LEGAL ETHICS OPINION 1872

VIRTUAL LAW OFFICE AND USE OF EXECUTIVE OFFICE SUITES

This opinion is an examination of the ethical issues involved in a lawyer or firm's use of a virtual law office, including cloud computing, and/or executive office suites. These issues include marketing, supervision of lawyers and nonlawyers in the firm, and competence and confidentiality when using technology to interact with or serve clients.

A virtual law practice involves a lawyer/firm interacting with clients partly or exclusively via secure Internet portals, emails, or other electronic messaging.1 This practice may be combined with an executive office rental, where a lawyer rents access to a shared office suite or conference room. This space is generally either unstaffed or staffed by an employee of the rental company who provides basic support services to all users of the space, rather than by an employee of the lawyer. The space is also not exclusive to the lawyer – even if she has exclusive access to a particular office or conference room, the suite is open to all other "tenants." Lawyers who maintain a virtual practice, who work from home, or who wish to expand their geographic profile without the higher costs of exclusive office space and staff all use these spaces as client meeting locations. In other words, virtual law offices and executive office suites do not always go together, but they frequently do.

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 1.12, 1.6(a)3, 5.1(a) and (b)4, 5.3(a) and (b)5, and 7.16. The relevant legal ethics opinions are LEOs 1600, 1791, 1818, and 1850. Finally, Regulation 7 Governing Applications for Admission to the Virginia Bar Pursuant to Rule 1A:1 of the Supreme Court of Virginia applies to lawyers who are admitted or seeking admission by motion to the Bar of Virginia7.

ANALYSIS

Virtual law offices involve issues that are present in all types of law offices – confidentiality, communication with clients, and supervision of employees – but that manifest themselves in a new way in this context. See also LEO 1850 (exploring similar concerns in context of outsourcing legal support services).

A lawyer must always act competently to protect the confidentiality of clients' information, regardless of how that information is stored/transmitted, but this task may be more difficult when the information is being transmitted and/or stored electronically through third- party software and storage providers. The lawyer is not required, of course, to absolutely guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to the representation of a client. When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination.8

Similarly, although the method of communication does not affect the lawyer's duty to communicate with the client, if the communication will be conducted primarily or entirely electronically, the lawyer may need to take extra precautions to ensure that communication is adequate and that it is received and understood by the client. The Committee previously concluded in LEO 1791 that a lawyer could permissibly represent clients with whom he had no in-person contact, because Rule 1.4 "in no way dictates whether the lawyer should provide that
information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is what information was transmitted, not how." On the other hand, one of the aspects of communication required by Rule 1.4 is that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Use of the word "explain" necessarily implies that the lawyer must take some steps beyond merely providing information to make sure that the client actually is in a position to make informed decisions. A lawyer may not simply upload information to an Internet portal and assume that her duty of communication is fulfilled without some confirmation from the client that he has received and understands the information provided.

Finally, the technology that enables a lawyer to practice "virtually" without any face-to-face contact with clients can also allow lawyers and their staff to work in separate locations rather than together in centralized offices. As with other issues discussed in this opinion, a partner or other managing lawyer in a firm always has the same responsibility to take reasonable steps to supervise subordinate lawyers and nonlawyer

assistants, but the meaning of "reasonable" steps may vary depending upon the structure of the law firm and its practice. Additional measures may be necessary to supervise staff who are not physically present where the lawyer works.

The use of an executive office/suite rental or any other kind of shared, non-exclusive space, either in conjunction with a virtual law practice or as an addition to a "traditional" office- based practice, raises a separate issue. A non-exclusive office space or virtual law office that is advertised as a location of the firm must be an office where the lawyer provides legal services. Depending on the facts and circumstances, it may be improper under Rule 7.1 for a lawyer to list or hold out a rented office space as her "law office" on letterhead or other public communications. Factors to be considered in making this determination include the frequency with which the lawyer uses the space, whether nonlawyers also use the space, and whether signage indicates that the space is used as a law office. In addition, a lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case. As discussed above in the context of Internet-based service providers, a lawyer must also pay careful attention to protecting confidentiality if any client information is stored or received in a shared space staffed by nonlawyers who are not employees of the law firm and may not be aware of the nature or extent of the duty of confidentiality.
For lawyers who are licensed to practice in Virginia by motion rather than by bar exam, Regulation 7 of the Regulations Governing Applications for Admission to the Virginia Bar Pursuant to Rule 1A:1 of the Supreme Court of Virginia creates an additional difficulty in using an executive office rental or virtual office. This Regulation requires that a lawyer who is seeking admission, or who is already admitted, by motion maintain an office in Virginia where clients can be seen on the premises, and specifically provides that virtual office or shared occupancy arrangements are not acceptable for purposes of satisfying the office requirement.9 Accordingly, a lawyer who is admitted by motion should first ensure that any office space arrangement complies with Regulation 7 before there is any need to consider the ethics issues raised.

This opinion is advisory only and is not binding on any court or tribunal.

Committee Opinion

March 29, 2013
1 Stephanie Kimbro, a practitioner and scholar of virtual law offices, defines a virtual law practice as one where "[t]he use of an online client portal allows for the initiation of the attorney/client relationship through to completion and payment for legal services.

Attorneys operate an online backend law office as a completely web-based practice or in conjunction with a traditional law office." http://virtuallawpractice.org/about/, accessed Jan. 22, 2013

2 Rule 1.1 Competence

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

3 Rule 1.6 Confidentiality of Information

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

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

***

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

4 Rule 5.1 Responsibilities of Partners and Supervisory Lawyers

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

5 Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and...

6 Rule 7.1 Communications Concerning a Lawyer's Services
(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim.
***

7 7. Intent to Practice Full Time in Virginia. An applicant must intend, promptly after being admitted to practice in Virginia without examination, to establish his or her office in Virginia and to practice full time from such Virginia office. Full time is defined as being engaged in the active practice of law (as defined above) as one's primary occupation for at least thirty-five (35) hours weekly and having an office where clients can be seen on the premises. The Board shall not approve an application unless the applicant has verifiable plans to practice in Virginia (i.e., a job offer from a Virginia firm, a relocation to the Virginia office of the applicant's firm, an executed lease for office space in Virginia, etc.). Practice from one's residence shall not constitute satisfactory evidence of intent to practice law full time unless the applicant's residence is in a zoning classification which permits seeing clients on the premises and displaying an exterior sign identifying the law office. Virtual offices or shared occupancy arrangements shall not be acceptable. In addition, an applicant shall not divide his or her time between an office within Virginia and one in another jurisdiction. An applicant who is a member of or associated with a firm which has offices outside Virginia must be resident at such firm's Virginia office, shall not maintain an office at a location outside Virginia, and may work at one of his or her firm's other offices only on an occasional and not on a regular basis. The Court will monitor to determine whether an applicant maintains his or her Virginia office.

8 See LEO 1818, where the Committee concluded that a lawyer could permissibly store files electronically and destroy all paper documents as long as the client was not prejudiced by this practice, but noted that the lawyer may need to consult outside technical assistance and support for assistance in using such a system.

9 But see Proposed Amendments to Rules 1A:1 and 1A:3, proposed October 22, 2012, available at
http://courts.state.va.us/news/draft_revisions_rules/2012_rules_1_3_draft.pdf
(proposing change to requirements for admission by waiver from "full-time" practice requirement to "predominant" practice requirement).

LEGAL ETHICS OPINIONS 1818 WHETHER THE CLIENT'S FILE MAY CONTAIN ONLY ELECTRONIC DOCUMENTS WITH NO PAPER RETENTION?

You have presented a hypothetical involving an attorney with a practice concentrated in an area of administrative law. The practice includes representing clients before a federal agency. During the course of each representation, the attorney generates a large number of paper documents; also, a number of electronic documents are exchanged between the agency and the attorney. The attorney's clients have generally indicated a preference for, and in some cases, a requirement for the attorney to assist in minimizing the clients' file maintenance and storage costs by providing documents from the attorney to the client in an electronic format. Due to technological and economic trends, the attorney expects more clients to require that the attorney provide all documents in only an electronic format. Accordingly, the attorney proposes the following procedure:

1) Scan each paper document into an industry-standard electronic format for which free "reader" software is readily available;

2) Transmit the electronically formatted document to the client via e-mail, and

3) Subsequently destroy the paper document to prevent a disclosure of any confidence contained therein.

Under this process, paper documents would be destroyed only if the particular client consented to the destruction; otherwise, the attorney would provide the client with the paper documents. At the termination of the representation, upon client request, the attorney would provide to the client any retained paper documents and an electronic copy of the electronically formatted documents.

Under the facts you have presented, you have asked the committee to opine as to the following:

1) Must an attorney maintain a paper copy of a client's file during the representation?

2) May an attorney destroy paper documents in a current client's file once the client consents?

3) May an attorney request that a client provide such consent as a condition of the representation?

Your first question asks whether an attorney must maintain a client's file in the form of paper. The committee believes the answer is "no." The Rules of Professional Conduct do not contain a provision specifically directing what items a lawyer must keep in the client's file or in what form.[1] Rule 1.16's paragraphs (d) and (e) address what items in a client's file must be

provided to the client, upon request at termination of the representation. However, they do not dictate the form in which such items must be kept.

In determining whether an attorney is meeting his ethical responsibilities for a particular client, it matters not generally what form the documents in the file take, but instead whether all the documents necessary for the representation are present in the file. This is not to say that there are not instances where a paper document might be required. There may be any number of circumstances where keeping an original paper document in the file is critical, for example, testamentary documents, marriage certificates, or handwriting exemplars, to name a few. Clients without access to computers would require the attorney to keep a paper file. As to file materials other than documents, such physical evidence, an attorney must always safeguard, maintain and account for such items. Any other instances where lack of a physical item may prejudice the interests of the client would also mean that an exclusively electronic file would not be permissible. The committee opines that there is not a *per se* prohibition against electronic files in all instances. However, when making decisions as to what to keep in the file and in what form, while an attorney may consider storage expediency, those decisions must be made such that the attorney's duties of competence, diligence, and communication are not compromised.[2] *See* Rules 1.1, 1.3, and 1.4. The preference for electronic storage cannot reduce a lawyer's obligation to fulfill these ethical duties for each client.

Your second question is whether the attorney can destroy paper documents with the client's consent. The committee's answer is generally "yes." As discussed above, the Rules of Professional Conduct do not specify the form of file maintenance. In line with the response to Question One, an attorney may ask for the client's consent to destroy the paper documents, retaining only the scanned version, so long as that procedure does not prejudice that client's interests. The attorney is in the better position to know in what circumstances there may be legal significance in keeping the paper versus the electronic version of file contents; the attorney's recommendation to the client should be consistent with that determination. In determining what to destroy or retain in the client's file, the attorney should be mindful of the committee's recommendations in LEO 1305 that before destroying a client's paper file the lawyer should review that file to make sure that any documents that may be of continued use or benefit to the client only if they are maintained in paper form are not destroyed. In deciding whether to destroy a paper document that was provided by the client to the lawyer, for example, the lawyer should consult with the client and obtain consent to destroy it, after it has been converted to an electronic document.

Your third question is whether the attorney can require, as a condition for representation, that each client consent to an "electronic-only" file. Again, the committee's answer is generally "yes," so long as the client's interests are not prejudiced by such a condition for representation. As with Questions One and Two, the committee concludes that there is no *per se* prohibition against such a condition; nevertheless, if the choice to destroy a hard copy of a particular item would prejudice that client, then in that instance, the attorney should not require the client to agree to that destruction to obtain legal representation. Such a condition in that instance would violate Rule 1.3's directive not to "intentionally prejudice or damage a client."

This opinion is advisory only, based on the facts you presented and not binding on any court or tribunal.

Committee Opinion
September 30, 2005

[1] Note that Rule 1.15 does provide such direction for trust account records; however, there is no equivalent provision for client files.

[2] The Committee notes that an electronic storage system frequently brings with it a need for outside technical assistance and support. The Committee cautions that in such instance the attorney should be mindful of the requirements of Rule 1.6(b)(6), which permits an attorney to disclose:

> information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, *provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential*.

(Emphasis added).

LEGAL ETHICS OPINION 1791

IS IT ETHICAL NOT TO MEET FACE-TO-FACE WITH YOUR CLIENT IF YOU COMMUNICATE BY E-MAIL OR TELEPHONE INSTEAD?

You have presented a hypothetical in which an attorney has a bankruptcy practice. The attorney begins most representations with a telephone conversation, followed by actual meetings with the clients regarding the many issues associated with a bankruptcy filing. However, in a number of instances, clients may not be able to come into the attorney's office for a face-to-face meeting. In those instances, the attorney provides review and advice via various forms of electronic communication: fax, telephone, and e-mail. Such clients receive an information packet to review and complete. The client completes the packet; the attorney reviews the completed packet and supervises a paralegal in the preparation of the necessary documents. If the client can not come in for a meeting at that point, the attorney will send the client the prepared documents and then review them with the client over the telephone. The client is then directed to provide a notarized signature for the documents and then to forward them to the attorney. Additional client questions are handled in a similar manner. In these cases, the first face-to-face meeting between the attorney and the clients may be at the §341 hearing.[(1)]

Under the facts you have presented, you have asked the committee to opine as to whether electronic communication, without in-person meetings, can be sufficient to fulfill an attorney's duties of communication and competence. The applicable rules of professional conduct with regard to your request are as follows:

> RULE 1.1 Competence
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> RULE 1.4 Communication
>
> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

> (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

The duty of competence is triggered in every attorney/client relationship. The comments discussing the duty created by Rule 1.1 focus on three areas: legal knowledge and skill, thoroughness and preparation, and maintaining competence (i.e., continuing legal education). *See* Rule 1.1, Comments 1-6. At issue here is whether the attorney in this hypothetical is being sufficiently thorough and is properly prepared with respect to the "electronic communication" portion of his practice. Comment 5, in pertinent part, states the following:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

The focus of this language is on the content of the lawyer's efforts: has the lawyer sufficiently reviewed and analyzed the information and become sufficiently familiar with the pertinent law so as to be able to pursue the legal objectives of the client. Neither the rule, nor the comments, prescribes precise means for the provision of legal services.

The lawyer in this hypothetical operates under procedures that include review of the client's information and interaction with the client regarding the responsibilities and consequences of filing a bankruptcy petition. Whether that procedure involves the provision of competent legal services depends on the content, not the method of communication; what does determine competency in this situation is whether the attorney reviews the proper materials and law, imparts to the client all necessary information, receives necessary direction from the client as to the client's objectives, and provides appropriate legal advice as a result. Although there is no per se requirement, the committee concludes that nothing in Rule 1.1 requires those items be accomplished via in person contact. Moreover, Rule 1.2 provides that the attorney should consult with the client as to the means to be used during the representation. So long as the requisite information is given, received, analyzed and acted upon, the attorney has met his duty of competency. There is no *per se* requirement that an attorney actually be in the physical presence of his client to provide competent legal services.

A second ethical duty at issue in this request is the duty of communication. In every attorney/client relationship, the attorney has a duty to communicate with his client during the course of the representation. To fulfill that duty, the attorney must ensure that the client has "sufficient information to participate intelligently in decisions

concerning the objectives of representation and the means by which they are to be imputed." Rule 1.4, Comment 1. Each of the three paragraphs of Rule 1.4 outlines *content* areas of communication, rather than the method of communication. The rule focuses on communicating the status of the matter, information necessary for informed decision-making, and pertinent facts in the matter. The rule in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*.

The committee finds no *per se* requirement in the rules that information be provided to a client in person. Accordingly, the procedures outlined in this hypothetical do not on their face create an ethics violation for this attorney. The attorney may ethically use electronic forms of communication in working with clients so long as all necessary information is transmitted between the attorney and the client.[(2)]

This committee opines that the attorney in the hypothetical is not precluded by the ethics rules from providing legal services to his clients via electronic communication so long as the content and caliber of those services otherwise comport with the duties of competence and communication.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
December 22, 2003

[1] A "§341 hearing" is a scheduled meeting of creditors pursuant to §341 of the Bankruptcy Code. *See*, 11 U.S.C.A. §341.

[2] The committee notes that a source of concern in the materials provided with this request is a line of authorities finding that particular bankruptcy attorneys provided less than adequate representation due to lack of client contact. *See,e.g., In re Pinkins*, 213 B.R. 818 (Bankr. E.D. Mich. 1997); *In re Jerrels*, 133 B.R. 161 (Bankr. M.D. Florida 1991). The committee notes that those cases are distinguishable from the present situation. Factually, the focus of the discussion in those opinions is that there was almost no contact of any sort between attorney and client. For example, in *Pinkins*, client contact was with a legal assistant rather than with the supervising attorney and in*Jerrels*, there was no contact with the client. This line of authority does not change the committee's conclusions in this opinion.

DAVID MUNSTER, Appellant-Plaintiff, vs. JOE GROCE and BUSINESS WORLD, INC., Appellees-Defendants.

No. 18A02-0409-CV-738

COURT OF APPEALS OF INDIANA, SECOND DISTRICT

829 N.E.2d 52; 2005 Ind. App. LEXIS 1036

June 8, 2005, Decided

PRIOR HISTORY: [**1] APPEAL FROM THE DELAWARE CIRCUIT COURT. The Honorable Marianne L. Vorhees, Judge. Cause No. 18C01-0401-CT-1.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

COUNSEL: FOR APPELLANT: THOMAS D. BLACKBURN, Blackburn & Green, Fort Wayne, Indiana.

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FOR APPELLEES: MICHAEL D. CONNER, Spitzer Herriman Stephenson, Holderead Musser & Conner, LLP, Marion, Indiana

JUDGES: BARNES, Judge. KIRSCH, C.J., and BAKER, J., concur.

OPINION BY: BARNES

OPINION

[*56] **BARNES, Judge**

Case Summary

David Munster appeals the dismissal of his complaint against Joe Groce and Business World, Inc. ("BWI"). We affirm in part, reverse in part, and remand.

Issues

The restated issues before us are:

I. whether Munster properly effected service of process on Groce; and

II. whether Munster properly effected service of process on BWI.

Facts

On February 25, 2000, Munster and Groce were involved in an automobile accident. At the time, Groce was an employee of BWI, a corporation that later was dissolved in July 2001. On February 15, 2002, Munster filed a complaint against Groce and BWI. [**2] Munster attempted to serve both Groce and BWI by certified mail. Both mailings were returned undelivered on March 1, 2002; the mailing to Groce was marked "attempted not known" and the mailing to BWI was marked with a new address. App. p. 2. No further action was taken in the case until December 2003, when Munster obtained new counsel. Second attempts to serve BWI and Groce by certified mail were again returned undelivered, with the marking on each "forwarding order expired." Id. Munster

then attempted to serve BWI and Groce through the Indiana Secretary of State, as provided by *Indiana Trial Rule 4.10*. Munster did not file a praecipe for summons with the trial court, but instead delivered copies of the summons and complaint directly to the Secretary of State. Munster provided the Secretary of State with addresses for BWI and Groce, the Secretary of State mailed copies of the summons and complaint to those addresses, and they were returned undelivered as before.

At least by December 2003, BWI's former insurer learned of Munster's lawsuit and filed an answer on behalf of BWI and Groce, which among other things asserted the affirmative defenses of lack of personal jurisdiction, [**3] insufficiency of process, and insufficiency of service of process. On January 22, 2004, counsel also filed a motion to dismiss on behalf of BWI and Groce under *Indiana Trial Rules 12(B)(2)*, (4), and (5), alleging a lack of personal jurisdiction due to insufficiency of process and service of process. The motion also sought dismissal due to failure to prosecute pursuant to *Indiana Trial Rule 41(E)*.

On January 26, 2004, Steve Harris, an investigator hired by Munster's counsel, delivered a copy of the summons and complaint to the residence of George Mikesell, who was listed as a director of BWI in its articles of incorporation. Mikesell was not home at the time, but his wife Lois personally received the summons and complaint. Harris phoned Mikesell the next day and confirmed that he received the summons and complaint. Also on January 26 and January 31, 2004, Harris attempted personal delivery of the summons and complaint at Groce's alleged former places of residence and employment, but could not locate him.

