



**SOCIAL MEDIA ETHICS GUIDELINES**

**OF THE**

**COMMERCIAL AND FEDERAL LITIGATION SECTION**

**OF THE**

**NEW YORK STATE BAR ASSOCIATION**

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

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## INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

## 1. ATTORNEY COMPETENCE

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

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

NYRPC 1.1(a) and (b).

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

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

Maintaining this level of understanding is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association (“ABA”) Formal Op. 466 (2014)<sup>6</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>7</sup>

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

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

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

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

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

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

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

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

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

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

9 [NYCBA, Formal Op. 2012-2](#).

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

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



applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.<sup>12</sup>

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

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

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

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12 NYRPC 1.1 cmt. 8.

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

14 [New York Cty. Lawyers Ass’n Prof’l Ethics Comm., Formal Op. 749 \(2017\)](#).

15 *Id.*

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

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

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

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

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

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

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

New York has not adopted the ABA’s revisions to advertising and solicitation rules. Rather, New York legal ethics opinions have focused on whether a statement, in any medium, is an “advertisement”<sup>20</sup> under the applicable

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

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

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

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

New York rules and thus must comply with requirements such as labeling and retention. For example, one New York ethics opinion states that the nature of the information posted on a lawyer’s LinkedIn profile may require that the profile be deemed “attorney advertising.” In general, a profile that contains basic biographical information, such as “only one’s education and a list of one’s current and past employment” does not constitute attorney advertising.<sup>21</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>22</sup>

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

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

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

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21 [New York County Lawyers’ Association \(“NYCLA”\), Formal Op. 748 \(2015\); see also Andrew Strickler, Many Atty LinkedIn Profiles Don’t Count as Ads, NYC Bar Says, LAW360 \(Jan. 5, 2016\)](#)

22 [NYCLA, Formal Op. 748 \(2015\)](#).

23 *Id.*

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

25 [NYCLA, Formal Op. 748](#).

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

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

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

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

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

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

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26 [NYCBA, Formal Op. 2015-7 \(2015\)](#).

27 NYRPC 7.1(k).

28 NYRPC 1.0(c).

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

deemed attorney advertising, the rules require that a lawyer include disclaimers similar to those described in NYCLA Formal Op. 748.<sup>30</sup>

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

Rule 7.1(k) of the NYRPC provides that all advertisements “shall be pre-approved by the lawyer or law firm.” It requires that a copy of an advertisement “shall be retained for a period of not less than three years following its initial dissemination,” but specifies a one-year retention period for advertisements contained in a “computer-accessed communication” and yet another retention scheme for websites.<sup>32</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 presences, and any attachments or links related thereto.”<sup>33</sup> Thus, social media posts that are deemed “advertisements,” are “computer-accessed communications, and their retention is required only for one year.”<sup>34</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. This would depend on whether they are broadly distributed and/or whether the communications are more akin to asynchronous email or website postings or in functionality closer to prohibited instant messaging or chat rooms involving “real-time” or “live” responses. Practitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially “live” or real-time tools.

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30 [NYSBA Comm. on Prof'l Ethics \(“NYSBA”\), Op. 1009 \(2014\).](#)

31 [NYSBA, Op. 1009.](#)

32 *Id.*

33 *Id.*

34 *Id.*

## **Guideline No. 2.B: Prohibited Use of Term “Specialists” on Social Media**

**Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms “specialist,” unless the lawyer is certified by the appropriate accrediting body in the particular area.<sup>35</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.<sup>36</sup> To avoid making prohibited statements about a lawyer’s qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey the lawyer’s experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.<sup>37</sup>

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

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

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35 See [NYSBA, Op. 972 \(2013\)](#).

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

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

38 [NYCLA, Formal Op. 748](#).

39 See [NYRPC 7.4](#).

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

A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.<sup>40</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 may wish to ask that person to remove it.<sup>41</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 his agent, a lawyer’s obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer’s social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than traditional forms of communication to which the ethics rules apply, these rules apply with the same force and effect to social media postings.

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

41 See [NYCLA, Formal Op. 748](#); see also [Phila. Bar Assn. Prof’l Guidance Comm., Op. 2012-8](#); [Va. State Bar, Quick Facts about Legal Ethics and Social Networking](#).

