

<sup>32</sup> Whether a Twitter or Reddit communication is a “real-time or interactive” computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See [NYSBA, Op. 1009](#) and page 7 *supra*.

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

<sup>34</sup> See [NYSBA, Op. 899](#).

<sup>35</sup> See *id.*

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

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

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

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

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

NYRPC 1.1, 1.15.

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

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<sup>37</sup> Id.

<sup>38</sup> See id.

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

<sup>40</sup> Id.

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

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

[NYCBA, Formal Op. 2008-1](#) sets out certain considerations for preserving electronic materials:

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

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to

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<sup>41</sup> See [NYCBA, Formal Op. 2008-1 \(2008\)](#).

<sup>42</sup> Id.

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

<sup>44</sup> Id.



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

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

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

#### **4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA**

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

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

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

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

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<sup>46</sup> See [NYSBA, Op. 843 \(2010\)](#).

<sup>47</sup> See [NYCLA, Formal Op. 743](#) ; [NYCBA, Formal Op. 2012-2](#).

<sup>48</sup> See [American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-466](#).

<sup>49</sup> One network that sends automatic notifications that someone has viewed one’s profile is LinkedIn.

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

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

NYRPC 4.1, 4.3, 8.4.

*Comment:* It is permissible for a lawyer to join a social media network to obtain information concerning a witness.<sup>51</sup> The New York City Bar Association has opined, however, that a lawyer shall not “friend” an unrepresented individual using “deception.”<sup>52</sup>

In New York, there is no “deception” when a lawyer utilizes her “real name and profile” to send a “friend” request to obtain information from an unrepresented person’s social media account.<sup>53</sup> In New York, the lawyer is **not** required to disclose the reasons for making the “friend” request.<sup>54</sup>

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

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

<sup>51</sup> [See also N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\).](#)

<sup>52</sup> [NYCBA, Formal Op. 2010-2 \(2010\).](#)

<sup>53</sup> [Id.](#)

<sup>54</sup> [See id.](#)

<sup>55</sup> [N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05.](#)

<sup>56</sup> [Massachusetts Bar Ass’n. Comm. on Prof Ethics Op. 2014-5 \(2014\).](#)

<sup>57</sup> [San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2 \(2011\).](#)

the “intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness” constitutes an impermissible omission of a “highly material fact.”<sup>58</sup>

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

#### **Guideline No. 4.C: Viewing a Represented Party’s Restricted Social Media Website**

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

NYRPC 4.1, 4.2.

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

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

The Oregon State Bar Committee has noted that “[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible.”<sup>60</sup>

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

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<sup>58</sup> [Phila. Bar Ass’n Prof’l Guidance Comm., Op. Bar 2009-2 \(2009\).](#)

<sup>59</sup> [Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 \(2013\).](#)

<sup>60</sup> [Id. See San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2.](#)

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

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

NYRPC 5.3, 8.4.

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

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<sup>61</sup> See [NYCBA, Formal Op. 2010-2 \(2010\)](#).

<sup>62</sup> See also [N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05](#).

## 5. COMMUNICATING WITH CLIENTS

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

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

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

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

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

<sup>64</sup> [NYCLA, Formal Op. 745 \(2013\)](#). See [Philadelphia Bar Ass’n, Guidance Comm. Op. 2014-5 \(2014\)](#).

<sup>65</sup> [VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 \(1st Dep’t 2012\)](#).

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

<sup>67</sup> [NYCLA, Formal Op. 745](#).

social media is appropriately preserved in the proper format and such is not a violation of law or a court order.<sup>68</sup>

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

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

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

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

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

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<sup>68</sup> [North Carolina State Bar 2014 Formal Ethics Op. 5 \(2014\); Phila. Bar Ass’n Guidance Comm. Op. 2014-5 \(2014\); Florida Bar Professional Ethics Committee, Proposed Advisory Opinion 14-1 \(Jan. 23, 2015\)](#)

<sup>69</sup> [NYCLA, Formal Op. 745.](#)

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

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

### **Guideline No. 5.C: False Social Media Statements**

**A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client’s social media posting that a client’s lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.<sup>71</sup>**

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

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

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

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

NYRPC 4.2.

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

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<sup>71</sup> [NYCLA, Formal Op. 745.](#)

<sup>72</sup> [NYRPC 3.1\(a\).](#)

<sup>73</sup> [NYRPC 3.1\(b\)\(3\).](#)

<sup>74</sup> [NYCBA, Formal Op. 2002-3 \(2002\).](#)

<sup>75</sup> [Id.](#)



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

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

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

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

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

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<sup>76</sup> [N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

<sup>77</sup> [Id.](#)

<sup>78</sup> [ABA, Formal Op. 11-461 \(2011\)](#).