On May 17, 2004, the trial court dismissed Munster's complaint pursuant to *Trial Rules 12(B)(2)*, (4), and (5); it did not dismiss under *Trial Rule 41(E)*. It stated in its order [**4] that Munster had not complied with *Trial Rule 4.10* allowing for service [*57] through the Secretary of State because he had not filed a praecipe for summons with the trial court first. As for the January 26, 2004 delivery of the summons and complaint to Lois Mikesell, the trial court struck the acknowledgment of service she had signed and concluded that she had no actual or apparent authority to accept service on BWI's behalf. On June 14, 2004, Munster filed a motion to correct error. On the same date, Munster also filed, with the trial court this time, a praecipe for summons for service upon BWI and Groce through the Secretary of State. Using the same addresses as before, the Secretary of State again sent certified mail addressed to BWI and Groce, and the mailings again were returned undelivered. On August 24, 2004, the trial court denied the motion to correct error. Munster now appeals.

Analysis

I. Standard of Review

Technically, Munster is appealing from the denial of a motion to correct error. We generally review a trial court's denial of a motion to correct error for an abuse of discretion. *Principal Life Ins. Co. v. Needler, 816 N.E.2d 499, 502 (Ind. Ct. App. 2004)*. [**5] Except for pointing out Munster's re-attempt to effect service through the Secretary of State, however, the motion to correct error in this case merely asked the trial court to reconsider its earlier ruling on the motion to dismiss.

BWI and Groce have not claimed that they lacked insufficient contacts with Indiana for the trial court to exercise jurisdiction over them and base their arguments solely on insufficient service of process. *Indiana Trial Rule 12(B)(5)* allows for dismissal of a complaint if there is insufficient service of process; *Trial Rule 12(B)(2)* similarly allows for a dismissal of a complaint if there is a lack of personal jurisdiction. A trial court does not acquire personal jurisdiction over a party if service of process is inadequate. *King v. United Leasing, Inc., 765 N.E.2d 1287, 1290 (Ind. Ct. App. 2002)*.

When a defendant argues a lack of personal jurisdiction, the plaintiff must present evidence to show that there is personal jurisdiction over the defendant. *Anthem Ins. Companies, Inc. v. Tenet Healthcare Corp., 730 N.E.2d 1227, 1231 (Ind. 2000)*. The defendant ultimately bears the burden of proving the lack of personal jurisdiction [**6] by a preponderance of the evidence, unless the lack of jurisdiction is apparent on the face of the complaint. Id. The existence of personal jurisdiction over a defendant is a question of law and a constitutional requirement to rendering a valid judgment, mandated by the *Due Process Clause of the Fourteenth Amendment to the United States Constitution*. *Id. at 1237*. Thus, we review a trial court's determination regarding personal jurisdiction de novo. *Id. at 1238*. To the extent a trial court may make findings of jurisdictional facts, these findings are reviewed for clear error if they were based on in-court testimony. *Id. at 1238*. If, however, only a

paper record has been presented to the trial court, we are in as good a position as the trial court to determine the existence of jurisdictional facts and will employ de novo review as to those facts. *Id. at n.12.*

Here, the trial court ruled on the motion to dismiss based entirely on a paper record, consisting of records of Munster's attempts at service and affidavits of Harris and Lois Mikesell. No testimony was presented at the hearings conducted on the motion to dismiss and motion [**7] to correct error. Thus, our review of the trial court's personal jurisdiction ruling is entirely de novo. Additionally, we note that although the trial court in dismissing [*58] Munster's complaint provided an explanation as to why it was doing so, we will affirm a trial court's grant of a motion to dismiss if it is sustainable on any theory or basis found in the record. See *Minks v. Pina, 709 N.E.2d 379, 381 (Ind. Ct. App. 1999)*, trans. denied.

II. Service as to Groce

Groce argues that Munster's attempts to serve him with process were insufficient to permit the trial court to exercise jurisdiction over him. [1] This question has two aspects: whether there was compliance with the Indiana Trial Rules regarding service, and whether such attempts at service comported with the *Due Process Clause of the Fourteenth Amendment*. We conclude that due process required more than was attempted here with respect to service on Groce.

> 1 For the sake of clarity, we are referring to Groce as if he has actual knowledge of and has participated in this lawsuit. In fact, there is no indication in the record that he personally has any knowledge of it. Likewise, although we refer to BWI throughout the opinion, it no longer exists as a functioning company.

[**8] In the seminal case regarding due process and notice, the Supreme Court held that the *Due Process Clause* requires at a minimum "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656-57, 94 L. Ed. 865 (1950)*. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id. at 314, 70 S. Ct. at 657*. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id. at 315, 70 S. Ct. at 657*. The [**9] Court held that alternatives to personal service and actual notice of a suit, such as publication, are permissible

> where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. . . . [Parties] whose interests or whereabouts could not with due diligence be ascertained come clearly within this category.

Id. at 317, 70 S. Ct. at 658-59 (emphasis added). Mullane thus clearly indicates that although it is acceptable in some instances to proceed with a lawsuit by using a service method that it is unlikely to give actual notice to an interested party, this is only the case if that party's whereabouts cannot reasonably and in the exercise of due diligence be ascertained.

The textbook example of constructive service and notice of a lawsuit is service by publication, as exemplified by *Mullane*. *Indiana Trial Rule 4.13* allows the use of this form of "service" or notice, [**10] but only if the party seeking publication files with the trial court "supporting affidavits [showing] that diligent search has been made that the defendant cannot be found, has concealed his whereabouts, or has left the state." This rule, therefore, preemptively [*59] requires a party to swear to "due diligence" in attempting to locate an interested party before he or she may seek service by publication.

In the present case, Munster never sought service by publication on Groce. Instead, before turning to the

Secretary of State, the CCS indicates that he attempted two certified mailings to Groce, once in February 2002 and once in December 2003. The first mailing was to an apartment address in Muncie, and there is no evidence in the record as to what address was used for the second mailing; the address provided to the Secretary of State was for a street address in Muncie. There is also no evidence in the record as to what information was used to determine Groce's possible whereabouts. In any event, none of these mailings resulted in actual service to Groce, as both mailings were returned to sender. This court has held, "Unclaimed service is insufficient to establish a reasonable probability [**11] that the defendant received adequate notice and to confer personal jurisdiction." *King, 765 N.E.2d at 1290*. We have also held, "Service upon a defendant's former residence is insufficient to confer personal jurisdiction." *Mills v. Coil, 647 N.E.2d 679, 681 (Ind. Ct. App. 1995)*, trans. denied. Additionally, *Indiana Trial Rule 4.1(A)(1)*, which allows for service by certified mail, requires that a return receipt must show receipt of the letter in order for service to be effective.

After the December 2003 failed mailing to Groce, Munster attempted to perfect service through the Secretary of State. *Indiana Trial Rule 4.4(A)(2)* states:

> Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or her or his or her agent: . . . causing personal injury or property damage by an act or omission done within this state . . . .

Trial Rule 4.4(B) goes on to state:

> A person subject to the jurisdiction of the courts [**12] of this state under this rule may be served with summons:
>
> (1) As provided by *Rules 4.1* (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions); or
>
> (2) The person shall be deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in *Rule 4.10*.

Finally, *Trial Rule 4.10* provides:

> Whenever, under these rules or any statute, service is made upon the Secretary of State or any other governmental organization or officer, as agent for the person being served, service may be made upon such agent as provided in this rule.
>
> (1) The person seeking service or his attorney shall:
>
> (a) submit his request for service upon the agent in the praecipe for summons, and state that the governmental organization or officer is the agent of the person being served;
>
> (b) state the address of the person being served as filed and recorded pursuant to a statute or valid agreement, or if no such address is known, then his last known mailing address, and, if no such address is known, then such shall be stated; [**13]
>
> (c) pay any fee prescribed by statute to be forwarded together with sufficient copies of the summons, [*60] affidavit and complaint, to the agent by the clerk of the court.
>
> (2) Upon receipt thereof the agent shall promptly:
>
> (a) send to the person being served a copy of the summons and complaint by registered or certified mail or by other public means by which a written acknowledgment of receipt may be

> obtained;
>
> (b) complete and deliver to the clerk an affidavit showing the date of the mailing, or if there was no mailing, the reason therefor;
>
> (c) send to the clerk a copy of the return receipt along with a copy of the summons;
>
> (d) file and retain a copy of the return receipt.

Initially, the parties spend much time arguing as to whether *Rule 4.10* required Munster to file a praecipe for summons with the trial court, instead of directly with the Secretary of State, before service could be effected under this rule; the trial court also based its ruling on Munster's not first filing a praceipe for summons with it. It would appear to us that the rule contemplates filing the praecipe with the trial court, which would then forward the necessary [**14] materials to the Secretary of State for service. Most tellingly, *subsection 1(c)* of the rule requires the person seeking service to "pay any fee prescribed by statute to be forwarded together with sufficient copies of the summons, affidavit and complaint, to the agent by the clerk of the court." (Emphasis added). This seems to say that the clerk of court forwards the summons, affidavit, complaint, and any required fee to the Secretary of State or other government officer, which necessarily means the clerk was provided with those materials in the first place by the party seeking service. We also reject Munster's argument that a party seeking service through the Secretary of State does not have to follow *Rule 4.10* to the letter. *Subsection (1)* clearly states that the party seeking such service "shall" do so as delineated.

Even assuming, however, that it was not fatal to Munster's service attempt that he initially filed a praecipe for summons directly with the Secretary of State instead of with the trial court, there is a fundamental problem in this case. It is evident that attempting to serve Groce through the Secretary of State would, at best, amount only to constructive service [**15] and constructive notice of the pending lawsuit. Munster had already twice attempted to mail summons to Groce unsuccessfully. Having the Secretary of State make the mailing instead was not going to somehow give Groce actual notice of the lawsuit.

As noted, the *Due Process Clause* requires that in order for constructive notice of a lawsuit to be sufficient, a party must exercise due diligence in attempting to locate a litigant's whereabouts. See *Mullane, 339 U.S. at 317, 70 S. Ct. at 659*. A party must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id. at 314, 70 S. Ct. at 657*. *Rule 4.4(B)(2)* does allow for service through the Secretary of State with respect to a defendant "whose residence is unknown," and presumably such service is effective even if the defendant does not receive actual notice of the lawsuit; *Rule 4.10* does not expressly require actual notice. We conclude, however, that in order for such service to be constitutionally effective there must be a showing by the plaintiff or party who sought such [**16] service that due diligence to ascertain the defendant's current whereabouts was exercised and service through [*61] the Secretary of State was reasonable under the circumstances.

We are also aware that neither *Rule 4.4(B)(2)* nor *Rule 4.10* requires a party seeking service through the Secretary of State to provide an affidavit asserting that due diligence to locate the defendant was unsuccessfully attempted, in contrast to service by publication under *Rule 4.13*. If such service is subsequently challenged by a motion to dismiss or motion to set aside a default judgment, however, we conclude that a plaintiff is required to present evidence of unsuccessful due diligence in locating the defendant, which in turn necessitated the use of constructive notice and service. Otherwise, parties who wished to serve opposing parties whose whereabouts they did not know could always sidestep the due diligence requirements of notice by publication and simply ask for service through the Secretary of State, which is not a proper reading of the Indiana Trial Rules and the *Due Process Clause*.

With issues as important as due process, notice of a lawsuit, and personal jurisdiction, we will not presume from the [**17] scant evidence in this record that Munster used due diligence in attempting to ascertain Groce's current whereabouts. Harris provided the following affidavit describing his efforts to serve Groce: "I duly pursued and exhausted all known information to perfect service upon Joe Groce by attempting to deliver

to his possession a true copy of the Summons and Complaint in the above-captioned manner at his former places of residence and employment." App. p. 46. Harris also swore elsewhere that he asked the Mikesells if they were aware of Groce's current whereabouts. There is no evidence in the record as to what information was used to ascertain Groce's alleged former places of residence and employment. There is no evidence in the record as to any attempts to locate his current whereabouts, aside from asking the Mikesells. [2] There is no evidence in the record that Groce was or is attempting to hide his whereabouts.

2

At the hearing on the motion to dismiss, counsel for Munster asserted that other steps were taken to ascertain Groce's whereabouts that were not recounted in Harris' affidavit. Arguments of counsel, however, are not evidence that courts may consider in making factual determinations. *El v. Beard, 795 N.E.2d 462, 467 (Ind. Ct. App. 2003)*.

[**18] Harris' bare-bones affidavit does not permit the conclusion that due diligence was used to locate Groce's current whereabouts, or that service via the Secretary of State, using an address that apparently was known to be invalid, was reasonably calculated to provide Groce notice of this lawsuit. Cf. *Bays v. Bays, 489 N.E.2d 555, 557-59 (Ind. Ct. App. 1986)* (finding sufficient due diligence to justify service by publication where husband had spoken to wife's parents eleven times in three years and parents stated they did not know wife's whereabouts, and where husband employed private investigator who searched for wife for three years and provided letter to trial court detailing efforts to locate wife). [3] As such, the trial court never obtained personal jurisdiction over Groce in a manner consistent with the *Due Process Clause*. Dismissal of Munster's [*62] lawsuit as to him for lack of personal jurisdiction and insufficient service of process was proper.

3

Bays does not necessarily establish the minimum that should be required for a showing of due diligence in locating a missing litigant. We do note that there is no evidence in this case of a public records or internet search for Groce or the use of a skip-trace service to find him. In fact, we discovered, upon entering "Joe Groce Indiana" into the Google search engine, an address for Groce that differed from either address used in this case, as well as an apparent obituary for Groce's mother that listed numerous surviving relatives who might have known his whereabouts.

[**19] ***III. Service as to BWI***

Next, we address whether Munster effectively served BWI with process. We decline to address Munster's attempts to serve BWI by certified mail and through the Secretary of State, and solely address service at the Mikesell's household. The question of how to serve a defunct corporation like BWI has not previously been addressed by Indiana case law. The trial rules and *Indiana Business Corporation Law*, however, provide sufficient guidance for how to resolve this issue.

Indiana Code Section 23-1-45-5(b)(5), which governs voluntary dissolution of a corporation and which apparently is what occurred to BWI, expressly provides that dissolution "does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name . . . ." As far as how to serve a defunct corporation with process, BWI points out that *subsection (7) of Section 23-1-45-5(b)* provides that the authority of the registered agent of a corporation does not terminate with the corporation's dissolution. BWI also notes that *Indiana Code Section 23-1-24-4(a)* states, "A corporation's registered agent is the corporation's [**20] agent for service of process, notice, or demand required or permitted by law to be served on the corporation." BWI essentially argues that pursuant to this statute, Munster was required to attempt to serve BWI's registered agent, Robert Compton, instead of Mikesell, and such attempt never occurred.

Subsection (c) of Section 23-1-24-4, however, plainly states, "This section does not prescribe the only means, or necessarily the required means, of serving a corporation." The Official Comment to this statutory provision of the *Indiana Business Corporation Law* confirms that methods of service permitted by the Indiana Trial Rules but not expressly mentioned by *Section 23-1-24-4* should be viewed as supplementary to the statute, not inconsistent with it. The Official Comment further cites *Burger Man, Inc. v. Jordan Paper Products, Inc., 170 Ind. App. 295, 352 N.E.2d 821 (1976)* as an "illustrative" case where this court approved service upon a corporation's "executive officer" rather than the corporation's registered agent, much like what happened

in this case. The Indiana Trial Rules and the *Indiana Business Corporation Law* permitted Munster to attempt service upon someone [**21] other than BWI's registered agent.

Indiana Trial Rule 4.6(A) provides that service upon a domestic organization may be made "upon an executive officer thereof . . . ." *Trial Rule 83* states, "'Executive officer' of an organization includes the president, vice president, secretary, treasurer, cashier, director, chairman of the board of directors or trustees, office manager, plant manager, or subdivision manager, partner, or majority shareholder." (Emphasis added). Munster provided BWI's 1986 articles of incorporation to the trial court, which listed George Mikesell as one of its three directors. BWI presented no evidence that Mikesell was not still a director of this closely-held corporation at the time of its dissolution in 2001. As the party seeking dismissal of a complaint on personal jurisdiction grounds, we conclude it was BWI's burden to prove by a preponderance of the evidence that Mikesell was not a director of BWI at the time of its dissolution and to demonstrate that the articles of incorporation's listing of directors was not accurate as of 2001. See *Anthem Ins. Companies, 730 N.E.2d at 1231*. Also, although *Trial Rules 4.6(A)* and *83* are not crystal clear [**22] on this point, we also hold that in the case of a dissolved [*63] corporation, it is appropriate to serve process upon a former director of the corporation at the time of its dissolution. See *Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741, 743 (Utah 1953)* (holding that service upon former director of defunct corporation was effective service upon the corporation under trial rules similar to Indiana's).

We now address whether Mikesell was adequately served so as to confer jurisdiction upon BWI. *Trial Rule 4.6(B)* provides that service shall be made upon a proper representative of the corporation, as listed by *Rule 4.6(A)*, in a manner provided for service upon individuals elsewhere in the *Trial Rules. Rule 4.6(B)* also states that generally such service cannot knowingly be made at the person's dwelling house or place of abode. This restriction, however, clearly is inapplicable in the case of a corporation such as BWI that is no longer functioning and, a fortiori, no longer has a business address. We conclude it was proper to attempt service at Mikesell's dwelling house or place of abode.

Next, we address the effect of leaving the summons and complaint with Lois Mikesell [**23] at the Mikesell residence. We find it unnecessary to address whether Lois had the authority to accept service of process on behalf of her husband. Even assuming that she did not, *Trial Rule 4.1(A)(3)* allows for service by leaving a copy of the summons and complaint at a person's dwelling house or usual place of abode. Thus, even if Lois had not personally been handed the summons and complaint by Harris and he had merely left the documents at the house, this would have constituted service upon Mikesell. [4]

> 4 BWI has never asserted that Harris did not deliver the summons and complaint to Mikesell's dwelling house or usual place of abode.

We do observe that there is nothing in the record to indicate that a copy of the summons only was subsequently mailed to the Mikesell residence, which is required as a second step in effective service by *Trial Rule 4.1(B)* when the complaint and summons has been left at a person's dwelling under *Trial Rule 4.1(A)(3)*. This omission is not fatal to Munster's attempt to serve [**24] Mikesell and, hence, BWI, in light of Harris' affidavit recounting that he spoke to Mikesell over the phone the day after delivery of the summons and complaint and Mikesell confirmed that he received them. BWI presented no evidence to refute Harris' memory of events. We have previously held that failure to follow up delivery of a complaint and summons under *Trial Rule 4.1(A)(3)* with mailing of a summons under *Trial Rule 4.1(B)* does not constitute ineffective service of process if the subject of the summons does not dispute actually having received the complaint and summons. See *Boczar v. Reuben, 742 N.E.2d 1010, 1016 (Ind. Ct. App. 2001)*.

Finally, BWI argues that service upon it via service upon Mikesell was ineffective because the summons was directed only to BWI, not to Mikesell or any other person, such as a "director" or "officer" of BWI. BWI relies upon *Volunteers of America v. Premier Auto, 755 N.E.2d 656 (Ind. Ct. App. 2001)*. There, we held that service upon Volunteers of America ("VOA") was ineffective because none of the initial attempts were directed to a person; instead, the summonses were simply addressed to "Volunteers of America." [**25] *Id. at 660*. We also held that this defect in service was not saved by *Trial Rule 4.15(F)*, which provides: "No summons or the service thereof shall be set aside or be adjudged insufficient [*64] when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court,

and the time within which he is required to respond." Id. We additionally noted that the first time Premier sent a garnishment proceeding notice to VOA addressed to the "Highest Ranking Officer" was also the first time a "proper person" for corporate service received notice of the lawsuit and default judgment. Id.