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

*Comment:* Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must monitor and verify that posts about them made to profiles they control<sup>42</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>43</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>44</sup> Certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

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

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

43 [NYCLA, Formal Op. 748](#).

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



response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct.”<sup>45</sup>

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

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

NYRPC 1.7, 1.8.

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

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

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

46 [D.C. Bar Ethics Op. 370](#).

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

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

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

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

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

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

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

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

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

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

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

**whether the communication is electronic or in some other format.<sup>51</sup> Emails and attorney communications via a website or over social media platforms, such as Twitter,<sup>52</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.<sup>53</sup>**

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

*Comment:* Answering general questions<sup>54</sup> on the Internet is analogous to writing for any publication on a legal topic.<sup>55</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>56</sup> In responding to questions,<sup>57</sup> a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.<sup>58</sup>

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

52 Whether a Twitter or Reddit communication is a “real-time or interactive” computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See [NYSBA, Op. 1009](#).

53 NYRPC 7.3(a)(1).

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

55 See [NYSBA, Op. 899](#).

56 See *id.*

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

58 *Id.*

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

A lawyer is permitted to accept employment that results from participating in “activities designed to educate the public to recognize legal problems.”<sup>60</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>61</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>62</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

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

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

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

62 *Id.*

representation ....”<sup>63</sup> NYRPC 1.0(x), the definition of “writing,” was expanded in late 2016 to specifically include a range of electronic communications.<sup>64</sup>

The NYRPC “does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation.”<sup>65</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, which the lawyer believes need to be saved.<sup>66</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>67</sup> Casual communications may be deleted without impacting ethical rules.<sup>68</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

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63 NYRPC 1.0(n), Terminology.

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

65 See [NYCBA, Formal Op. 2008-1 \(2008\)](#).

66 *Id.*

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

68 *Id.*

electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.<sup>69</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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69 [Formal Op. 623](#) states that “all documents belonging to the lawyer may be destroyed without consultation or notice to the client in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents” and that “[a]bsent a legal requirement or extraordinary circumstances, the lawyer’s only obligation with respect to such documents is to preserve confidentiality.” [NYSBA, Op. 623 \(1991\)](#).

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

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

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

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

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

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

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

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

71 See [NYSBA, Op. 843 \(2010\)](#); see also [Colo. Bar Ass’n Ethics Comm., Formal Op. 127 \(2015\)](#); [Me. Prof’l Ethics Comm’n, Op. 217 \(2017\)](#).

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

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



NYRPC 4.1, 4.3, 8.4.

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

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

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

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

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

75 [NYCBA, Formal Op. 2010-02 \(2010\)](#).

76 [Tex. State Bar, Op. 671, \(2018\)](#).

77 [NYCBA, Formal Op. 2010-02](#).

78 *See id.*

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

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

81 [Phila. Bar Ass’n Prof’l Guidance Comm., Op. Bar 2009-2 \(2009\)](#); *see* [Me. Prof’l Ethics Comm’n, Op. 217](#).

has some other reason to believe that the person misunderstands her role, [the  
]lawyer must provide the additional information or withdraw the request.”<sup>82</sup>

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

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

NYRPC 4.1, 4.2.

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

The Oregon State Bar Committee has noted that “[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible.”<sup>83</sup>

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

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

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

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

83 *Id.*; see also [San Diego Cty. Bar Ass’n Legal Ethics Comm., Op. 2011-2](#).

84 See [NYCBA, Formal Op. 2012-2](#); [NYCLA, Formal Op. 743 \(2011\)](#).

and the lawyer is not involved.<sup>85</sup> This view has also been adopted by the District of Columbia and Colorado Bar Associations.<sup>86</sup>

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

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

NYRPC 5.3, 8.4.

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

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85 See [ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 \(2014\)](#).