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

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

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

NYRPC 1.6, 1.9(c).

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

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<sup>79</sup> [NYRPC 1.6](#).

<sup>80</sup> Comment 17 to [NYRPC Rule 1.6](#) provides:

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

<sup>81</sup> [NYSBA Op. 1032 \(2014\)](#).

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

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

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<sup>82</sup> [NYSBA, Opinion 1032.](#)

<sup>83</sup> See Michmerhuizen, Susan “[Client reviews: Your Thumbs Down May Come Back Around.](#)”*Americanbar.org*. Your ABA, September 2014. Web. 3 March 2015.

<sup>84</sup> [Pennsylvania Bar Association Ethics Committee, Formal Op. 2014-300.](#)

<sup>85</sup> [Pennsylvania Bar Association Ethics Committee Opinion 2014-200.](#)

## 6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* “Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”<sup>86</sup>

The ABA issued [Formal Opinion 466](#) noting that “[u]nless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial.”<sup>87</sup> There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice.”<sup>88</sup> However, Opinion 466 does not address “whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors.”<sup>89</sup>

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<sup>86</sup> See [NYCBA Formal Op. 2012-2 \(2012\)](#).

<sup>87</sup> See [American Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-466](#).

<sup>88</sup> Id.

<sup>89</sup> Id.

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* Lawyers need “always use caution when conducting [jury] research” to ensure that no communication with the prospective or sitting jury takes place.<sup>91</sup>

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

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

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

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<sup>90</sup> See [NYCLA, Formal Op. 743 \(2011\)](#); [NYCBA, Formal Op. 2012-2](#); see also [Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 \(2013\)](#).

<sup>91</sup> [Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, 85 N.Y. St. B.A.J. 50 \(2013\)](#).

<sup>92</sup> See [ABA, Formal Op. 14-466](#).

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> See [ABA Formal Op. 14-466](#).

juror's street and telling the juror that the lawyer had been seen driving down the street."<sup>96</sup>

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

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

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

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

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

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

<sup>98</sup> Id.

<sup>99</sup> Id.

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

<sup>101</sup> See [NYCBA, Formal Op. 2012-2](#) and [NYCLA, Formal Op. 743](#).

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

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

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

**Guideline No. 6.D: Juror Contact During Trial**

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

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

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<sup>103</sup> See Id.

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

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

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

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

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

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

<sup>105</sup> See [NYCBA, Formal Op. 2012-2](#).

<sup>106</sup> See Richard Vanderford, "[LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial](#)," Law360 (Sept. 27, 2013).

<sup>107</sup> Id.

<sup>108</sup> [ABA, Formal Op. 14-466](#).



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

**In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror’s social media profile or posts, or otherwise, she must promptly bring it to the court’s attention.**<sup>109</sup>

NYRPC 3.5, 8.4.

*Comments:* An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, [ABA, Formal Op. 466](#) pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, “including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding.”<sup>110</sup>

New York, however, provides that “a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge.”<sup>111</sup> If a lawyer learns of “juror misconduct” due to social media research, he or she “must” promptly notify the court.<sup>112</sup> “Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.”<sup>113</sup>

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<sup>109</sup> See [NYCLA, Op. 743](#); [NYCBA, Op. 2012-2](#).

<sup>110</sup> See [ABA, Formal Op. 14-466](#).

<sup>111</sup> [NYRPC 3.5\(d\)](#).

<sup>112</sup> [NYCBA, Op. 2012-2](#).

<sup>113</sup> *Id.* See [Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300](#) (“a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.”).

## 7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

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

NYRPC 3.5, 8.2 and 8.4.

*Comment:* There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should not be surprised that any such communication is fraught with peril as the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether retweeting a judge's own tweets would be improper.

A lawyer may communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"<sup>114</sup> which is consistent with [NYRPC 3.5\(a\)\(1\)](#) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."<sup>115</sup>

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

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

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<sup>114</sup> [Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300.](#)

<sup>115</sup> [NYRPC 3.5\(a\)\(1\).](#)

<sup>116</sup> [New York Advisory Committee on Judicial Ethics Opinion 08-176](#)

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

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

## APPENDIX

### DEFINITIONS

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

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

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

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

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

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