Here, the record does seem to indicate that the summons for BWI was addressed only to BWI, and not to any specific individual or title. This case, however, clearly differs from *VOA* because that case concerned mailings to VOA's office that subsequently were never brought to the attention of a high-ranking corporate officer. Here, by contrast, the summons and complaint were delivered directly to Mikesell's residence and he acknowledged receipt of them; there was no chance that the summons and complaint would fail to follow [**26] the proper internal corporate channels to a high-ranking officer or director because they were delivered directly to a director. As such, even if there was a technical defect in the summons to BWI, the method of service by delivery at Mikesell's residence still was reasonably calculated to inform BWI of the pending lawsuit and, in fact, did provide such notice. *Trial Rule 4.15(F)* excuses minor, technical defects in the method of service where actual service has been accomplished. See *Reed Sign Service, Inc. v. Reid, 755 N.E.2d 690, 696 (Ind. Ct. App. 2001)*, trans. denied. In sum, Munster sufficiently complied with the Indiana Trial Rules so as to effect service upon BWI and give the trial court personal jurisdiction over it. Likewise, as we have indicated the method of service on BWI was reasonably calculated so as to provide it with notice of the lawsuit and, therefore, comports with the *Due Process Clause*. See *Mullane, 339 U.S. at 314, 70 S. Ct. at 657*. We reverse the trial court's grant of the motion to dismiss with respect to BWI.

Conclusion Munster has failed to demonstrate that his attempts to serve Groce comported with the [**27] *Due Process Clause* and the trial court was correct to dismiss the lawsuit as to Groce for lack of personal jurisdiction. With respect to BWI, we find sufficient compliance with the Indiana Trial Rules and *Due Process Clause* regarding service of process to allow the lawsuit against it to proceed. We affirm in part, reverse in part, and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.

KIRSCH, C.J., and BAKER, J., concur.

PHIL JOHNSON, Respondent, v. J. EDWARD McCULLOUGH, M.D., and MID-AMERICA GASTRO-INTESTINAL CONSULTANTS, P.C., Appellants.

No. SC90401

SUPREME COURT OF MISSOURI

306 S.W.3d 551*; *2010 Mo. LEXIS 80

March 9, 2010, Opinion Issued

PRIOR HISTORY: [**1]

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY. The Honorable Gary D. Witt, Judge.

Johnson v. McCullough, 2009 Mo. App. LEXIS 991 (Mo. Ct. App., June 30, 2009)

COUNSEL: For APPELLANTS: Mr. Jonathan P. Kiefer, Mr. Brandon D. Henry, Mr. Adam S. Davis, Wagstaff & Cartmell LLP, Kansas City, Missouri.

For RESPONDENT: Ms. Laurie L. Del Percio, Mr. Douglas R. Horn, The Horn Law Firm, P.C., Independence, Missouri.

For AMICUS CURIAE: Mr. Leland F. Dempsey, Ms. Ashley L. Baird, Dempsey & Kingsland, P.C., Kansas City, Missouri.

OPINION

[*554] **en banc**

PER CURIAM

J. Edward McCullough and Mid-America Gastro-Intestinal Consultants (collectively "Defendants") appeal from the trial court's judgment granting Phil Johnson's motion for a new trial alleging intentional nondisclosure by a juror. After disposition by the court of appeals, [1] this Court granted transfer. *MO. CONST. art. V, sec. 10.*

1 Portions of the court of appeals opinion authored by the Honorable Harold L. Lowenstein are incorporated in this opinion without further attribution.

This Court affirms the trial court's judgment. Counsel's question during voir dire regarding jurors' prior involvement in litigation was clear and unambiguous, triggering the jurors' duty to respond. Moreover, the trial court did not abuse its discretion in finding intentional nondisclosure and ordering a new trial. Contrary to Defendants' argument, Johnson was not required to present either an affidavit or testimony to support a finding of intentional nondisclosure. Lastly, this Court finds that the trial court did not err in finding that the juror intentional nondisclosure argument was timely raised. Under the case [**2] law at the time of trial, it was timely raised. However, this Court will adopt a formal rule requiring litigants to promptly bring to the trial court's attention information about jurors' prior litigation history. Until that time, a party must use reasonable efforts to examine the litigation history on Case.net [2] of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial, as set out in this opinion.

2 Case.net can be accessed using the following web address: https://www.courts.mo.gov/casenet.

I. Background

Johnson brought a medical malpractice lawsuit against Defendants alleging he received negligent medical treatment from Defendants for a throat condition. According to Johnson, Defendants' negligent medical care, in which surgery was performed, resulted in permanent throat injuries.

During voir dire, Johnson's counsel asked about prior involvement in litigation by any venire member. Specifically, counsel asked, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" Although numerous members of the panel responded affirmatively, venire member Mims did not [*555] respond to the question and eventually [**3] was chosen to sit on the jury.

At the close of a six-day trial, the jury deliberated for 40 minutes and returned a verdict in Defendants' favor. Mims signed the verdict. After the trial, Johnson's counsel investigated Mims' civil litigation history using Missouri's automated case record service, Case.net, and discovered that Mims previously had been a defendant in multiple debt collection cases and in a personal injury case. At least three of the lawsuits against Mims were recent, as they were filed within the previous two years.

Johnson filed a motion for new trial alleging Mims intentionally failed to disclose her prior litigation experience when asked during voir dire. The trial court conducted a hearing on the motion. Johnson supported his allegation of intentional nondisclosure by presenting the litigation records he discovered on Case.net. Johnson did not call Mims or any other witnesses to testify at the hearing, nor did he obtain an affidavit from Mims to support his argument.

After the hearing concluded, the trial court granted Johnson's motion and ordered a new trial. The court determined that counsel's question during voir dire was clear and unambiguous and that Mims' involvement [**4] in prior litigation was recent. As a result, her failure to respond constituted an intentional nondisclosure. The court inferred prejudice from the intentional concealment. The court reached no decision as to Johnson's additional arguments in support of his motion for new trial, finding the issue of intentional nondisclosure dispositive. Defendants appeal.

II. Analysis

A. Standard of Review

This Court will not disturb the trial court's ruling on a motion for a new trial based on juror nondisclosure unless the trial court abused its discretion. *Wingate by Carlisle v. Lester E. Cox Med. Ctr., 853 S.W.2d 912, 917 (Mo. banc 1993).* A trial court abuses its discretion if its "ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.*

B. Clarity of Question

A member of the venire has a duty during voir dire examination to give full, fair, and truthful answers to all questions asked of him or her specifically, as well as those asked of the panel generally, so that his or her qualifications may be determined and challenges may be posed. *Williams by Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. banc 1987).* [**5] The duty to disclose is triggered only after a clear question has been asked. *Brines by Harlan v. Cibis, 882 S.W.2d 138, 139 (Mo. banc 1994).* The question asked during voir dire must clearly and unambiguously trigger the juror's obligation to disclose the information requested. *See Carlisle, 853 S.W.2d at 916.* In reviewing the grant of a motion for new trial based on a claim of juror nondisclosure, this Court first must determine, from an objective standpoint, whether the question asked of the prospective juror was sufficiently clear in context to have elicited the undisclosed information. *See Brines, 882 S.W.2d at 139.* Whether a question was sufficiently clear is a threshold issue that this Court reviews de novo. *Keltner v. K-Mart Corp., 42 S.W.3d 716, 723 (Mo. App. 2001).*

During voir dire, Johnson's counsel asked the venire members, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" Several venire members disclosed [*556] prior involvement in lawsuits. One venire member mentioned her involvement as a defendant in a personal injury suit against a limited liability company she owned with her husband. Another venire member disclosed a "dog-bite" [**6] lawsuit when, as a child, her parents sued the dog owner on her behalf. Numerous other venire members disclosed lawsuits in which they acted as a plaintiff or a defendant. Among the various disclosures were a class action lawsuit, a property dispute, a car accident case, and a discrimination lawsuit. After each individual disclosure, counsel merely asked the responding venire members

whether the experience would affect his or her ability to be a fair and impartial juror in this case. Counsel did not delve further into each venire member's response. Upon eliciting all of the preceding disclosures, counsel asked, "Now did I miss anyone here? I just want to make sure. No other people that have been, not including family law, a plaintiff or a defendant on any case? Let the record reflect that I see no additional hands." Juror Mims remained silent throughout this line of questioning.

Defendants contend that the inquiry at issue was unclear because the phrase "now not including family law" renders the question ambiguous and confusing. "The issue is whether a reasonable venire member *would have* understood what counsel intended." *McBurney v. Cameron, 248 S.W.3d 36, 42 (Mo. App. 2008)*. "The [**7] duty of counsel to show that the question was clear is not satisfied when some venire members could reasonably think one thing, and some other venire members could reasonably think the opposite." *Id. at 46*. The record must demonstrate that, from an objective standpoint, the question was clear in the total applicable context. *Id*. Here, the total applicable context does not render counsel's inquiry unclear. The question generally asked about prior litigation experience and specifically excluded any litigation involving domestic relations. In cases where counsel's question during voir dire regarding prior litigation experience has been deemed unclear, a general question is typically followed or surrounded by more detailed questions "honing in" on specific lawsuits. *Id*. For example, in *Payne v. Cornhusker Motor Lines, Inc*., the court found that, taken in context, counsel's question asking venire members to disclose claims made "for personal injuries or monetary damages" did not clearly require disclosure of a property-damage lawsuit in which a venire member was a plaintiff. *177 S.W.3d 820, 842-43 (Mo. App. 2005)*. Additionally, in *McBurney v. Cameron*, the court determined that, in context, [**8] counsel's general question regarding prior litigation experience was extensively surrounded with questions about personal injury claims and litigation. *248 S.W.3d at 45*. The majority in *McBurney* could not isolate the general question regarding prior litigation experience from its surrounding context and, therefore, could not find that a reasonable venire member would have understood counsel's general question about prior litigation experience was intended to solicit information about "*all kinds of claims and cases*." *Id. at 46*.

Here, the inquiry into prior litigation experience is similar to counsel's questioning in *Massey v. Carter*, in which counsel asked generally, "Have any of you ever filed a lawsuit?" *238 S.W.3d 198, 201 (Mo. App. 2007)*. After a venire member mentioned filing a claim "as a homeowner," and after finding out the venire member was satisfied with how things were resolved in that case, counsel asked, "Have any of you ever been sued by anyone?" *Id*. The juror in question failed to disclose he had been sued five times in collection lawsuits. *Id. at 200*. The court in *Massey* [*557] pointed out that, after the question about having been "sued by anyone," there were no follow-up questions [**9] "honing in" on a specific kind of lawsuit, as there was in Payne. *Id. at 201*. The court determined that counsel's question "remained a general question." *Id*.

Applying the objective standard of clarity developed in prior case law, this Court agrees with the trial court's assessment that the voir dire question was reasonably clear and triggered Mims' duty to disclose the multiple debt collection lawsuits against her and the suit for personal injuries. The question remained a general question and was not rendered confusing or ambiguous by surrounding context. Counsel's question clearly indicated that he was not interested in disclosure of "family law" disputes. From the standpoint of a reasonable lay person, debt collection lawsuits and suits for personal injuries are not excluded by counsel's general inquiry into prior litigation experiences. With the question so narrowed, counsel's question unequivocally triggered Mims' duty to disclose. However, Mims remained silent. Failure to answer a clear question is considered a nondisclosure. *Id*. Accordingly, the trial court correctly determined that counsel's question was reasonably clear.

C. Intentional Nondisclosure

After it is objectively determined [**10] that the question *was* reasonably clear in context and that a nondisclosure occurred, this Court reviews whether the trial court abused its discretion in deciding whether the nondisclosure was intentional or unintentional. *McBurney, 248 S.W.3d at 42*. Here, the trial court determined that Mims' nondisclosure of her involvement in prior litigation was intentional and, therefore, inferred prejudice from her concealment. The distinction between intentional and unintentional nondisclosure is significant. As this Court explained in *Wilford*, this distinction determines whether prejudice can be inferred from a

nondisclosure. *736 S.W.2d at 37*. If the nondisclosure was unintentional, a new trial is not warranted unless prejudice resulted from the nondisclosure. *Id*. On the other hand, bias and prejudice is presumed if a juror intentionally withholds material information. *Harlan ex rel. Brines v. Cibis, 882 S.W.2d 138, 140 (Mo. banc 1994)*. "[Q]uestions and answers pertaining to a prospective juror's prior litigation experience are material." *Brines, 882 S.W.2d at 140*. A finding of intentional concealment of material information has '"become tantamount to a per se rule mandating a new trial.'" *Id*. [**11] (quoting *Wilford, 736 S.W.2d at 37*).

Although Johnson did not provide the trial court with any *direct* evidence explaining why Mims failed to answer the pertinent questions as to a material matter, the trial court's determination that Mims' nondisclosure was intentional is not an abuse of discretion. "The determination of whether concealment is intentional or unintentional is left to the sound discretion of the trial court." *Wilford, 736 S.W.2d at 36*. The record establishes that a nondisclosure occurred, as Mims did not respond to counsel's clearly asked question, and that Mims' involvement in prior litigation is both extensive and recent, as demonstrated by counsel's litigation records search via Case.net. Defendants cite no case law supporting their argument that either an affidavit or testimony is necessary to support a finding of intentional nondisclosure. In this case, the trial court based its findings on the Case.net litigation records submitted by Johnson, which demonstrated Mims' involvement as a defendant in multiple recent lawsuits. [*558] At least three of the lawsuits against Mims were filed within the previous two years. [3]

> 3 There was no dispute that the Mims contained in the Case.net [**12] records was in fact the same person as the juror empanelled.

Although the better practice here would have been for the party seeking a new trial to have deposed Mims, obtained an affidavit, or had her testify, under these facts there was no reasonable inability to understand the question, as several venire members provided relevant disclosures of prior litigation experience, and Mims' litigation history was of such significance that forgetfulness is unreasonable, as her experiences were both numerous and recent. The trial court properly found that Mims' nondisclosure was intentional. Because Mims' nondisclosure was intentional, bias and prejudice are presumed. *See Brines, 882 S.W.2d at 140*. A finding of intentional concealment of material information has '"become tantamount to a per se rule mandating a new trial.'" *Id*. (quoting *Wilford, 736 S.W.2d at 37*). "[Q]uestions and answers pertaining to a prospective juror's prior litigation experience are material." *Id*. The trial court did not abuse its discretion in finding intentional nondisclosure and ordering a new trial.

D. Timeliness of Challenge

Finally, Defendants contend that the trial court erred in granting a new trial because Johnson's [**13] juror nondisclosure argument was untimely, as it was brought after Johnson received an adverse verdict following a six-day jury trial. In support, Defendants point to *McBurney*, where that court commented in dicta about the issue. *248 S.W.3d at 41*.

In *McBurney*, the court of appeals noted that the issue of timeliness and waiver was first raised by this Court in *Brines*. In *Brines*, those plaintiffs appealed an adverse verdict on the basis of one juror's failure to disclose during voir dire that he had been a defendant in multiple collection cases. *Id. at 139*. The defendant argued a claim based on litigation history must be raised before submission, and if it is not, it is untimely and waived. *Id. at 140*. The Court rejected the defendants' argument that an issue regarding prior litigation experience must be raised before submission. *Id*.

The court of appeals resurrected the issue in *McBurney*, stating that "the issue may not necessarily be settled forever in view of the technological advances in the thirteen years since *Brines*." *248 S.W.3d at 41*. *McBurney* displayed the court of appeals' willingness to delve into a claim about the issue of timeliness and waiver, "at least with regard to cases [**14] that extend beyond a short time." *Id*. With the relative present day ease of procuring the venire member's prior litigation experiences, via Case.net, "[w]e encourage counsel to make such challenges *before* submission of a case whenever practicable." *Id. at 41*.

This Court cannot convict the trial court of error in following the law in existence at the time of trial. *See, e.g., McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473, 479-80 (Mo. banc 2009)*. Further, there was no evidence that it was practicable for the attorneys in this case to have investigated the litigation history of all of the selected jurors prior to the jury being empanelled.

Accordingly, there was no error in the trial court's determination that Johnson's juror nondisclosure argument was timely.

However, in light of advances in technology allowing greater access to information that can inform a trial court [*559] about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history [**15] when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled. Litigants should endeavor to prevent retrials by completing an early investigation. Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial. [4] To facilitate this search, the trial courts are directed to ensure the parties have an opportunity to make a timely search prior to the jury being empanelled and shall provide the means to do so, if counsel indicates that such means are not reasonably otherwise available.

4 Because Case.net is not an official record, this Court recognizes its limitations. First, Case.net may contain inaccurate and incomplete information. Second, Case.net may have limited usefulness in searches involving common names or when a person's name has changed. Until a more specific rule is promulgated, the trial court must determine whether [**16] a party has made a reasonable effort in determining a juror's prior litigation history by searching Case.net. Searches of other computerized record systems, such as PACER, are not required.

III. Conclusion

The judgment of the trial court is affirmed.

ANTOINE LEVAR GRIFFIN v. STATE OF MARYLAND

No. 1132, SEPTEMBER TERM, 2008

COURT OF SPECIAL APPEALS OF MARYLAND

192 Md. App. 518*; *995 A.2d 791*; *2010 Md. App. LEXIS 87

May 27, 2010, Filed

SUBSEQUENT HISTORY: Writ of certiorari granted *Griffin v. State, 415 Md. 607, 4 A.3d 512, 2010 Md. LEXIS 539 (2010)*
Reversed by, Remanded by *Griffin v. State, 419 Md. 343, 19 A.3d 415, 2011 Md. LEXIS 226 (Md., Apr. 28, 2011)*

DISPOSITION: [***1] JUDGMENTS OF CONVICTION AFFIRMED. COSTS TO BE PAID BY APPELLANT.

COUNSEL: ARGUED BY Katherine P. Rasin (Elizabeth L. Julian, Acting Public Defender, Baltimore, MD) on the brief FOR APPELLANT.

ARGUED BY Robert Taylor, Jr., Asst. Atty. Gen. (Douglas F. Gansler, Atty. Gen., Baltimore, MD) on the brief FOR APPELLEE.

JUDGES: ARGUED BEFORE Hollander, Woodward, Kehoe, JJ. Opinion by Hollander, J.

OPINION BY: Hollander

OPINION

[*523] [**794] Opinion by Hollander, J.

A jury in the Circuit Court for Cecil County convicted Antoine Levar Griffin, appellant, of second degree murder, first degree assault, and use of a handgun in the commission of a felony or crime of violence. The convictions arose from the fatal shooting of Darvell Guest on April 24, 2005. [1]

> 1 Appellant was sentenced to thirty years for the murder conviction and to a consecutive term of twenty years for the handgun offense. The assault conviction merged into the murder conviction.

On appeal, Griffin poses three questions, which we have rephrased slightly:

> I. Did the trial court err in admitting a page printed from a MySpace profile alleged to be that of appellant's girlfriend?
>
> II. Did the trial court err in permitting the prosecutor to incorrectly describe "reasonable doubt" in his rebuttal closing argument?
>
> III. Did the trial court err in denying appellant's request for a mistrial following an outburst by the mother of a witness?

For the reasons set forth below, we shall affirm the convictions.

I. FACTUAL SUMMARY

[2]

> 2 Numerous witnesses testified [***2] during the course of the seven-day trial. Because appellant has not challenged the sufficiency of the evidence, however, we shall include "only the portions of the trial evidence necessary to provide a context for our discussion . . . ." *Washington v. State, 180 Md. App. 458, 461-62 n.2, 951 A.2d 885 (2008)*; *see Singfield v. State, 172 Md. App. 168, 170, 913 A.2d 671 (2006), cert. denied, 398 Md. 316, 920 A.2d 1060 (2007)*; *Martin v. State, 165 Md. App. 189, 193, 885 A.2d 339 (2005), cert. denied, 391 Md. 115, 892 A.2d 478 (2006)*.

In the early morning hours of April 24, 2005, Darvell Guest was cornered, unarmed, in the women's bathroom of Ferrari's Bar in Perryville, where he was brutally shot seven times. Appellant was charged with the murder. Griffin's first trial was held in August 2006. At that trial, Dennis Gibbs, appellant's cousin and an eyewitness to Guest's murder, testified that he did not see appellant pursue the victim into the bathroom with a gun. The trial ended in a mistrial.