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

87 See [NYCBA, Formal Op. 2010-02](#).

88 See [N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05](#).

## 5. COMMUNICATING WITH CLIENTS

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

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

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

*Comment:* A lawyer must ensure that potentially relevant information is not destroyed “once a party reasonably anticipates litigation”<sup>92</sup> or where preservation is required by common law, statute, rule, regulation or other requirement. Failure to do so may result in sanctions or other penalties. “[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,<sup>93</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>94</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 litigation has commenced, as long as

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89 “Content” may, as appropriate, include metadata.

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

91 [NYCLA, Formal Op. 745 \(2013\)](#); *see also* [Phila. Bar Ass’n. Guidance Comm. Op. 2014-5 \(2014\)](#).

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

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

94 [NYCLA, Formal Op. 745](#).

social media is appropriately preserved in the proper format and such is not a violation of law or a court order.<sup>95</sup>

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

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

**A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim.”<sup>96</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 social media in advance of posting<sup>97</sup> and guide the client, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may, for example, counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the posts may be perceived; and discuss how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client that social media content or data that the client considers highly private or personal, even if not shared with other social media users, may be reviewed by opposing parties, judges and others due to court order, compulsory process, government searches, data breach, sharing by others or unethical conduct. A

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

96 [NYCLA, Formal Op. 745](#).

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

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

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

**Guideline No. 5.C: 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 and if proper inquiry of the client does not negate that conclusion.**<sup>98</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>99</sup> Frivolous conduct includes the knowing assertion of “material factual statements that are false.”<sup>100</sup>

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

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

NYRPC 4.2.

*Comment:* One party may always seek to communicate with another party. Where a “client conceives the idea to communicate with a represented party,” a lawyer is not precluded “from advising the client concerning the substance of the communication” and the “lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.”<sup>101</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>102</sup>

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98 See [NYCLA, Formal Op. 745](#).

99 NYRPC 3.1(a).

100 NYRPC 3.1(b)(3).

101 [NYCBA, Formal Op. 2002-3 \(2002\)](#).

102 *Id.*

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

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

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

A New Hampshire opinion states that a lawyer’s client may, for instance, send a friend request or request to follow a private Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety “depends on the extent to which the lawyer directs the client who is sending the [social media] request,” and whether the lawyer has complied with all other ethical obligations.<sup>103</sup> In addition, the client’s profile needs to “reasonably reveal[] the client’s identity” to the other person.<sup>104</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>105</sup>

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

104 *Id.*

105 [ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-461 \(2011\).](#)

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

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

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

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

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106 [ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 480 \(2018\)](#).

107 *See* NYRPC 1.6.

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

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

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

NYSBA Comment 16 to NYRPC 1.6 provides:

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



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

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

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

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

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

Comment 17 further provides:

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

110 [L.A. Cnty Bar Ass’n Prof’l Responsibility and Ethics Comm., Op. No. 529 \(2017\)](#).

former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer “may reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct.”<sup>111</sup> NYSBA Ethics Opinion 1032 indicates that the self-defense exception applies to “claims” and “charges” in formal proceedings or a “material threat of a proceeding,” which “typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction” but not to a “negative web posting.”<sup>112</sup> As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on platforms such as Avvo, Yelp or Facebook.<sup>113</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>114</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>115</sup>

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

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

112 *Id.*

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

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

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

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

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

## 6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* “Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”<sup>116</sup> At this juncture, it is “not only permissible for trial counsel to conduct Internet research on prospective jurors, but [] it may even be expected.”<sup>117</sup>

The ABA issued [Formal Op. 466](#) noting that “[u]nless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial.”<sup>118</sup> “There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice.”<sup>119</sup> Opinion 466, however, does not address “whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors.”<sup>120</sup>

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116 [NYCBA, Formal Op. 2012-2 \(2012\)](#).

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

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

119 *Id.*

120 *Id.*

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

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

NYRPC 1.1, 3.5, 4.1, 5.3, 8.4.

*Comment:* Lawyers need to “always use caution when conducting [jury] research” to ensure that no communication with the prospective or sitting jury takes place.<sup>122</sup>

“Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper *ex parte* communication.”<sup>123</sup> 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>124</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>125</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.<sup>126</sup> New York ethics opinions also draw a distinction between public and private juror information.<sup>127</sup> They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic

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

122 See [Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, 85 N.Y. St. B.A.J. 50 \(2013\)](#).

123 [Colo. Bar Ass’n Ethics Comm., Formal Op. 127](#).