At appellant's second trial in January 2008, several witnesses testified that they saw appellant with a handgun just before the shooting, and others testified that they witnessed appellant pursue Guest into the women's bathroom, where appellant fired his weapon. Gibbs [***3] testified that appellant was the only person, other than Guest, in [**795] the bathroom when the [*524] shots were fired. According to Gibbs, another cousin, George Griffin, was standing "right with me" during the shooting and did not enter the bathroom. He explained the discrepancy in his testimony at the two trials, claiming that Jessica Barber, appellant's girlfriend, had threatened him prior to the first trial.

Thereafter, the court permitted the State to introduce into evidence a redacted printout obtained in December 2006 from a MySpace profile page allegedly belonging to Ms. Barber. The profile page, introduced for the limited purpose of corroborating Gibbs's testimony, said, in part: "JUST REMEMBER, SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!"

We shall include additional facts as they pertain to our discussion of the issues.

II. DISCUSSION

A.

Appellant contends that the court erred in admitting the MySpace evidence. He complains that the evidence was not properly authenticated and that its prejudicial effect outweighed its probative value.

Before reviewing the parties' contentions in more detail, we pause to set forth additional facts.

At the second trial, Gibbs recalled that he arrived at Ferrari's [***4] in the company of three of his cousins, Dorian Griffin, Dyrle Griffin, and George Griffin. According to Gibbs, Guest bumped into Dorian, and the two "exchanged a few words." They quickly shook hands, however, then "parted ways," without further incident. A few minutes later, according to Gibbs, he saw appellant run up and punch Guest in the face. In response, the victim's girlfriend, Kesha Bowser, grabbed appellant. A "commotion" with physical "tussling" ensued, during which appellant pulled a black handgun "from his hip" and held it out "[s]traight in front of him," pointing it "[t]owards Mr. Guest." Guest ran into the women's bathroom, and [*525] appellant followed. Although Gibbs could not see inside the restroom, he testified that he saw both Guest and appellant go into the bathroom, and that no one else went in. Gibbs then heard multiple gunshots.

Gibbs conceded that his testimony at the second trial as to who entered the bathroom before the shots were fired was inconsistent with what he told police and with his testimony at the first trial. He acknowledged that, at the first trial, he had testified that appellant was outside the bathroom while the victim was in the bathroom, that he [***5] did not see appellant go into the bathroom with Guest, and that he saw his cousin, George Griffin, exit the bathroom.

On re-direct, the prosecutor asked Gibbs to explain the "inconsistencies between your testimony here in this trial and some of your earlier statements." Gibbs replied:

> I had been threatened. Like right after the stuff happened I was threatened by people from across the bridge that knew Mr. Guest. That's why I couldn't go back to work. And **then right before the last [trial] I was threatened by Antoine's girlfriend. She told me I might catch a bullet if I showed up in court[.]** (Emphasis added.)

On re-cross, the following exchange ensued:

> [DEFENSE COUNSEL]: Did you see George Griffin come out of the bathroom?
>
> [MR. GIBBS]: No, sir.
>
> [**796] [DEFENSE COUNSEL]: Did you tell under oath and swear to a jury that you did see him come out of the bathroom?
>
> [MR. GIBBS]: Yes, sir. . . .
>
> [DEFENSE COUNSEL]: Now you said that the reason that you are giving inconsistencies or . . . lies . . . would be because his girlfriend threatened to you that you were going to get a bullet?
>
> [MR. GIBBS]: Yes, sir; and I have a witness.
>
> [DEFENSE COUNSEL]: When was that, sir?
>
> [MR. GIBBS]: It was like the week before the [***6] trial.

[*526] [DEFENSE COUNSEL]: Where was that?

[MR. GIBBS]: Me and my sister was right out in front of her house, and her and my sister and Jesse was on the phone together, and she was like --

[DEFENSE COUNSEL]: Just listen. I'm talking to you. I said where did you get that, not your sister.

[MR. GIBBS]: From the phone.

[DEFENSE COUNSEL]: You spoke to somebody on the phone?

[MR. GIBBS]: My sister was on the phone with her.

[DEFENSE COUNSEL]: Sir, did you tell the state's attorney?

[MR. GIBBS]: Yes, on the first case, yes, I did tell whoever the state's attorney was. I did tell him that morning. . . .

[DEFENSE COUNSEL]: When did you tell this state's attorney?

[MR. GIBBS]: Today. . . . Because you didn't let me finish answering my question when you had asked me, and I said there was a reason behind everything. . . . I wanted to finish my statement, but you didn't let me.

The State also called Ms. Barber. She testified that, on the night in question, appellant was her boyfriend, and he lived with her and their two children. Ms. Barber identified appellant's nickname as "Boozy." Although Ms. Barber was at Ferrari's at the time of the shooting, she did not arrive with appellant, and claimed that she was [***7] not with him during the evening. According to Ms. Barber, she heard gunshots at the bar but did not see appellant in the bar after the shooting.

On the day after Ms. Barber testified, the prosecutor sought to introduce five pages printed on December 5, 2006, from an Internet Web site [3] for a MySpace profile in the name of "SISTASOULJAH," who was described on that Web page as a 23 year-old female from Fort Deposit. The profile page listed the member's birthday as "10-2-83." It also contained [*527] a photograph posted next to the description, showing a "three-quarter view" of an embracing couple. Counsel and the court agreed that the couple appeared to be appellant and Ms. Barber. A "blurb" posted on the profile stated as follows:

I HAVE 2 BEAUTIFUL KIDS . . . . FREE [*528] BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!

3 The term "Web" is a shorthand reference to the World Wide Web.

The State offered the printout to rehabilitate Gibbs's credibility, and to bolster Gibbs's claim that Ms. Barber had threatened him before the first trial. Defense counsel objected, arguing that the State had not sufficiently established a "connection" to Ms. Barber, and had failed to question her about [***8] the MySpace profile. In response, the prosecutor asserted that the profile could be authenticated as belonging to Barber through the testimony of Sergeant John Cook, the Maryland [**797] State police investigator who printed the document.

The trial court then allowed defense counsel to voir dire Sergeant Cook, outside the presence of the jury. The following transpired:

[DEFENSE COUNSEL]: How do you know that this is her web page? . . .

[SGT. COOK]: Through the photograph of her and Boozy on the front, through the reference to Boozy, to the reference of the children, and to her birth date indicated on the form.

[DEFENSE COUNSEL]: How do you know she sent it?

[SGT. COOK]: I can't say that.

Sergeant Cook acknowledged that he could not determine when any particular posting was made. But, he indicated that he visited the Web site on December 5, 2006, the date that appeared on the printout.

The court ruled that it would admit a single, redacted page from the MySpace printout, containing only the photo next to a description of the page creator as a 23 year-old female from Fort Deposit, and a portion of the blurb, stating: "FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!"

Without [***9] waiving appellant's objection, defense counsel agreed to the following stipulation, in lieu of Cook's testimony:

> If asked, Sergeant Cook would testify that he went onto the internet to the web site known as MySpace. . . . [F]rom that site he downloaded some information of a posting that someone had put there.
>
> That posting contains a photograph which the witness would say he recognizes as a photograph of Jessica . . . Barber, who testified, . . . that she is the defendant's live-in fiance; and that it also contains a date of birth, to wit October 2nd, 1983, which the witness would testify is the date of birth that Jessica Barber gave as her date of birth.
>
> When this exhibit, the download, comes to you, you are going to see that it has a great -- that most of its content has been redacted; this is, blacked out. That's because some of it, in my judgment, might tend to be inflammatory without proving anything one way or the other. There is one portion of it that will not be redacted when it comes to you, and this is the only portion of it which you should consider. And you certainly should not speculate as to what any of the redacted portions may be.
>
> The portion that will not be redacted says, [***10] just remember snitches get stitches. You will see that. The phrase is, just remember snitches get stitches. . . . And . . . the witness would testify that the date it was retrieved was . . . . December 5, 2006.

Thereafter, the court promptly instructed the jury regarding the limited evidentiary purpose of the MySpace printout, as follows:

> Now here's a cautionary instruction. This is being offered for a limited purpose. The limited purpose is for such weight as you choose to give it. That's completely up to you. You will hear me say several times when I [instruct] you that I'm going to be instructing you as to the law on [*529] various things. It's for you to decide what the evidence shows.
>
> And by my instructions and my cautionary instruction now you should not assume that I am implying one thing or another as to how much weight or what the evidence shows. That's completely up to you.
>
> But it's being offered for the proposition that this corroborates what Dennis [**798] Gibbs said about being threatened by the defendant's girlfriend. Now you can decide whether it corroborates that or not. You can decide what that means in the context of Mr. Gibbs' testimony. That's completely up to you. I'm not implying [***11] anything in that regard.
>
> But that's the limited purpose for which this evidence is being offered. It should be considered on nothing but that purpose. Now you may decide that it corroborates Mr. Gibbs. You may decide it does not corroborate Mr. Gibbs. If you find that it corroborates Mr. Gibbs, then you still have to evaluate the rest of Mr. Gibbs' testimony. That's completely up to you.
>
> But that's the only purpose it [sic] going offered for, because Gibbs said that he was threatened by the defendant's girlfriend; and the [S]tate is offering this for the sole purpose of showing that on this web site as of December 5, 2006, a statement is made, just remember snitches get stitches.

The defense did not present any testimonial evidence. But, it introduced various documents.

During the court's instructions to the jury, the judge reviewed the stipulations. He stated, in part: "And that Sergeant Cook went online to the Web site My Space and downloaded an entry there, redacted version of which is in evidence, and that he would have testified that there was a photo there of Miss Barber."

In closing argument, the State relied upon the MySpace page to explain the inconsistencies in Gibbs's testimony. [***12] After referring to Gibbs's claim that Ms. Barber threatened him before the first trial, the prosecutor said:

> [*530] Mr. Gibbs said, That's the reason that my testimony at that trial wasn't consistent with my testimony at this trial. Now, is that believable, that state-

> ment from him? I suggest to you it is. . . . Sergeant Cook told you that he went online and went to a website called My Space and found a posting that had been placed there by the defendant's girlfriend, Jessica Barber, recognized her picture, able to match up the date of birth on the posting with her date of birth, and the posting includes these words, "Free Boozie. Just remember, snitches get stitches. You know who you are."

In closing argument, the defense argued, in part:

> And I suggest to you, ladies and gentlemen, that [Gibbs] said in court last time under oath, and he told you, that he never even saw Antoine Griffin go into the bathroom. He was standing by the bar when the shots were fired. That's what he told another court under oath. He told you this time that George Griffin did not go into the bathroom. He told the police and someone else that George Griffin did go into the bathroom. And he tells you that his inconsistencies [***13] and his lying under oath either today or back in August of '06 was because he was fearful.

In rebuttal, the State responded:

> Now, were there inconsistencies between Mr. Gibbs' testimony at the August 2006 trial and this trial? Absolutely. Absolutely. I don't in any way pretend there weren't, and I talked to you a while ago about why that was. . . . Well, first, folks, remember . . . the stipulation that we had regarding Sergeant Cook's testimony about that page that it was only December of '06 that Sergeant Cook found the page. There's no evidence whatsoever of when the page was created. Could have been before August 2006. Maybe it wasn't. But even if it wasn't, folks, it's not the [**799] date of creation of the page or the date of finding of the page by Sergeant Cook that's important. What's important is the state of mind evidenced by the person to whom the page relates, and that person was Jessica Barber, the defendant's girlfriend, and the state of my [sic] evidence by that page is [*531] snitches get stitches. Just what Gibbs told you in regard to his explanation of why his testimony at the August 2006 trial was not consistent with his testimony at this trial.

B.

As noted, appellant contends that [***14] the trial court erred in admitting the redacted printout from the MySpace page. He asserts: "The State came nowhere near authenticating the contents of the MySpace page as statements by Barber."

Claiming that it provided adequate authentication under *Md. Rule 5-901(b)(4)*, the State posits: "The foundational evidence the State provided was sufficient to support a reasonable inference by the jury that the printout was what it purported to be -- Jessica Barber's MySpace website." Moreover, it contends that the only issue pertains to whether the MySpace page belonged to Barber, because the defense "stipulated to the process by which [the State] obtained the information from the website."

As to the adequacy of the prosecution's authentication, the State points to the content of the profile, which included Ms. Barber's photograph, her date of birth, and the references to her children. Further, it asserts:

> Three other considerations support the trial court's determination that the State had offered sufficient authentication evidence. In her testimony, Barber confirmed that Griffin sometimes went by the nickname "Boozy," the name used on the MySpace page. Additionally, Sergeant Cook's testimony [***15] should be deemed sufficient given that a MySpace website is a personal profile containing text and image content supplied not by MySpace itself, but rather by the site's individual users. The judge, moreover, provided a detailed limiting instruction clarifying the purpose for which the statement could be used and emphasized that the MySpace page should be afforded only "such weight as [the jurors] choose to give it."

Maryland Rule 5-901 governs authentication. Notably, the authentication concerns attendant to the use of evidence printed [*532] from a social networking

Web site such as MySpace is a topic on which there is no Maryland precedent and scant case law from other jurisdictions.

Under *Rule 5-901 (a)*, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Moreover, *Md. Rule 5-901(b)(4)* provides, "[b]y way of illustration," that "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics," may be sufficient to establish "that the offered evidence is what it [***16] is claimed to be." *See, e.g., Knoedler v. State, 69 Md. App. 764, 772-74, 519 A.2d 811 (1987)* (holding that telephone conversations were admissible where direct or circumstantial evidence was presented "'to establish the identity of the other person to the conversation,'" and noting that "[s]uch authentication can be found either from evidence that the witness was familiar with and recognized the voice of the alleged caller, or, in the absence of such recognition, 'sundry circumstances . . . .'") (citations omitted).

[**800] Whether there is sufficient authenticating evidence to admit a proffered document is a preliminary question to be decided by the court. *See Md. Rule 5-104(a)*. The court must make its threshold determination of whether there is sufficient authenticating evidence on the basis of admissible evidence that the jury may later consider in making its ultimate determination of authenticity. *See Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 539-40 (D. Md. 2007)* (construing and applying analogous federal rules in determining admissibility of electronic communications). However, "the burden of proof for authentication is slight, and the court 'need not find that the evidence is necessarily what [***17] the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.'" *Dickens v. State, 175 Md. App. 231, 239, 927 A.2d 32 (2007)* (quoting *United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C.2006))* (emphasis in *Safavian*). When a proponent makes a prima facie showing that a proffered [*533] document is genuine, the "'writing or statement comes in, and the ultimate question of authenticity is left to the jury.'" *Gerald v. State, 137 Md. App. 295, 304, 768 A.2d 140* (citation omitted), *cert. denied, 364 Md. 462, 773 A.2d 514 (2001)*. We review a decision to admit such evidence for abuse of discretion. *Id. at 305*.

As indicated, this case involves a profile posted on a social media networking site, MySpace. Such Web sites, which include Facebook, LinkedIn, Plaxo, and Twitter, are increasingly popular vehicles for the dissemination of personal information posted on individualized profiles. Social media Web sites offer users multi-faceted avenues to "network" with fellow users, along with control over the content of their profiles. [4] The Court of Appeals explained in *Independent Newspapers, Inc. v. Brodie, 407 Md. 415, 424 n.3, 966 A.2d 432 (2009)*: "Social networking sites and blogs are sophisticated tools of communication [***18] where the user voluntarily provides information that the user wants to share with others. . . . The user can choose what information to provide . . . ." Moreover, the *Brodie* Court recognized that these Web sites offer users the opportunity to post messages for the world to see, as well as the option "to tightly control the dissemination of [posted] information." *Id.* [5]

4 In a recent article by information technology engineers, the authors stated:

> In April 2009, Facebook announced that it had over 200 million active users worldwide. In the same month, Twitter, the new kid on the social networking block, reached over 14 million users in the United States. LinkedIn claims over 48 million members worldwide and Plaxo over 40 million. MySpace, once the 800-pound gorilla of this new world, has fallen from favor with Internet users. Still, according to TechCrunch, it has an impressive 125 million users globally. These networks are rapidly becoming a part of everyday life to an increasing number of people, but if any of the sites listed above are unfamiliar to you, just take a look at their Wikipedia entries.
>
> Sharon Nelson et al., *The Legal Implications of Social Networking, 22 REGENT U.L. REV. 1, 1-2 (2009/2010)* [***19] (footnotes omitted).

5 For an informative description of various forms of Internet communication, including e-mails, instant messaging, blogs, chatrooms, and discussion forums, *see Brodie, 407 Md. at 422-25*. In *Brodie*, the Court said, *407 Md. at 423*: "Blogs, chatrooms and discussion forums constitute a different category of Internet communications, in which users often post statements to the world at large without specification."

[*534] Typically free to users, social networking sites "can serve as an online newsletter or as a personal journal -- where an individual can post concerns, ideas, opinions, etc. -- and it can contain links to web sites or can use images or video." *Id. at 424*. [**801] But, in

the absence of limitations imposed by the user, "whatever is posted [is] available to the world at large." *Id. at 424 n.3*. Moreover, the development of Web sites like YouTube allows users to upload streaming video, so that personal statements may be recorded and disseminated. Thus, such online networking communities have led to an expanding universe of shared information, and have been aptly characterized as "soda fountains for the twenty-first century." *See, e.g.*, John S. Wilson, *MySpace, Your Space,* [***20] *or Our Space? New Frontiers in Electronic Evidence, 86 OR. L. REV. 1201, 1219-24 (2007)* (reviewing the history of social networking sites).

With respect to MySpace, the particular social media Web site at issue here, one court has explained, using MySpace's own words:

> MySpace is "an online community that lets you meet your friends' friends." Most aptly described as a social networking site, individuals can create "profiles" listing their interests in books, television, music, movies, and so forth, as well as posting pictures, music, and videos. MySpace allows its members to control who can view the entirety of their "profile." On all "profiles," certain information is displayed to other members and visitors that "allows our users to identify each other and expand their network of friends." MySpace users have a choice to make their "profiles" public or private. For example, if a member wishes to restrict public access to her "profile," she may make it viewable to only those that she has accepted as friends, but information [*535] such as the member's photo and first name are still displayed for public view.

A.B. v. State, 885 N.E.2d 1223, 1224 (Ind. 2008) (footnotes and citations omitted).

The [***21] design and purpose of social media sites make them especially fertile ground for "statements involving observations of events surrounding us, statements regarding how we feel, our plans and motives, and our feelings (emotional and physical)[.]" *Lorraine, 241 F.R.D. at 569*. For that reason, both prosecutors and criminal defense attorneys are increasingly looking for potential evidence on the expanding array of Internet blogs, message boards, and chat rooms. *See, e.g.*, *Nelson, supra, at 13* ("It should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."); Seth P. Berman et al., *Web 2.0: What's Evidence Between "Friends"*?, 53 B.B.J. 5, 6 (Jan/Feb 2009) (social networking sites "may record people's thought processes and impressions in unguarded moments, exactly the sort of evidence that can be invaluable during litigation"); Kathrine Minotti, *Evidence: The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession, 60 S.C.L. REV. 1057, 1059-61, 1066-68, 1071-73 (2009)* ("Prosecutors are gathering information from social networking web sites for evidence. . . .").

As indicated, users of social [***22] media Web sites, blogs, chat rooms, and discussion forums may post messages anonymously or under pseudonyms. *See Wilson, supra, at 1220*. The Court observed in *Brodie, 407 Md. at 425*: "Since the early 1990's, when Internet communications became available to the American public, anonymity or pseudonymity has been a part of the Internet culture."

The MySpace profile at issue here illustrates that a user "can choose not to provide" the user's real name. *See id. at 424 n.3*. Instead, users may join the online community anonymously, by registering under password and [*536] user names that are self-selected and confidential. [6] [**802] Access to the profile may be obtained by logging in on the Web site with the confidential user name and password. Other social networking site features preserve the veil of anonymity or pseudonymity, by allowing members to communicate electronically using their chosen screen names, both via private message sent to other members, as an alternative to traditional e-mail in which "users generally know with whom they are communicating[,]" *id. at 422*, and via an "in-house" instant messaging option that allows members to conduct real-time "chats" with other members, by use of their [***23] screen names. *See Wilson, supra, at 1220*.

> 6 The name that is publicly displayed on the profile is known as a screen name.

In *Brodie, 407 Md. at 419*, the Court held that a company that commissioned an Internet forum allowing participants to post messages under screen names could not be required to identify those participants in the circumstances of that case. In doing so, the Court recognized the increasing difficulty in ascertaining the identity of a person posting a message on an Internet site under a screen name. *Id. at 424-25*. Recounting the development of anonymous communications on the Internet, the Court said, *id. at 425-27*:

> Generally, first exposure to communications on the Internet was through the use of a dial-up online access providers, such as America Online ("AOL") or Prodigy. These online access providers

permitted subscribers to choose "screen names" to represent their online identities. When users logged-on using their screen names, they reached a home page presenting them with a host of communications services --from e-mail to chatrooms to instant messaging to forums --all of which were provided by the online access provider and all of which were accessed by using the online [***24] access provider's screen name. Thus, for example, under the AOL regime, an account held by John Smith might have had the screen name/log-in of "Jsmith1417," the e-mail [*537] address of "Jsmith1417@aol.com," and any statement posted in a chatroom, during an instant message exchange or in a forum, would be posted under the screen name "Jsmith1417." Under this configuration, subscribers enjoyed a degree of anonymity, because they were permitted to use a screen name wholly distinct from their real name, but their screen names also were easily traceable, because they were linked to an Internet access account.

Full-service online access providers, like AOL or Prodigy, presently no longer dominate the Internet communications market, and at-home access to the Internet is often achieved through broadband services, provided by local cable or phone companies. These broadband companies, unlike former online access providers, usually do not require the registration of a screen name and generally provide Internet access without any other services. Most communications services, moreover, such as those that provide e-mail, instant messaging, chatrooms or forums, are accomplished through a website hosted [***25] by a third-party on the World Wide Web. Thus, today, the hypothetical Internet user John Smith might gain access to the Internet through his local cable company, might obtain the e-mail address JSmith1747 over the World Wide Web through Google's "gmail," or a like service, and might participate in an Internet forum regarding a topic of interest under the registered username "crazyCOAcommentator." When registering [**803] for this forum, John Smith might even obfuscate his true identity, making it even more difficult to trace his statements to him. In short, **unlike former days when a user's posts were easily traceable through the online access provider's billing records, today, the World Wide Web host of an e-mail, instant messaging, forum or chatroom service obtains only as much information about an individual as it requires for registration**, and even then, there are few checks to ensure the validity and accuracy of that information. (Emphasis added; footnotes omitted.)

The anonymity features of social networking sites may present an obstacle to litigants seeking to authenticate messages [*538] posted on them. *See, e.g.*, Paul W. Grimm et al., *Back to the Future: Lorraine v. Markel American Insurance* [***26] *Co. and New Findings on the Admissibility of Electronically Stored Information, 42 AKRON L. REV. 357, 370-71 (2009)* ("Chat room and text or instant messaging 'dialogues' . . . pose unique challenges to authentication due in large part to the fact that they typically are created by parties using anonymity-protecting ' screen names' on websites where the host cannot be assumed to know the content."). That is the issue we encounter here: whether the State adequately established the author of the cyber message in question.

Despite the pervasive popularity of social networking sites and their potential as treasure troves of valuable evidence, Maryland appellate courts have not yet addressed the issue of authenticating anonymous or pseudonymous documents printed from social media Web sites. Notably, neither the Maryland Rules of Evidence nor the Maryland Rules of Procedure specifically address the authentication of such evidence. Perhaps this is because courts that have generally considered the issue of authentication of electronic communications have concluded that they may be authenticated under existing evidentiary rules governing authentication by circumstantial evidence.

In the leading [***27] case of *Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007)*, Magistrate Judge Paul Grimm, a noted authority on electronic discovery, offered well-reasoned methods to authenticate various types of electronically stored information, including e-mails, text messages, chat room logs, and "Internet Website Postings." Although *Lorraine* recognized that such evidence "may require greater scrutiny than that required for the authentication of 'hard copy' documents," the court suggested that the existing rules governing authentication provide an adequate analytical framework to determine the admissibility of such evidence. *Id. at 542-43*.

In particular, the *Lorraine* Court cited *Federal Rule of Evidence 901 (b)(4)*, the federal analogue to *Md. Rule 5-901(b)(4)*, as "one of the most frequently used to authenticate [*539] e-mail and other electronic records." *Id. at 546*. It observed: "'[T]he characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety,' including authenticating an exhibit by showing that it came from a 'particular person by virtue of its disclosing knowledge of facts known peculiarly to him[.]'" *Id.* (quoting [***28] *FED. R. EVID. 901(b)(4)* advisory committee's note). *See generally* Steven Goode, *The Admissibility of Electronic Evidence*, *29 REV. LITIG. 1, 7 (2009)* (explaining why "the existing rules of evidence are adequate to the task of addressing questions about the admissibility of such electronic evidence").

Dickens, 175 Md. App. at 241, is also noteworthy. There, we upheld a decision to admit into evidence electronically [**804] communicated text messages proffered for the purpose of showing that the sender threatened his estranged wife over a period of time before he murdered her. Applying *Rule 5-901(b)(4)*, we held, *inter alia*, that messages sent to the victim's cell phone, one without a return phone number and two sent by a person identified only as "Doll/M," were sufficiently authenticated as having been sent by the defendant. *Id. at 239-40*. In reaching that conclusion, we relied on circumstantial evidence that two of the messages were sent during a period of time consistent with the time line of criminal events, and that the substantive content of all three messages pointed to the defendant's authorship. *Id*. Of import here, we pointed to references in the individual text messages to the defendant, [***29] his wife, their son, and their wedding vows, which indicated that they were sent by the defendant. *Id.*

The rationale of *Dickens* supports our view that *Maryland Rule 5-901(b)(4)*, like its federal counterpart, permits authentication of electronic communications based on the content and the circumstances of those messages. Although we did not explicitly say as much, *Dickens* also suggests that circumstantial evidence may be sufficient to establish authorship of an electronic message without the use of technological [*540] data. *See also State v. Thompson, 2010 ND 10, 777 N.W.2d 617, 623 (N.D. 2010)* (holding that evidence that recipient of threatening text messages was familiar with the defendant's phone number and distinctive electronic signature was sufficient to authenticate messages as having been sent by the defendant); *Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146 (C.D. Cal. 2002)* (considering content of e-mails printed from a corporate Web site and attached to authenticating affidavit in granting a preliminary injunction).

We have found only a handful of reported cases involving evidence specifically pertaining to social networking Web sites. *See, e.g., A.B., supra, 885 N.E.2d 1223* [***30] (holding that a juvenile's profane messages criticizing disciplinary actions taken by her former school principal, which she posted on her MySpace profile and on a MySpace group page, were protected political speech); *In re K.W., 192 N.C. App. 646, 666 S.E.2d 490, 494 (N.C. Ct. App. 2008)* (concluding that victim's statements on her MySpace profile were admissible as prior inconsistent statements to impeach her testimony, but that exclusion was harmless error); *In re T.T., 228 S.W.3d 312, 322-23 (Tex. Ct. App. 2007)* (involving a termination of parental rights proceeding, in which the court considered a father's statement on his MySpace profile that he did not want children). Our research reveals only one reported decision directly resolving an authentication challenge to evidence printed from a social media Web site. However, it involved a printout of MySpace instant messages rather than a MySpace profile page, and was authored by a trial court; we have not found a reported appellate decision addressing the authentication of a printout from a MySpace or Facebook profile.

In *Ohio v. Bell, 2008 Ohio 592, 882 N.E.2d 502, 511 (Ohio C.P. 2008), aff'd*, No. CA2008-05-044, *2009 Ohio 2335, 2009 Ohio App. LEXIS 2112 (Ohio Ct. App. May 18, 2009)*, [***31] the trial court denied a defense motion to exclude printouts of MySpace instant messages alleged to have been sent to a victim by the defendant under his MySpace screen name. It pointed to the dearth of authority on the "important issue" of authenticating printouts of electronic communications. [*541] Moreover, it was not persuaded by the defense complaints "that MySpace chats can be readily edited after the fact from a user's homepage" and that, "while his name may [**805] appear on e-mails to T.W., the possibility that someone else used his account to send the messages cannot be foreclosed." *See id. at 511-12*. The trial court emphasized that the evidence required to meet the authentication threshold for admissibility "is quite low--even lower than the preponderance of the evidence," and observed that "[o]ther jurisdictions characterize documentary evidence as properly authenticated if 'a reasonable juror could find in favor of authenticity.'" *Id. at 512* (citing *United States v. Tin Yat Chin, 371 F.3d 31, 38 (2d Cir. 2004)*).

After reviewing the evidentiary proffers, the court concluded that the MySpace chat logs could be authenticated "through [the alleged victim's] testimony that (1) he has knowledge [***32] of defendant's . . . MySpace user name, (2) the printouts appear to be accurate records of his electronic conversations with defendant, and (3) the communications contain code words known only to

defendant and his alleged victims." *Id*. Moreover, the court held that "evidence of electronic conversations between defendant and the alleged victims would be relevant under *Evid.R. 401*" and that, "[u]pon testimonial development of the 'code language' at issue, the probative value of these messages would outweigh any prejudicial effect." *Id*.

Bell is consistent with other decisions affirming the admission of transcripts of chat room conversations on the basis of similar authenticating testimony by the other party to the online conversation. *See, e.g., United States v. Barlow, 568 F.3d 215, 220 (5th Cir. 2009)* (Internet chat logs of correspondence between defendant and police contractor posing as minor were adequately authenticated through contractor's testimony); *United States v. Gagliardi, 506 F.3d 140, 151 (2d Cir. 2007)* (concluding that chat room logs were authenticated as having been sent by defendant through testimony of persons who participated in the online conversations); *United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000)* [***33] (concluding [*542] that content of conversation was sufficient to link defendant to user name on chat room log printouts); *State v. Glass, 146 Idaho 77, 190 P.3d 896, 901 (Idaho Ct. App. 2008)* (finding that chat room statements were adequately linked to the defendant by evidence that he arrived for a meeting as arranged in that private correspondence), *rev. denied, No. 31422, 2008 Ida. App. LEXIS 117 (Idaho August 11, 2008)*; *In re F.P., 2005 PA Super 220, 878 A.2d 91, 95-96 (Pa. Super. Ct. 2005)* (holding that evidence regarding content and timing of threatening instant messages was sufficient to authenticate them, and rejecting the argument that anonymity of electronic messages makes them inherently unreliable).

To be sure, profile information posted on social networking Web pages differs from chat logs of instant message correspondence conducted through such sites. A chat log is a verbatim transcript of a private "real time" online conversation between site members, which can be authenticated by either of the two participants. In contrast, social networking profiles contain information posted by someone with the correct user name and password, with the intent that it be viewed by others. Therefore, a proponent should anticipate [***34] the concern that someone other than the alleged author may have accessed the account and posted the message in question. *Cf., e.g., In re K.W., 192 N.C. App. 646, 666 S.E.2d 490, 494 (2008)* (although victim admitted that the proffered MySpace page was hers, she claimed that her friend posted the answers to the survey questions that defendant sought to introduce as impeachment evidence with respect to her claims of rape). *See also St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999)* ("There is no [**806] way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet . . . hackers can adulterate the content on *any* website. . . .").

A pseudonymous social networking profile might be authenticated by the profiled person, based on an admission. That did not occur here, however, because the State never questioned Ms. Barber about the profile. Nevertheless, we regard [*543] decisions as to authentication of evidence from chat rooms, instant messages, text messages, and other electronic communications from a user identified only by a screen name as instructive to the extent that they address [***35] the matter of authentication of pseudonymous electronic messages based on content and context. We see no reason why social media profiles may not be circumstantially authenticated in the same manner as other forms of electronic communication -- by their content and context. *Accord Minotti, supra, at 1061-62* ("cases that did not address social networking web sites specifically but addressed Internet communication devices similar to social networking web sites, such as instant messaging and email, are helpful because of the argument presented for the denial of admissibility . . . such as . . . problems with authentication").

The inherent nature of social networking Web sites encourages members who choose to use pseudonyms to identify themselves by posting profile pictures or descriptions of their physical appearances, personal background information, and lifestyles. This type of individualization may lend itself to authentication of a particular profile page as having been created by the person depicted in it. That is precisely what occurred here.

The My Space profile printout featured a photograph of Ms. Barber and appellant in an embrace. It also contained the user's birth date and identified [***36] her boyfriend as "Boozy." Ms. Barber testified and identified appellant as her boyfriend, with the nickname of "Boozy." When defense counsel challenged the State to authenticate the MySpace profile as belonging to Ms. Barber, the State proffered Sergeant Cook as an authenticating witness. He testified that he believed the profile belonged to Ms. Barber, based on the photograph of her with appellant; Ms. Barber's given birth date, which matched the date listed on the profile; and the references in the profile to "Boozy," the nickname that Ms. Barber ascribed to appellant. [7]

7 The defense never recalled Ms. Barber to dispute the accuracy of Cook's testimony.

[*544] Appellant relies on two out-of-state cases to suggest that printouts from such social networking sites must be authenticated either by the author or expert information technology evidence, neither of which oc-

curred here. We are not persuaded. The unpublished Florida decision cited by appellant lacks persuasive value. The other case, *In re Homestore.com, Inc. Securities Litigation, 347 F. Supp. 2d 769 (C.D. Cal. 2004)*, involved a ruling that printouts from a corporate Web site were properly excluded in securities litigation because [***37] there was no authenticating evidence from the company's "web master or someone else with personal knowledge . . . ." *Id. at 782*. In our view, the case is not instructive because appellant never argued below that the printout did not accurately depict the MySpace profile in question. Moreover, printouts from a company-created and controlled Web site differ materially from printouts from a social networking profile, in that site members create and control their own individual profiles.

[**807] On the record before us, we have no trouble concluding that the evidence was sufficient to authenticate the MySpace profile printout. Therefore, the trial court did not err or abuse its discretion in admitting that document into evidence.

C.

Alternatively, appellant argues that the MySpace profile printout should have been excluded "because its prejudice to appellant far outweighed its probative value." In his view, the probative value of the evidence was "minimal," given that the only change in Gibbs's testimony pertained to whether he saw appellant enter the bathroom after Mr. Guest. On the other hand, appellant maintains that the jury "undoubtedly" was influenced by the statement as "evidence of witness [***38] intimidation," making it possible that "the jury . . . decided to find him guilty, at least partly, for the purpose of sending a message regarding witness intimidation." Moreover, he contends that admission of the evidence could not have been harmless error because, without it, "it is highly likely that the jury would have had a reasonable doubt regarding appellant's [*545] guilt based on the evidence surrounding Gibbs's involvement alone."

Preliminarily, the State contends that appellant has not preserved his claim that the probative value of the evidence was outweighed by the prejudice. It points out that at trial Griffin "argued only that Gibbs' testimony was fundamentally consistent, making the admission of the MySpace page unwarranted. Griffin, however, made no other argument at trial regarding either the MySpace page's relevance or its risk of introducing unfair prejudice, leaving all other arguments regarding its admissibility unpreserved."

Even if preserved, the State maintains that appellant's claim is without merit. In its view, because the defense challenged Gibbs's credibility, the MySpace page had "significant probative value in corroborating Gibbs' claim of threats," and the probative [***39] value was not "outweighed by any danger of unfair prejudice."

The State argues:

> To the extent that this Court addresses the merits of Griffin's claim, the trial court acted within its broad discretion in admitting a redacted printout of the MySpace page, which corroborated Gibbs's explanation that changes in his testimony followed threats from Griffin's girlfriend. Because Gibbs testified at the second trial to a crucial fact contrary to his previous testimony -- namely, that he did see Antoine Griffin enter the women's restroom, where the shooting occurred -- the trial court properly exercised its discretion in admitting the printout.

Assuming that the claim is preserved, we conclude that the trial court did not err or abuse its discretion in failing to exclude the "SNITCHES GET STITCHES" statement on Ms. Barber's MySpace profile on the basis of undue prejudice. We explain.

Under *Maryland Rule 5-403*, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the [*546] issues, or misleading the jury[.]" The task of balancing the probative value of a particular item of evidence against its potential prejudicial [***40] effect "is committed to the sound discretion of the trial judge." *Broberg v. State, 342 Md. 544, 552, 677 A.2d 602 (1996)*.

Gibbs's credibility was a hotly contested issue at trial. The defense underscored that Gibbs's testimony at the first trial was inconsistent with his testimony at the second trial as to whether he saw appellant or George Griffin enter the bathroom following [**808] Mr. Guest. Although the prosecution acknowledged the inconsistencies, it offered Gibbs's explanation that Ms. Barber had threatened him before the first trial.

Even if appellant had explicitly asked for exclusion under *Rule 5-403*, the record indicates that the trial court reasonably exercised its discretion in deciding to permit the State to present such evidence, for whatever value the jury might give it, in support of its effort to explain the inconsistencies in Mr. Gibbs's testimony. It is also salient that the trial court carefully redacted irrelevant material from the profile and gave a detailed limiting instruction to the jurors, telling them that it was up to them to weigh such evidence. We cannot say that exclusion on the

ground of undue prejudice was required under these circumstances.

D.

In his next assignment of error, [***41] appellant argues that "the trial court erred in allowing the prosecutor to incorrectly define 'reasonable doubt' in his rebuttal closing argument" and to otherwise suggest "that the defense had the burden to prove that one of the other people present at the bar did commit the shooting[.]" In his view, the colloquy "almost certainly left confusion in the juror's mind regarding which party had which burden and, most importantly, about what reasonable doubt means":

The following occurred at trial:

> [PROSECUTOR]: [Defense counsel] says, Hey, remember what beyond a reasonable doubt means. Remember that it [*547] doesn'tt mean probably or more likely. I agree. I agree. But it means this, do you right now have a good reason to believe that somebody other than [appellant] was the person who shot Darvell Guest in Ferrari's Bar on April 25th, 2005? I'm not asking you whether you can speculate and create some construct of hypothetical possibilities that would have somebody else than he be the shooter. I'm not asking you that question at all. I'm asking you the question, do you have right now any reason, any rational reason to believe that somebody other than he was the shooter or gunman?
>
> [DEFENSE COUNSEL]: [***42] I would object.
>
> THE COURT: I think that's the definition of reasonable doubt.
>
> [DEFENSE COUNSEL]: But we don't have to prove that. He said the same thing as somebody else.
>
> The Court: Well, I agree. The defense has no burden to prove anything. I understand the State's argument at this point to be, do you have a reasonable doubt, do you had a doubt based on reason?
>
> [PROSECUTOR]: That's correct.
>
> THE COURT: That's why he used the word "reason."
>
> [PROSECUTOR]: And, folks, I recognize that it's my job as the prosecutor to prove these charges to you beyond a reasonable doubt, that is to say to the exclusion of reasonable doubt. I simply suggest to you, folks, that reasonable doubt doesn't exist in this case because there's just no reason based on this evidence to believe that anybody other than [appellant] fired the shots that killed Darvell Guest and, once again, I ask you to find him guilty.

It is well settled that counsel generally enjoy the rhetorical freedom in closing argument to discuss the evidence in the light most favorable to his or her theory of the case. *See Mitchell v. State, 408 Md. 368, 380, 969 A.2d 989 (2009)*. Appellate relief is warranted, *inter alia*, when the prosecutor's remarks "actually [**809] misled [***43] or were likely to have misled the jury to the defendant's prejudice." *Wise v. State, 132 Md. App. 127, 142, 751 A.2d 24, cert. denied, 360 Md. 276, 757 A.2d* [*548] *811 (2000). See also Lee v. State, 405 Md. 148, 164, 950 A.2d 125 (2008)*. This is not one of those instances.