124 See [ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466](#).

125 *Id.*

126 [NYCLA, Formal Op. 743](#); [NYCBA, Formal Op. 2012-2 \(2012\)](#).

127 *Id.*

message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).<sup>128</sup>

In contrast to the above New York opinions, [ABA Formal Op. 466](#), opined that “[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when an [electronic social media (“ESM”)] network setting notifies the juror of such review does *not* constitute a communication from the lawyer in violation” of the Rules of Professional Conduct.<sup>129</sup> The ABA concluded that, as a general rule, an automatic notification represents a communication between the juror and a given ESM platform, instead of an impermissible communication between the juror and the attorney. The Colorado Bar Association and DC Bar have since adopted the ABA’s position, i.e., “such notification does not constitute a communication between the lawyer and the juror or prospective juror” as opposed to a “friend” request, which would be impermissible.<sup>130</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 juror’s street and telling the juror that the lawyer had been seen driving down the street.”<sup>131</sup> Yet, this view has been criticized on the basis of the possible impact such communication might have on a juror’s state of mind and has been deemed more analogous to the improper communication where, for instance, “[a] lawyer purposefully drives down a juror’s street, observes the juror’s property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial, knowing that a neighbor will see the lawyer and will advise the juror of this drive-by and the signage.”<sup>132</sup>

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

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

129 [ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 \(emphasis added\)](#).

130 [D.C. Bar Legal Ethics Comm., Formal Op. 371](#); *see also* [Colo. Bar Ass’n Ethics Comm., Formal Op. 127](#).

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

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

purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.”<sup>133</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>134</sup>

New York guidance similarly holds that, when reviewing social media to perform juror research, a lawyer needs to perform such research in a way that does not leave any “footprint” or notify the juror that the lawyer or her agent has been viewing the juror’s social media profile.<sup>135</sup>

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

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

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

134 *Id.*

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

136 *Id.*

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* An “attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable.”<sup>137</sup>

“Subordinate lawyers and nonlawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access” to portions of social media accounts not otherwise accessible to the lawyer.<sup>138</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 or her agent or automatically generated by the social media network) with the juror.**

NYRPC 1.1, 3.5, 4.1, 5.3, 8.4.

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

Yet, these later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.<sup>139</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

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137 See [NYCBA, Formal Op. 2012-2](#).

138 [Colo. Bar Ass’n Ethics Comm., Formal Op. 127](#).

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



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

[ABA Formal Op. 466](#) permits passive review of juror social media postings, even when an automated response of a reviewer's Internet "presence" is sent to the juror during trial, absent court instructions prohibiting such conduct.<sup>141</sup> In one New York case, a lawyer's review of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this information to the attention of the court, stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."<sup>142</sup> This case demonstrates that a lawyer must use caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.<sup>143</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>144</sup>

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140 See [NYCBA, Formal Op. 2012-2 \(2012\)](#).

141 See [ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466](#); [D.C. Bar Legal Ethics Comm., Formal Op. 371](#).

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

143 See *id.*

144 [ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466](#).

## Guideline No. 6.E: Juror Misconduct

**If a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror’s social media profile or posts, or otherwise, she must promptly bring it to the court’s attention.**<sup>145</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 discusses a lawyer’s obligation to take remedial steps, “including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding.”<sup>146</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 his or her family of which the lawyer has knowledge.”<sup>147</sup> If a lawyer learns of “juror misconduct” due to social media research, he or she “must” promptly notify the court.<sup>148</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>149</sup>

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

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

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

147 [NYRPC 3.5\(d\)](#).

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

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

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

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

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

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

NYRPC 3.5, 8.2 and 8.4.

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

A lawyer may connect or communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"<sup>151</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>152</sup>

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

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151 [Pa. Bar Ass'n Ethics Comm., Formal Op. 2014-300.](#)

152 [NYRPC 3.5\(A\)\(1\).](#)

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

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

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

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

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

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

## APPENDIX – Social Media Definitions

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

### A. Social Technologies



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



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



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



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



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



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



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



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



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



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



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



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

## **B. Social Terminologies**

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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