We concur with the State that the prosecutor did not misstate the reasonable doubt standard, but merely discussed that standard as it applied to the evidence presented at trial. It was undisputed that someone in Ferrari's Bar shot and killed Mr. Guest, so the jury had only three alternative conclusions it could reach. It could find (1) that appellant was the killer, as the State urged; or (2) that someone else was the killer, as the defense suggested; or (3) that there was a reasonable doubt, based on conflicts in the eyewitness accounts of prosecution witnesses, as to whether appellant was the killer, as the defense also advocated. The challenged rebuttal argument by the prosecutor merely urged the jury to reach the first conclusion and to reject the two defense alternatives.

Furthermore, even if there had been error, it was harmless, beyond a reasonable doubt. *See Alston v. State, 414 Md. 92, 994 A.2d 896, 2010 Md. LEXIS 185, *21, No. 129, Sept. Term, 2007 (filed May 11, 2010)*; *Lancaster v. State, 410 Md. 352, 369, 978 A.2d 717 (2009)*; [***44] *State v. Blackwell, 408 Md. 677, 698, 971 A.2d 296 (2009)*; *Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665 (1976)*. Prior to closing arguments, the trial court correctly instructed the jury on the meaning of reasonable doubt, using the pattern jury instruction. When defense counsel objected that appellant was not obligated to prove that someone else was the killer, both the trial court and the prosecutor agreed, and the court stated: "The defense has no burden to prove anything." The prosecutor then continued his rebuttal argument by clar-

ifying that "it's my job as the prosecutor to prove these charges to you beyond a reasonable doubt."

Given the clear and repeated statements that the State had the burden of proving that appellant killed Mr. Guest -- made by the court, the prosecutor, and defense counsel -- we are readily satisfied that the jury was not misled into believing that appellant had to prove that someone else in the bar killed Mr. Guest.

[*549] **E**.

Appellant's final complaint is that "the trial court erred in failing to declare a mistrial following an outburst by the mother of one of the victims." Again, we disagree.

The outburst occurred during the testimony of Kesha Bowser, who was Guest's fiancee at the time [***45] of his death. On direct examination, Ms. Bowser testified about the events at Ferrari's. She recalled: "[Appellant] pulled out a gun in my face. . . ." On cross-examination, defense counsel asked Ms. Bowser about her testimonial inconsistencies at the first and second trials. She explained that she had been "nervous, "upset," and "crying" during the first trial. The following transpired:

> [DEFENSE COUNSEL]: So you're not nervous or upset today?
>
> [MS. BOWSER]: I'm actually a little calmer because I'm more prepared from last time.
>
> [DEFENSE COUNSEL]: And meaning by prepared, so you spoke with the State's attorney.
>
> UNIDENTIFIED WOMAN: Today.
>
> [MS. BOWSER]: Today, yeah.
>
> UNIDENTIFIED WOMAN: He put the gun in my daughter's face and you want to make it seem like -- (unintelligible).
>
> [**810] THE COURT: Whoa, whoa. Ma'am, I caution you to remain quiet while you leave the courtroom.
>
> (Pause in the proceedings.)
>
> THE COURT: Now, ladies and gentlemen, let me calmly say that I appreciate the fact that this case and the testimony in this case has emotional content for both sides in the matter. But this is a courtroom and one of my major responsibilities here is to maintain order so that both sides can be heard in an orderly [***46] and fair fashion.
>
> Now, I understand that I'm preaching to the choir, so to speak, because everybody I'm speaking to has not had an outburst, so please don't take any offense from this, but [*550] please understand from what you've just seen that I will tolerate no outburst whatsoever. I will have a person who does such a thing removed from the courtroom. And if necessary, I will use the contempt power of the Court, reluctantly, but I will do it if I have to.

In the ensuing bench conference, defense counsel moved for a mistrial, asserting that appellant could no longer get a fair trial. The prosecutor opposed the motion, asking instead for a "cautionary instruction." The court denied the motion and gave the following instruction to the jury:

> All right. Ladies and gentlemen, everything that happens in the presence of a jury is seen and heard by the jury. And all of us as adults and as we become more mature as adults have to learn how to sort through what we're going to pay attention to and what we are not going to pay attention to. None of us can purge our hard drives, so to speak, so that what you've seen or heard is not there. But I want to caution you that what you saw and what you heard -- [***47] frankly, I was preoccupied with getting security moving to stop the outburst, so you heard better than I did whatever was said.
>
> I'm told that the lady who had the outburst is the mother of this witness and is apparently emotionally upset, and all of us as parents feel protective toward our children. Whatever she said is not evidence in this case and you should pay no attention to it whatsoever.
>
> As you may have heard me say numerous times, you have to decide the case based on the evidence that you have. And evidence does not come from outside the courtroom, and in fact, doesn't come from emotional outbursts inside the courtroom. So please disregard whatever the lady said. It was an emotional outburst. I stopped it and it is not evidence in this matter. You should not let it affect you one way or the other.

> Now, we are at a little past the time to take an afternoon break anyway and this may be a good time to take an afternoon break. Let everybody calm down, take a deep [*551] breath, and then we'll come back and finish the testimony of this witness at about ten minutes of.

A mistrial is a rare remedy that "'should only be granted if necessary to serve the ends of justice.'" *Hunt v. State, 321 Md. 387, 422, 583 A.2d 218 (1990)* [***48] (citation omitted), *cert. denied, 502 U.S. 835, 112 S. Ct. 117, 116 L. Ed. 2d 86 (1991)*. The trial court is in the best position, having heard the case, to weigh the danger of prejudice arising from improper testimony. *Burks v. State, 96 Md. App. 173, 190, 624 A.2d 1257, cert. denied, 332 Md. 381, 631 A.2d 451 (1993)*. For that reason, we review the denial of a request for a mistrial for abuse of discretion. *See State v. Hawkins, 326 Md. 270, 277, 604 A.2d 489 (1992)*. Such abuse exists when "the prejudice to the defendant was so [**811] substantial that he was deprived of a fair trial." *Kosmas v. State, 316 Md. 587, 595, 560 A.2d 1137 (1989)*.

Deference to the trial court's ability to evaluate prejudicial effect is especially appropriate in cases involving emotional displays or outbursts by members of a victim's family. "A motion for a mistrial, based on the behavior in the courtroom of a member of the victim's family, should only be granted under very extraordinary circumstances[.]" *Parham v. State, 79 Md. App. 152, 158, 556 A.2d 280 (1989)*.

In an appeal involving members of a slain police officer's family leaving the courtroom in emotional distress during the playing of a police recording of the shooting, the Court of Appeals observed that "[e]motional responses in a courtroom are not unusual, especially [***49] in criminal trials, and manifestly the defendant is not entitled to a mistrial every time someone becomes upset in the course of the trial." *Hunt v. State, 312 Md. 494, 501, 540 A.2d 1125 (1988)*. And, in another case involving an isolated emotional outburst against the defendant by the mother of a victim, we held that a curative instruction adequately preserved the defendant's right to a fair trial. *See Parham, 79 Md. App. at 158*.

Nothing in the record of this case indicates a level of prejudice that warrants appellate relief. As the trial court [*552] noted, this was an emotional outburst by a family member of a witness. The outburst occurred on the second day of a lengthy trial, was brief, and did not disclose any factual information that the jury had not already heard. [8] Moreover, the trial court immediately settled the courtroom, then addressed the jury, giving a model curative instruction that sensitively explained why jurors could not treat the outburst as evidence. The court also allowed defense counsel to decide whether to continue immediately with the cross-examination, in order to avoid drawing attention to the incident, or to take a brief recess. Counsel chose to take a recess, after which the [***50] examination resumed without further incident.

> 8 Appellant's reliance on cases in which an outburst or blurt resulted in the jury hearing inadmissible evidence is misplaced. Although the outburst contained a reference to appellant "put[ting] a gun in [the victim's] face," Ms. Bowser had already testified to that fact in her direct examination. *Cf., e.g., Rainville v. State, 328 Md. 398, 410, 614 A.2d 949 (1992)* (concluding that a mistrial was required after mother of alleged child sex abuse victim blurted out that the defendant "'was in jail for what he had done to'" the victim's nine-year-old brother); *Guesfeird v. State, 300 Md. 653, 666-67, 480 A.2d 800 (1984)* (concluding that a mistrial was required after key prosecution witness blurted out that she took a lie detector test).

In these circumstances, the outburst was not likely to have a substantial impact on the jury. Therefore, we cannot say that the trial court erred or abused its discretion in declining to grant a mistrial.

JUDGMENTS OF CONVICTION AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Blogging and Social Networking for Lawyers: Ethical Pitfalls

by James M. McCauley, Ethics Counsel, Virginia State Bar

AS SOCIAL NETWORKING WEBSITES such as Twitter, Facebook, MySpace, and LinkedIn become more popular among lawyers, judges, support staff, and clients, lawyers have to be mindful about ethical concerns that may not be obvious. Some lawyers might say that social networking does not present any novel issues for lawyers to worry about. Lawyers cannot afford to be so cavalier. Experienced lawyers and seasoned judges have suffered professional discipline for the improper use of social networking tools. The informality and speed that characterize social networking sites can contribute to errors and ethical transgressions. Social networks are public, easily searched, and permanently archived.

Confidentiality

Rule 1.6 of the Virginia Rules of Professional Conduct requires a lawyer to protect and not disclose a client's confidences and secrets, unless the client consents to the disclosure. Confidences are communications between lawyer and client that are protected under the common law attorney-client privilege. Secrets embrace all other information gained in the course of the lawyer-client relationship that the client wants kept confidential or that, if disclosed, would be detrimental or embarrassing to the client. Unlike Virginia, most states did not keep the "confidences and secrets" formulation when they adopted a rule modeled after American Bar Association Model Rule 1.6. ABA Model Rule 1.6 requires that all information relating to the representation of the client be kept confidential. It is important for Virginia lawyers who are admitted in other jurisdictions to know that other jurisdictions' rules on confidentiality. Under ABA Model Rule 1.6, even the client's identity and the fact of representation are confidential, whereas under Virginia's Rule 1.6, that generally is not the case.

A lawyer who discusses his or her cases on Twitter, Facebook, or a blog risks violating Rule 1.6, absent client consent. A lawyer could easily breach confidentiality on Twitter simply by tweeting to followers what they are doing at that particular time. A lawyer could try to avoid disclosing specific client information by keeping the message general and vague but this would not be interesting to read. A lawyer may consider having the client permit the lawyer to post information about the client's matter on a social networking site. However, the lawyer must ensure that any disclosure will not hurt the client's legal position or embarrass the client.

Since there might be information that is unknown at the outset of an engagement, an advanced consent may not be effective, because it was not informed. The client may be angry with the lawyer for posting information learned after the consent was given. In addition, there is a risk that the posted information may be read by the client's adversary, opposing counsel, or other third parties.

While it may be improper under certain circumstances for lawyers or their agents to mine for an opposing party's personal information on a social networking site, some lawyers don't think, don't know, or don't care that obtaining and using your client's information may be unethical.

The Illinois Attorney Registration and Disciplinary Commission began disciplinary action against an experienced assistant public defender who discussed her cases on her blog. She posted:

> #127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.[1]

In another post, the assistant public defender stated:

> "Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.[2]

In yet another post, the assistant public defender vividly described her client's perjury in a criminal case.[3] In addition to the blog entries described above, the lawyer referred to a judge as being "a total asshole," and in another she referred to a judge as "Judge Clueless."[4] The Illinois Board has recommended her disbarment.[5]

Criticizing a judge in a blog got lawyer Sean Conway in trouble in Florida. In a conditional plea, Conway agreed to a reprimand for calling a judge an "evil, unfair witch" in a blog post. He claimed in a brief submitted to the Florida Supreme Court that his remarks were protected by the First Amendment, but the court disagreed and affirmed the disciplinary agreement.[6]

On Facebook, a user's profile, photographs, and updates are sometimes available to the public or to any other member who is authorized by the user. Facebook's platform allows users to add such "friends" and to send them messages, as well as leave postings on "friends"' profile pages through "comments" and "wall posts." Fortunately, privacy and security settings on Facebook allow the user to restrict or limit access to the user's profile to only members, the user's "friends," or even a select few "friends." But information can easily fall into the wrong hands. For example, in *People v. Liceaga*, a Michigan murder trial, the prosecutor sought to admit photographs found on the defendant's MySpace page as evidence of intent and planning.[7] The defendant's profile Web page contained photographs of himself and the gun allegedly used to shoot the victim, and in which he was displaying a gang sign.[8]

In *In the matter of K.W.*, a North Carolina court admitted into evidence an alleged child abuse victim's MySpace page as impeachment evidence. The court held that the victim's posting of suggestive photographs along with provocative language could be used to impeach inconsistent statements made to the police about her sexual history.[9]

Courts have also permitted information gathered on a person's social networking site to be used as evidence at sentencing. In *United States v. Villanueva*, the court found that postconviction images on the defendant's MySpace page of the defendant holding an AK-47 with a loaded clip — photos taken after the defendant had been convicted of a violent felony — could be used as evidence to enhance sentencing.[10]

Trial Publicity

Virginia Rule 3.6 prohibits a prosecutor or a defense lawyer from making public statements about pending criminal cases in which they are involved if the statement will have a substantial likelihood of interfering with the fairness of a trial by jury. Other states' versions of Rule 3.6 impose the ban in civil cases as well. As jurors use the Internet when they go home for the evening, there is a risk of a mistrial if the lawyers participating in the case are blogging or tweeting about it.[11]

A forty-year-old California attorney had his law license suspended for forty-five days over a trial blog he wrote while serving as a juror. Because of a blog post by Frank Russell Wilson, an appeals court reversed and remanded the felony burglary case, reports the *California Bar Journal.* As a juror, Wilson was warned by the judge not to discuss the case, orally or in writing. Wilson evidently made a lawyerly distinction concerning blogs: "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial," he writes, before posting unflattering descriptions of both the judge and the defendant. He also failed to identify himself as a lawyer to the trial participants, the *Bar Journal* notes.[12]

Using Pretext to Obtain a Person's Information on a Social Networking Website

As social networking websites such as Myspace, Facebook, and Twitter continue to become more popular, criminal and civil attorneys across the nation are beginning to find these websites useful for gathering evidence and personal information relevant to their cases. However, lawyers must be mindful of Virginia Rule 8.4(c), which prohibits deception and misrepresentation and Rule 8.4(a), which states that a lawyer cannot use the agency of another to violate the ethics rules. A recent ethics opinion by the Philadelphia Bar Association holds that a lawyer violates Rule 8.4 by employing a third party to go online and gain access to a person's information on Facebook by asking to be their "friend."[13]

Misrepresentation

A lawyer requested a continuance claiming a death in the family, but the Galveston, Texas, judge checked her Facebook page and discovered news of a week of drinking and partying. The judge informed the lawyer's senior partner of her misrepresentation. The judge told the *ABA Journal* that the lawyer "defriended" her.[14]

Ethical Lapses by Judges

A North Carolina judge has been reprimanded for "friending" a lawyer in a pending case on Facebook, posting and reading messages about the litigation, and accessing the website of the opposing party. *See In the Matter of B. Carlton Terry Jr.*, North Carolina Judicial Stds, Comm'n, No. 08-234 (April 1, 2009). Both the Virginia Rules of Professional Conduct and the Canons of Judicial Conduct prohibit ex parte communications between lawyers and judges about pending matters, subject to some limited exceptions. Virginia Rules of Professional Conduct, Rule 3.5 (e); Canons of Judicial Conduct, Canon 3B(7).

The Florida Supreme Court's Judicial Ethics Advisory Committee has issued an opinion holding that it is judicial misconduct for a judge to add as "friends" on Facebook lawyers who may appear before that judge. The committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. *See also* Va. CJC, Canon 2B.

Lawyer Advertising Rules

Lawyers should review Virginia Rules 7.1 and 7.2 to make sure all statements or claims made via a website, a blog, Twitter, Facebook, or LinkedIn are in compliance with the advertising rules. Rule 7.1 prohibits a lawyer in his or her public communications from making false or misleading statements about the lawyer or the lawyer's services. Rule 7.2 imposes additional requirements on "lawyer advertising," including identifying by name and office address the lawyer responsible for the advertisement. Rule 7.2(e). Consider also reading Virginia Legal Ethics Opinion 1750 (Advertising, Compendium Opinion). Lawyers must ensure the advertising rules are followed if using Internet media to promote their services — especially if they use celebrity endorsements, client testimonials, specific case results, specialization claims, or comparative statements. Moreover, advertising with

electronic media is subject to Rule 7.2(b), which requires that a record be maintained of the advertisement for one year from its last appearance date.

For example, LinkedIn has a section on specialties. In many jurisdictions, lawyers are either forbidden from holding themselves out as specialists or required to meet certain requirements to do so. In some states this means the lawyer must be certified as a specialist under that state's specialization certification program. Virginia does not have such a program. However, Virginia does not prohibit a lawyer from holding out generally as a specialist or expert in an area or field, so long as the claim can be factually substantiated. Virginia's Rule 7.4 prohibits a lawyer from saying that he or she is certified as a specialist, unless the communication also has a required disclaimer that the state of Virginia does not have a procedure for approving or certifying specializations.

A lawyer who tweets about obtaining a huge verdict in a case likely violates Rule 7.2's prohibition against advertising specific case results, because the 140-character limitation on tweets makes it impossible to include the required disclaimer. Rule 7.2(a)(3).[15] Rule 7.2(e)'s requirement of responsible attorney identification may also preclude the use of Twitter as an advertising medium.

Client recommendations or endorsements must be scrutinized by the lawyer for compliance with the advertising rules. South Carolina Ethics Advisory Opinion 09-10 states that a lawyer is responsible for any recommendations, endorsements, or ratings ascribed to that lawyer on a third-party website. If the lawyer cannot monitor and remove or edit noncompliant statements, the lawyer must cease participation on that website. Some legal ethics experts believe a lawyer should not be held responsible for an unsolicited endorsement or recommendation.[16]

LinkedIn has a section on recommendations in which the member can ask other members for a recommendation. Some states do not allow client testimonials, so Virginia lawyers admitted and practicing in other states should be aware of those states' rules. Even if the state, like Virginia, allows client testimonials, endorsements, or recommendations, the testimonials must be monitored, revised, or removed so as to comply with Rules 7.1 and 7.2. For example, the lawyer cannot permit to remain on his or her LinkedIn page a client recommendation that says the lawyer is the "best personal injury lawyer in town," because it is a comparative statement that cannot be factually substantiated.

Is There a Form of "Solicitation" that Is Prohibited or Restricted?

Virginia's Rule 7.3 regulates direct communication with prospective clients and states "[i]n person communication means face-to-face communication and telephonic communication." Thus, invitations from a lawyer to a prospective client into the lawyer's LinkedIn or Facebook page would likely not fall within the rule. However, lawyer solicitation rules vary from state to state, so a Virginia lawyer licensed in other jurisdictions should review all applicable ethics rules to determine whether these forms of communication are subject to regulation as a form of solicitation.

Creating Unintended Lawyer-Client Relationships

The lawyer must consider whether informational advice on a blog or website creates the impression of giving legal advice that can be relied on by a visitor. Clear disclaimers can be helpful in resolving this problem. The question to ask is, "Does the online resource do anything that would create client expectations?"

Legal information of general application about a particular subject or issue is not "legal advice" and should not create any lawyer-client issues for the blogging or posting lawyer. Appropriate disclaimers will assure this conclusion. However, if a lawyer, by online forms, e-mail, chat room, or a social networking site, for example, elicits specific information about a person's particular legal problem and provides advice to that person, there is a risk that a lawyer-client relationship will have formed. Virginia Legal Ethics Opinion 1842 (2008) addresses this issue somewhat in connection with visitors on a law firm's Web page. The Virginia State Bar's Standing Committee on Legal Ethics believes the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website. The person is using mere contact information provided by the law firm on its website and does not, in the committee's view, have a reasonable expectation that the information contained in the e-mail will be kept confidential.

On the other hand, if the law firm's website invites the visitor to submit information via e-mail to the law firm for evaluation of their claim, there will be a limited lawyer-client relationship for purposes of Rules 1.6, 1.7, and 1.9. The law firm may be disqualified under those circumstances if it also represents a client adverse to the website visitor. The website disclaimer might state, for example, that no attorney-client relationship is being formed when a prospective client submits information and that the firm has no duty to maintain as confidential any information submitted. The disclaimer should be clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential. In addition, the committee recommends the use of a "click-through" (or "click-wrap") disclaimer, which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information.

Law Firm Policies and Supervision of Employees

Lawyers in law firms have an ethical duty to supervise subordinate lawyers and nonlawyer staff to ensure that their conduct complies with applicable professional rules, including the ethical duty of confidentiality. *See* Rules 5.1 and 5.3. To this end, law firms should have policies to govern employees' use of social networking websites during and outside of normal business hours.

Ethics Watch continued on page 59

Ethics Watch continued from page 26

Endnotes:

1 *In the Matter of Peshek*, No. 6201779, Comm. No. 09 CH 89 (Aug. 25, 2009) (recommendation of disbarment).
2 *Id*.
3 The disciplinary complaint stated that not only did Peshek seem to reveal confidential information about a case, but that her actions might also constitute "assisting a criminal or fraudulent act." See Va. Rule 1.2 (c).
4 *Id*.
5 *Id*.
6 John Schwartz, "A Legal Battle: Online Attitude vs. Rules of the Bar," *New York Times* (Sept. 12, 2009).
7 *People v. Liceaga*, No. 280726, 2009 Mich. App. LEXIS 160, *7 (Mich. Ct. App. Jan. 27, 2009).
8 *Id*.
9 See Molly McDonough, "Trial Consultants Add Facebook/MySpace to Juror Research Toolbox," *A.B.A. J.*, Sept. 29, 2008.
10 United States v. Villanueva, No. 08-12911, 2009 U.S. App. LEXIS 3852, *7 (11th Cir. 2009).
11 *Cf.* John Schwartz, "As Jurors Turn to the Web, Mistrials Are Popping Up," *New York Times* (March 17, 2009).
12 *Cal. Bar. J.* (Aug. 2009) accessed January 6, 2010, at http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2009&MONTH=August&YEAR=2009&sCatHtmlTitle=Discipline&sJournalCategory=YES#s10.
13 Philadelphia Bar Ass'n Ethics Op. 2009-02 (March 2009).
14 Molly McDonough, "Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches," *ABA Journal*, July 31, 2009.
15 A second federal lawsuit challenging the constitutionality of Louisiana's new lawyer advertising rules was filed Nov. 24, 2009, by an attorney who claims that the mandatory rules will stifle evolving forms of lawyer speech on the Internet (*Wolfe v. Louisiana Attorney Disciplinary Bd.*, E.D. La., No. 08-4994, filed 11/24/08). The suit claims that the Louisiana rules will unfairly restrict lawyers' modes of communication such as blog posts and online discourse, and it charges that the rules will make it difficult or impossible for law firms to place small Internet text ads with Google and other Internet services. The challenged provisions should be struck down as contrary to the First Amendment and the due Process clause of the Fourteenth Amendment, the complaint contends. For example, the bar's requirement that an ad identify the name and address of the lawyer responsible for its content would unduly burden on a "tweet" or message via Twitter because of its 140-character limitation. Wolfe noted that text ads provide only a small space for the advertiser to deliver its message — sometimes no more than 30 or 60 characters. If an attorney is required to provide a name and address, this would virtually eliminate the attorney's ability to say anything else in the ad, he said.
16 Nathan Crystal, *Ethical Issues in Using Social Networking Site, S.C. Bar J.* at 8-10 (Nov. 2009).

Vizibility
LexisNexis

Social media in the legal sector

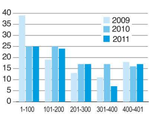
Benchmark Data

Giving some perspective to legal sector data

Source: Fortune Magazine

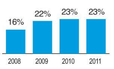
Fortune 500 companies with corporate Twitter account

62% of these have tweets in the last 30 days



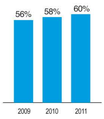
Fortune 500 companies with public facing corporate blogs

F500 companies have slowed down their social media efforts



Fortune 500 companies with Facebook page

A slight increase, just like Twitter. Both are preferred to blogging



Legal Sector

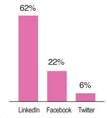
Which legal directories and online lawyer profiles in-house legal professionals recognize

Source: BTI Consulting Group

Law firms using social media in 2011

Those in the legal profession are embracing social media, not just individual attorneys

Individual attorneys using social media for professional purposes in 2011



Source: 2011 American Bar Association technology survey report

What percent of your attorneys are active or have complete and up-to-date profiles on the following sites?

Source: Vizibility/LexisNexis Survey

However, there are only 393,338 Linked profiles containing one of the following words in the current title (less than a third of all attorneys in the U.S.)

Duplicates were removed

Source: Linkedin

Monthly Google searches for the terms "attorney," "lawyer" and "counsel"

Source: Google

Legal Social Media Survey

Vizibility and LexisNexis sent formal invitations by email to the membership of the Legal Marketing Association (LMA). Additionally, the survey invitation was posted on more than two dozen LinkedIn message boards for LMA local chapters, shared with Twitter and Facebook followers of both Vizibility and LexisNexis, and posted on LexisNexis blogs.

The LMA email invitations were sent to 2,144 members and had a 22.4% open rate. The overall click-through rate was 23.5%. As a benchmark, according to Constant Contact, the typical click-through rate for legal services mailings is 13%. Therefore this mailing generated almost two times the typical click-through rate for emails sent to this industry segment. The LMA represents 233 of the top 250 U.S. law firms.

We received 258 responses to the survey, with 40% from the LMA members, and 4% from LinkedIn groups. Of the respondents, 74% perform marketing/business development roles within law firms and 13.7% are attorneys. AmLaw 100 and AmLaw 200 firms represent 15.3% and 9% respectively. Approximately 73% of survey respondents were from firms with 21 or more attorneys.

Firm sizes of respondents

1-5 attorneys	19.6%
6-20 attorneys	7.6%
21-50 attorneys	12.4%
51-100 attorneys	16.4%
100+ attorneys	44%.

When do you plan to implement social media as part of your marketing programs?

	We already use social media	Within 6 months	Within 12 months	Within 24 months	No immediate plans
All respondents	81%	10.1	2.3	1.2	5.4
AmLaw 100 firms	88.2	5.9	0	0	5.9
AmLaw 200 firms	75	10	10	0	5
Number of attorneys in firm 1-5	90.9	2.3	0	0	6.8
6-20	52.9	41.2	0	0	5.9
21-50	82.1	10.7	0	0	7.1
51-100	67.6	16.2	8.1	0	8.1
101+	85.9	5.1	2	2	5.1

How important is social media in your firm's overall marketing strategy?

	Extremely important	Somewhat important	Not very important	Not important at all
All respondents	30.8	48.8	18.8	1.7
AmLaw 100 firms	31.3	50	15.6	3.1
AmLaw 200 firms	15.8	63.2	21.1	0
Number of attorneys in firm 1-5	58.5	34.1	4.9	2.4
6-20	37.5	31.3	31.3	0
21-50	23.1	73.1	3.8	0
51-100	17.6	41.2	38.2	2.9
101+	21.3	56.4	20.2	2.1

Does your firm have a social media policy or guidelines for using social media?

	Yes	No
All respondents	61.2	38.8
AmLaw 100 firms	84.4	15.6
AmLaw 200 firms	78.9	21.1
Number of attorneys in firm 1-5	39	61
6-20	37.5	62.5
21-50	69.2	30.8
51-100	58.8	41.2
101+	73.4	26.6

What social media services do you plan to use in these marketing programs?

	Blogging	Twitter	Professional social networks (LinkedIn etc.)	Consumer social networks (Facebook, Google+, etc.)	Social Q&A (Wikipedia, Quora, Yahoo! Answers, etc.)	Video (YouTube, Vimeo, etc.)	QR codes for attorneys (Vizibility, Paperlinks, Kawya, etc.)	Other
All respondents	83.1%	74.9	93.1	57.1	19.9	46.8	34.2	3.5
AmLaw 100 firms	93.8	75	90.6	53.1	28.1	46.9	31.3	0
AmLaw 200 firms	94.7	94.7	89.5	63.2	36.8	52.6	47.4	5.3
Number of attorneys in firm 1-5	87.8	73.2	90.2	68.3	19.5	51.2	22	2.4
6-20	87.5	62.5	93.8	62.5	37.5	37.5	31.3	0
21-50	76.9	61.5	93.8	57.7	7.7	50	34.6	7.7
51-100	82.4	73.5	95.7	41.2	17.6	47.1	41.2	5.9
101+	84	80.9	95.7	57.4	22.3	45.7	37.2	1.1

How do you measure the success of your social media programs?

	Improved client satisfaction	Increased website traffic	Number of followers and online connections	Lead generation	New business	Not sure yet	We're not tracking	Other
All respondents	15.9	64	56.8	55.9	47.1	21.6	7.8	10.6
AmLaw 100 firms	6.3	65.6	53.1	50	40.6	34.4	6.3	6.3
AmLaw 200 firms	5.3	57.9	68.4	47.4	42.1	15.8	5.3	5.3
Number of attorneys in firm 1-5	24.4	61	53.7	75.6	70.7	12.2	2.4	12.2
6-20	18.8	43.8	37.5	50	43.8	37.5	6.3	6.3
21-50	23.1	73.1	61.5	61.5	53.8	11.5	3.8	7.7
51-100	8.8	58.8	47.1	47.1	35.3	35.3	11.8	20.6
101+	10.6	63.8	61.7	51.1	37.2	23.4	10.6	5.3

Legal Directories and Online Lawyer Profiles

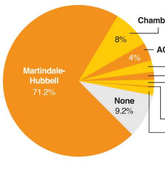
Source: BTI Consulting Group

Which Legal Directories and Online Lawyer Profiles Legal Decision Makers Find Extremely Helpful

How in-house legal departments use legal directories and online lawyer profiles

Over 70% of corporate counsel and legal staff turn to an online lawyer profile or legal directory to identify, evaluate or validate credentials of outside counsel

Legal directories and online lawyer profiles recommended by legal decision makers

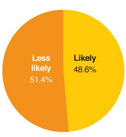


How frequently do legal decision makers use legal directories and online lawyer profiles?

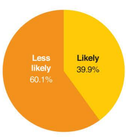
Nine out of ten in-house legal professionals turn to online lawyer profiles or legal directories at least once a year

Percent of legal decision makers unlikely to hire an attorney not listed in a directory or online lawyer profile

One in two legal decision makers are less likely to hire an attorney not listed in a directory



When conducting research to validate the credentials of a referral

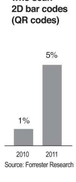


When identifying outside counsel in an unfamiliar jurisdiction or area of expertise (when a personal referral is unavailable)

QR Codes for Attorneys

As smartphones continue to become more popular, the number of people scanning QR codes will continue to increase.

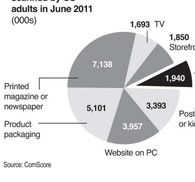
U.S. adults who scan 2D bar codes (QR codes)



Source: Forrester Research

14 million QR codes scanned by US adults in June 2011

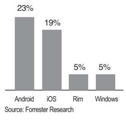
(000s)



Source: ComScore

Percentage of users who scan 2D bar codes (by OS)

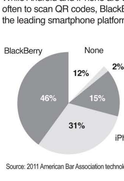
Android comes preinstalled with a bar code scanner while iOS does not



Source: Forrester Research

Lawyer smartphone use in 2011

While Android and iPhone are used most often to scan QR codes, BlackBerry is still the leading smartphone platform for attorneys



Source: 2011 American Bar Association technology survey report

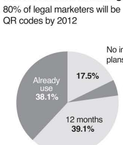
How do legal marketers plan to use QR codes in their marketing programs?

46% plan to use QR codes on individual attorney business cards

Source: Vizibility Survey

When do legal marketers plan to implement QR codes in their marketing programs?

80% of legal marketers will be using QR codes by 2012



Source: Vizibility Survey

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LEGAL ETHICS OPINION 1842

OBLIGATIONS OF A LAWYER WHO RECEIVES CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

The Committee generated this opinion in response to numerous questions posed regarding the duties a lawyer or law firm owes to prospective clients. The opinion also addresses the resulting disqualification in situations where a lawyer or law firm receives confidential information via a law firm website or by telephone voicemail. These questions most commonly arise in the following hypothetical scenarios:

(A) Lawyer A, a solo practitioner in a small town, advertises in the local yellow pages. The advertisement details Lawyer A's areas of practice and also includes Lawyer A's office address and telephone number. After returning from court one afternoon, Lawyer A retrieves a voicemail message from an individual seeking representation in a criminal matter. The caller also provides information about the multiple felony drug charges he incurred as one of several co-defendants in a local drug ring. The caller provides his name and requests a consultation with Lawyer A, who realizes, after running a conflicts check, that he already represents one of the other co-defendants.

The Committee believes Rule 1.6 governs its analysis throughout this opinion. Rule 1.6 deals with the issue of client confidentiality.[1] Also pertinent to the Committee's analysis is The Preamble to the Virginia Rules of Professional Conduct, which states that "…there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established" (italics added).[2]

The question presented is whether a caller who contacts a law firm via telephone using a public listing in a directory and who leaves a detailed message in the firm's voicemail reasonably expects that such information will be kept confidential?[3] Standing alone, publication of a telephone number in a yellow pages advertisement cannot reasonably be construed as an invitation by the lawyer or firm to an individual to submit confidential information. Thus, it would be unreasonable for a person leaving a voicemail to have an expectation that the information will be maintained as confidential. Therefore, the Committee believes that the lawyer who receives such information is under no ethical obligation to maintain its confidentiality and further, may use the information in representing an adverse party.

(B) Law Firm B maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail but the website does, however, provide contact information for every lawyer in the firm, including e-mail addresses in the biographies of each lawyer in the firm. One of the domestic lawyers in the firm receives an e-mail from a woman seeking a divorce from her husband detailing the circumstances surrounding the demise of the marriage, including her affair with another man. The lawyer reads the e-mail before he discovers that he is already representing the woman's husband.

The Committee believes the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website. The person is using mere contact information provided by the law firm on its website and does not, in the Committee's view, have a reasonable expectation that the information contained in the e-mail will be kept confidential.

In reaching this conclusion, the Committee looks to two factors: (1) whether the law firm, by merely publishing contact information on its website that includes an e-mail address, creates a reasonable belief that the law firm is specifically inviting or soliciting the communication of confidential information; and (2) whether it is reasonable for the person providing the information to expect that it will be maintained as confidential.

Whether or not it is reasonable for a person to expect that information transmitted by e-mail or left on a voicemail will be maintained as confidential depends in part on whether the lawyer said or did anything to create the impression that he was inviting information or simply publishing his contact information.[4] The Committee is of the opinion that including an e-mail address on a law firm's website or publishing a telephone number in a yellow-page advertisement, without more, is not the solicitation of confidential information from a prospective client. In these circumstances, the publication of such information is more appropriately viewed simply as an invitation to contact the firm and not an invitation for a prospective client to submit confidential information. The mere inclusion of an e-mail address on a web-page is not an agreement to consider the formation of an attorney-client relationship; rather, the lawyer is simply advertising his or her general availability and how he/she may be reached.

Generally speaking, when communicating with a prospective client, the lawyer not only consents to the receipt of information but may be able to control the amount of information received. The lawyer can also avoid receipt of information that would create a conflict for that lawyer representing an adverse party. Conversely, a lawyer who unilaterally receives information via an e-mail communication has no opportunity to

control or prevent the receipt of that information and risks the creation of a conflict to the representation of an existing client or another adverse party. The Committee believes that it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client, simply because the lawyer lacks ability under the circumstances to control the nature and extent of information being provided. Based on the foregoing analysis, Law Firm B should be permitted to continue representing the husband of the woman who contacted the lawyer by e-mail and to use the information acquired thereby for the benefit of the husband.

In addressing the circumstances presented in both Hypotheticals A and B, the Committee recognizes that, in addition to the mere publication of the lawyer's contact information, other factors or circumstances may exist which could give rise to a reasonable expectation of confidentiality on the part of the prospective client. Among these factors may be the specific nature and content of the invitation to contact the firm, including language in the advertisement or on the website that would imply the lawyer is agreeing to accept confidential information or an invitation in the lawyer's outgoing voicemail message asking the caller to provide as much detailed information about his/her case as possible. Therefore, an examination of the totality of the circumstances on a case-by-case basis is necessary to determine whether it is reasonable for a prospective client to believe that the information he/she provides will be maintained as confidential.

(C) Law Firm C maintains a website where prospective clients are invited to fill out an on-line form outlining the factual details of their accidents and injuries. In exchange for this information, Law Firm C's website offers to provide prospective clients a free evaluation of their claims. Mrs. X, an accident victim, fills out the form and provides information about her accident involving a two-car collision, including the fact that she consumed three glasses of wine in one hour before getting behind the wheel. One of Law Firm C's lawyers, after reviewing Mrs. X's online information, asks his legal assistant to run a conflicts check. The legal assistant does so and advises the lawyer that Law Firm C is currently representing a client who was the guest passenger in Mrs. X's vehicle at the time of the accident. The lawyer tells the legal assistant, "That's not a problem. I'll just tell Mrs. X we can't take her case."

In Hypothetical C, the lawyer's website specifically invites Mrs. X to submit the information in exchange for an evaluation, thereby inviting the formation of an attorney-client relationship for the purpose of providing a case evaluation. Even if the lawyer ultimately declines representation of Mrs. X, Rule 1.6(a) imposes upon that lawyer a duty of confidentiality with respect to the information received.

This analysis is consistent with prior legal ethics opinions imposing a duty of confidentiality on a lawyer when consulting with a prospective client. Even in the absence of an attorney-client relationship under such circumstances, it is reasonable for a prospective client to expect that the information provided to the lawyer will be maintained as confidential based on the mutual exchange of information. [See Legal Ethics Opinions 1453, 1546, 1601, and 1794.]

Although the representation of Mrs. X is limited to providing her with an evaluation, her situation more closely parallels the scenario of a lawyer interviewing a prospective client. Because the lawyer has an ethical duty to keep Mrs. X's information confidential, the lawyer's obligation to Mrs. X "materially limits" the lawyer's representation of the party adverse to her. Rule 1.6 would prohibit the lawyer from thereafter using that information to the detriment of Mrs. X or from sharing that information with a party whose interests are adverse to her. Because the lawyer is prohibited from using that information, Rule 1.7(a)(2) imposes a material limitation conflict on the lawyer, limiting his ability to represent an adverse party by the duty of confidentiality that is owed Mrs. X.[5] As a result, in Hypothetical C, the lawyer must not only decline the representation of Mrs. X but must actually go so far as to withdraw from the representation of an existing client whose interests are adverse to those of Mrs. X.

Finally, to avoid any inference that an attorney-client relationship has been established or that the information a prospective client provides will be kept confidential, a law firm may wish to consider the inclusion of a disclaimer on the website or external voicemail warning the person to not disclose confidential or sensitive information. The website disclaimer might also state, for example, that no attorney-client relationship is being formed when a prospective client submits information and that the firm has no duty to maintain as confidential any information submitted. The disclaimer should be clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential.[6] In addition, the Committee recommends the use of a "click-through"(aka "click-wrap") disclaimer, which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information.[7]

This opinion is advisory only, based only upon the facts presented and not binding on any court or tribunal.

Committee Opinion
September 30, 2008

[1] Rule 1.6 Confidentiality of Information
(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

[2] Scope, Pt. 6, § II, Rules of Virginia Supreme Court.

[3] See LEOs 1453, 1546, 1601 and 1794 that established the Committee's determination of the duty of confidentiality at the time of initial consult and which are referenced later in this opinion.
[4] Other jurisdictions have opined on what constitutes a solicited versus an unsolicited e-mail. See Association of the Bar of the City of New York, Formal Opinion 2001-1 (concluding that information submitted by e-mail to a law firm via the firm's website was unsolicited; simply including an e-mail link on a law firm's website does not amount to an invitation to transmit confidential information); Iowa State Bar Association Op. 07-02 (evaluated whether the lawyer said or did anything to prompt the potential client to provide confidential information to the lawyer, noting that a lawyer's "request to contact" is not the same as a request for information); Massachusetts Bar Association Op. 07-01 (concluding that a website is a marketing tool by which a prospective client may identify which lawyers have the expertise necessary to handle a particular case, and that the publication of such information could reasonably lead a prospective client to conclude that, when sending information to the firm via an e-mail link, the firm and its lawyers have implicitly "agreed to consider" whether to form an attorney-client relationship. However, this opinion further states that it would be unjust to allow the prospective client to unilaterally impose a duty of confidentiality on an unsuspecting lawyer when contacting the lawyer by an e-mail address that was obtained on the internet and that is equivalent to a listing in a telephone directory.)

[5] Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[6] California Formal Ethics Op. 2005-168 (concluding that terms of the disclaimer should defeat the sender's reasonable expectation of confidentiality. Language which merely states that "no confidential relationship is being formed" by submitting the information is "potentially confusing.")

[7] David Hricik, To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients, 16 Prof. Lawyer 1 (2005) (indicating that "Click wraps are the only certain way to ensure that a court will hold that the prospective client manifested assent to the term. Without manifested assent, the term is not binding on the prospective client. Thus, a firm website should be structured so that the client must assent to the term in order to transmit e-mail.").

HORACE FRAZIER HUNTER v. VIRGINIA STATE BAR, EX REL. THIRD DISTRICT COMMITTEE

Record No. 121472

SUPREME COURT OF VIRGINIA

285 Va. 485; 744 S.E.2d 611; 2013 Va. LEXIS 28

February 28, 2013, Decided

SUBSEQUENT HISTORY: Petition for certiorari filed at, 05/21/2013
US Supreme Court certiorari denied by *Hunter v. Va. State Bar, 133 S. Ct. 2871, 2013 U.S. LEXIS 4743 (U.S., June 24, 2013)*

PRIOR HISTORY: [***1]
FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND. Kenneth R. Melvin, Alfred D. Swersky, and Von L. Piersall, Jr., Judges Designate.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

COUNSEL: Rodney A. Smolla (Horace F. Hunter; Hunter & Lipton, on briefs), for appellant.

Renu M. Brennan, Assistant Bar Counsel (Edward L. Davis, Bar Counsel, on brief), for appellee.

Amicus Curiae: Virginia Association of Broadcasters (George W. House; Brooks, Pierce, McLendon, Humphrey & Leonard, on brief), in support of appellant.

Amici Curiae: Virginia Press Association, Newspaper Association of America, Gannett Co., Inc., The New York Times Company, and The Washington Post (Clifford M. Sloan; Frank E. Correll, Jr.; Paul M. Kerlin; Skadden, Arps, Slate, Meagher & Flom, on brief) in support of appellant.

Amicus Curiae: The Thomas Jefferson Center for the Protection of Free Expression (Deana Kessler; J. Joshua Wheeler; Baker & Hostetler, on brief) in support of appellant.

JUDGES: OPINION BY JUSTICE CLEO E. POWELL.

OPINION BY: CLEO E. POWELL

OPINION

[**613] [*491] PRESENT: All the Justices

OPINION BY JUSTICE CLEO E. POWELL

In this appeal of right by an attorney from a Virginia State Bar ("VSB") disciplinary proceeding before a three judge panel appointed pursuant to [***2] *Code § 54.1-3935*, we consider whether an attorney's blog posts are commercial speech, whether an attorney may discuss public information related to a client without the client's consent, and whether the panel ordered the attorney to post a disclaimer that is insufficient under *Rule 7.2(a)(3) of the Virginia Rules of Professional Conduct.*

I. FACTS AND PROCEEDINGS

Horace Frazier Hunter, an attorney with the law firm of Hunter & Lipton, PC, authors a trademarked blog[1] titled "This Week in Richmond Criminal Defense," which is accessible from his law firm's website, www.hunterlipton.com. This blog, which is not interactive, contains posts discussing a myriad of legal issues and cases, although the overwhelming majority are posts about cases in which Hunter obtained favorable results for his clients. Nowhere in these posts or on his website did Hunter include disclaimers.

1 A "blog" is a shortened, colloquial reference for the term "weblog," and is defined as "'a Web site that contains an online personal journal with reflections, comments, and often hyperlinks pro-

> vided by the writer; also: the contents of such a site.'" *White v. Baker, 696 F.Supp.2d 1289, 1310 (N.D. Ga. 2010)* (quoting Merriam-Webster [***3] Online Dictionary, http://www.merriam-webster.com/dictionary/blog (last visited January 31, 2013)).

As a result of Hunter's blog posts on his website, the VSB launched an investigation. During discussions with the VSB about whether his blog constituted legal advertising, Hunter wrote a letter to the VSB offering to post a disclaimer on one page of his website:

> "This Week in Richmond Criminal Defense is not an advertisement[;] it is a blog. The views and opinions expressed on this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case."

However, the negotiations stalled and no disclaimers were posted at that time.

[**614] [*492] On March 24, 2011, the VSB charged Hunter with violating *Rules 7.1*, *7.2*, *7.5*,[2] and *1.6* by his posts on this blog. Specifically, the VSB argued that he violated *rules 7.1* and *7.2* because his blog posts discussing his criminal cases were inherently misleading as they lacked disclaimers.[3] The VSB also asserted that Hunter violated *Rule 1.6* by revealing information that could embarrass or likely [***4] be detrimental to his former clients by discussing their cases on his blog without their consent.

> 2 The District Committee ultimately did not find by clear and convincing evidence that Hunter violated *Rule 7.5* and dismissed that charge.
>
> 3 Although some of Hunter's blog posts now contain disclaimers, not all do and the disclaimers that are present were not added until after the VSB brought disciplinary charges against Hunter.

In a hearing on October 18, 2011, the VSB presented evidence of Hunter's alleged violations. The VSB presented a former client who testified that he did not consent to information about his cases being posted on Hunter's blog and believed that the information posted was embarrassing or detrimental to him, despite the fact that all such information had previously been revealed in court. The VSB investigator testified that other former clients felt similarly. The VSB also entered all of the blog posts Hunter had posted on his blog to date. At that time, none of the posts entered contained disclaimers. Of these thirty unique posts, only five discussed legal, policy issues. The remaining twenty-five discussed cases. Hunter represented the defendant in twenty-two of these [***5] cases and identified that fact in the posts. In nineteen of these twenty-two posts, Hunter also specifically named his law firm. One of these posts described a case where a family hired Hunter to represent them in a wrongful death suit and the remaining twenty-one of these posts described criminal cases. In every criminal case described, Hunter's clients were either found not guilty, plea bargained to an agreed upon disposition, or had their charges reduced or dismissed.

At the hearing, Hunter testified that he has many reasons for writing his blog - including marketing, creation of a community presence for his firm, combatting any public perception that defendants charged with crimes are guilty until proven innocent, and showing commitment to criminal law. Hunter stated that he had offered to post a disclaimer on his blog, but the offered disclaimer was not satisfactory to the VSB. Hunter admitted that he only blogged about his cases that he won. He also told the VSB that he [*493] believed that using the client's name is important to give an accurate description of what happened. Hunter told the VSB that he did not obtain consent from his clients to discuss their cases on his blog because [***6] all the information that he posted was public information.

Following the hearing, the VSB held that Hunter violated *Rule 1.6* by "disseminating client confidences" obtained in the course of representation without consent to post. Specifically, the VSB found that the information in Hunter's blog posts "would be embarrassing or be likely to be detrimental" to clients and he did not receive consent from his clients to post such information. The VSB further held that Hunter violated *Rule 7.1*. The VSB's conclusion that Hunter's website contained legal advertising was based on its factual finding that "[t]he postings of [Hunter's] case wins on his webpage advertise[d] cumulative case results." Moreover, the VSB found that at least one purpose of the website was commercial. The VSB further held that he violated *Rule 7.2* by "disseminating case results in advertising without the required disclaimer" because the one that he proposed to the VSB was insufficient. The VSB imposed a public admonition with terms including a requirement that he remove case specific content for which he has not received consent and post a disclaimer that complies with *Rule 7.2(a)(3)* on all case-related posts.

Hunter appealed [***7] to a three judge panel of the circuit court and the court heard argument. The court disagreed with Hunter that de novo was the proper standard of review and instead applied the following standard: "whether the decision is contrary to the law or

whether there is substantial evidence in the record upon which the district committee could reasonably have found as it did." The [**615] court further ruled that the VSB's interpretation of *Rule 1.6* violated the *First Amendment* and dismissed that charge. The court held VSB's interpretation of *Rules 7.1* and *7.2* do not violate the *First Amendment* and that the record contained substantial evidence to support the VSB's determination that Hunter had violated those rules. The court imposed a public admonition and required Hunter to post the following disclaimer: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case." This appeal followed.

[*494] II. ANALYSIS

A. Whether "[t]he Ruling of the Circuit Court finding a violation of *Rules 7.1(a)(4)* and *7.2(a)(3)* conflicts with the *First Amendment to the Constitution of the United States*."

Rule 7.1(a)(4), which is the specific portion [***8] of the Rule that the VSB argued that Hunter violated, states:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> . . . .
>
> (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

The VSB also argues that Hunter violated the following subsection of *Rule 7.2(a)(3)*:

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> . . . .
>
> (3) advertises specific or cumulative case results, [***9] without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication [*495] is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

In response to these allegations, Hunter contends that speech concerning the judicial system is "quintessentially 'political speech'" which is within the marketplace of ideas. Hunter asserts that the Supreme Court of the United States has twice declined to answer whether political speech is transformed into commercial speech simply because one of multiple motives is commercial. Specifically, he argues that his blog posts are not commercial because

> (1) the [Supreme Court [***10] of the United States'] formal commercial speech definitions focus heavily on whether the speech does no more than propose a commercial transaction; (2) the [Supreme Court of the United States'] commercial speech decisions, to the extent that they discuss motivation at all, have focused on whether the speech is solely driven by commercial interest; (3) the [Supreme Court of the United States] has repeatedly insisted that the existence of a commercial motivation does not disqualify speech from the heightened scrutiny protection it would otherwise deserve; (4) the [Supreme Court of the United States] has warned that when commercial and political elements of speech are inextricably intertwined, the heightened protection applicable to the political [**616] speech

> should be applied, lest the political speech be chilled; and (5) the constitutional policy arguments that undergird the reduction of protection for commercial speech have no persuasive force when the content of the speech is political.

The VSB responds that Hunter's blog posts are inherently misleading commercial speech.

"Whether the inherent character of a statement places it beyond the protection of the *First Amendment* is a question of [***11] law over which . . . this Court . . . exercise[s] de novo review." *Peel v. Atty. Registration & Disciplinary Comm'n, 496 U.S. 91, 108, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990)*. An appellate Court must independently examine the entire record in *First Amendment* cases to ensure that "'a forbidden intrusion on the [*496] field of free expression'" has not occurred. *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)* (quoting *New York Times Co. v. Sullivan, 376 U.S. 254, 284-86, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964))*.

Turning to Hunter's argument that his blog posts are political, rather than commercial, speech, we note that "[t]he existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the *First Amendment*.'" *Bigelow v. Virginia, 421 U.S. 809, 818, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975)* (quoting *Ginzburg v. United States, 383 U.S. 463, 474, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966))*. However, when speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech. *Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)*.

While it is settled that attorney advertising is commercial speech, *Bates v. State Bar of Arizona, 433 U.S. 350, 363-64, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*, [***12] Bates and its progeny were decided in the era of traditional media. In recent years, however, advertising has taken to new forms such as websites, blogs, and other social media forums, like Facebook and Twitter. See generally *Spirit Airlines, Inc. v. United States Dep't of Transp., 687 F.3d 403, 402 U.S. App. D.C. 70 (D.C. Cir. 2012)*; *QVC Inc. v. Your Vitamins Inc., 439 Fed. Appx. 165 (3d Cir. 2011)*; *Athleta, Inc. v. Pitbull Clothing Co., 2013 U.S. Dist. LEXIS 6867 (C.D. Cal. Jan. 7, 2013)*.

Thus, we must examine Hunter's speech to determine whether it is commercial speech, specifically, lawyer advertising.

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

Bigelow, 421 U.S. at 826 (internal citations omitted). [***13] Simply because the speech is an advertisement, references a specific product, or is economically motivated does not necessarily mean that it is commercial speech. *Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67, 103 S. Ct. 2875, 77 L. Ed. 2d 469* [*497] *(1983)*. "The combination of all these characteristics, however, provides strong support for the . . . conclusion that [some blog posts] are properly characterized as commercial speech" even though they also discuss issues important to the public. *Id. at 67-68* (emphasis in original).

Certainly, not all advertising is necessarily commercial, e.g., public service announcements. See *id. at 66* (holding "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech"). However, all commercial speech is necessarily advertising. See Webster's Third New International Dictionary 31 (1993) (defining "advertisement" as "a calling attention to or making known[;] an informing or notifying[;] a calling to public attention[;] a statement calling attention to something[;] a public notice; esp[ecially] a paid notice or announcement published in some public print [**617] (as a newspaper, periodical, poster, or handbill) [***14] or broadcast over radio or television"). Indeed, the Supreme Court of the United States has said that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow, 421 U.S. at 826*.

Here, Hunter's blog posts, while containing some political commentary, are commercial speech. Hunter has admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client. He unquestionably references a specific product, i.e., his lawyering skills as twenty-two of his twenty-five case related posts describe

cases that he has successfully handled. Indeed, in nineteen of these posts, he specifically named his law firm in addition to naming himself as counsel.

Moreover, the blog is on his law firm's commercial website rather than an independent site dedicated to the blog. See Howard J. Bashman, How Appealing Blog (Feb. 11, 2013, 9:40 AM), http://howappealing.law.com (an independent blog by a Pennsylvania appellate attorney that is accessible through Law.com at http://legalblogwatch.typepad.com/). The website uses the [***15] same frame[4] for the pages openly soliciting clients as it does for the blog, including the [*498] firm name, a photograph of Hunter and his law partner, and a "contact us" form. The homepage of the website on which Hunter posted his blog states only:

> **Do you need Richmond attorneys?**
>
> Hunter & Lipton, CP [sic] is a law practice in Richmond, Virginia specializing in litigation matters from administrative agency hearings to serious criminal cases. As experienced Richmond attorneys, we bring a genuine desire to help those who find themselves in difficult situations. Our partnership was founded on the idea that everyone, no matter what the circumstance, deserves a zealous advocate to fight on his or her behalf.
>
> People make mistakes, and may even find themselves in situations not of their own making. And for these people, the system can be extraordinarily unforgiving and unjust-but you do not have to face this system alone.
>
> **If you find yourself in a difficult legal situation, the Richmond attorneys of Hunter & Lipton, LLP would consider it a privilege to represent you. Please contact our office with any questions or to schedule a consultation**.

This non-interactive blog does not allow for discourse about [***16] the cases, as non-commercial commentary often would by allowing readers to post comments. See, e.g., Law.com Legal Blog Watch, http://legalblogwatch.typepad.com/; Above the Law, http://abovethelaw.com/. See also June Lester & Wallace C. Koehler, Jr., Fundamentals of Information Studies 102 (2d ed. 2007) (observing that "[i]n contrast to the interaction possible in some other forms of web-published information, blog readers are most frequently permitted to leave comments and create threads of discussion"). Instead, in furtherance of his commercial pursuit, Hunter invites the reader to "contact us" the same way one seeking legal representation would contact the firm through the website.

> 4 See Joan M. Reitz, Online Dictionary for Library and Information Science, http://www.abc-clio.com/ODLIS/odlis_F.aspx?#frame (last visited February 25, 2013) (defining frame as "[a] separately scrollable area in the window of a computer application or in a Web page that has been divided into more than one scrollable area").

Thus, the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform Hunter's otherwise self-promotional [***17] blog posts into political speech, "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Fox, 492 U.S. at 474-75*. Indeed, unlike situations [*499] and topics where the subject matter is inherently, inextricably intertwined, Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog. "Advertisers should not be permitted [**618] to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger, 463 U.S. at 68*. When considered as a whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product.

Having determined that Hunter's blog posts discussing his cases are commercial speech,

> we must determine whether the expression is protected by the *First Amendment*. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [***18] whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); *Adams Outdoor Advertising v. City of*

Newport News, 236 Va. 370, 383, 373 S.E.2d 917, 923, 5 Va. Law Rep. 981 (1988).

The VSB does not contend, nor does the record indicate, that Hunter's posts do not concern lawful activity; rather, the VSB argues that the posts are inherently misleading. While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates, 433 U.S. at 383*. Of the thirty posts that were on his blog at the time of the VSB hearing, twenty-two posts named himself as counsel and discussed cases that he handled. With one exception, in all of these posts, he described the successful results that he obtained for his clients.[5] While the States may place an absolute prohibition on inherently [***19] misleading advertising, "the States may not place an absolute prohibition on certain [*500] types of potentially misleading information, . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)*. Here, the VSB's own remedy of requiring Hunter to post disclaimers on his blog posts demonstrates that the information could be presented in a way that is not misleading or deceptive.

> 5 In the one case that he does not describe favorable results he has received, he discusses how he has been retained by a family in a wrongful death lawsuit against a police department.

Thus, we must examine whether the VSB has a substantial governmental interest in regulating these blog posts. *Central Hudson, 447 U.S. at 566*. The Supreme Court of the United States has recognized that "'[i]f the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.'" *Peel, 496 U.S. at 110* (quoting *Bates, 433 U.S. at 375*). Indeed, the Supreme Court of the United States expressed concern that the public may lack the [***20] sophistication to discern misstatements as to the quality of a lawyer's services. *Bates, 433 U.S. at 383*. Therefore, the VSB has a substantial governmental interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter.

Because the VSB's governmental interest is substantial, we must now determine "whether the regulation directly advances the governmental interest asserted." *Central Hudson, 447 U.S. at 566*. The VSB's regulations permit blog posts that discuss specific or cumulative case results but require a disclaimer to explain to the public that no results are guaranteed. *Rules 7.1* and *7.2*. This requirement directly advances the VSB's governmental interest.

Finally, we must determine whether the VSB's regulations are no more restrictive than necessary. *Central Hudson, 447 U.S.* [**619] *at 566*. The Supreme Court of the United States has approved the use of disclaimers or explanations. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)*; *In re R.M.J., 455 U.S. at 203*; *Bates, 433 U.S. at 384*. [***21] The disclaimers mandated by the VSB

> shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative [*501] case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3). This requirement ensures that the disclaimer is noticeable and would be connected to each post so that any member of the public who may use the website addresses to directly access Hunter's posts would be in a position to see the disclaimer. Therefore, we hold that the disclaimers required by the VSB are "not more extensive than is necessary to serve that interest." *Central Hudson, 447 U.S. at 566*.

Hunter's blog posts discuss lawful activity and are not inherently misleading, but the VSB has asserted a substantial governmental interest to protect the public from potentially misleading lawyer advertising. See *Central Hudson, 447 U.S. at 566*. These regulations directly advance this interest and are not more restrictive than necessary, unlike [***22] outright bans on advertising. Id. We thus conclude that the VSB's *Rules 7.1* and *7.2* do not violate the *First Amendment*. As applied to Hunter's blog posts, they are constitutional and the panel did not err.

B. Whether the circuit court erred in holding that the VSB's application of *Rule 1.6* to Hunter's blog violated his *First Amendment* rights.

Rule 1.6(a) states, that with limited exceptions,

> [a] lawyer shall not reveal information protected by the attorney-client privilege

> under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .

The VSB argues that the circuit court erred in holding that its interpretation of *Rule 1.6* violates the *First Amendment* and that Hunter violated that rule by disclosing potentially embarrassing information about his clients on his blog "in order to advance his personal economic interests." VSB argues that lawyers, as officers of the Court, are prohibited [***23] from engaging in speech that might otherwise be constitutionally [*502] protected. Thus, the VSB's interpretation of *Rule 1.6* involves two types of information: 1) that which is protected by the attorney-client privilege, and 2) that which is public information but is embarrassing or likely to be detrimental to the client. Hunter is charged with disseminating the later type of information. In response to these allegations, Hunter argues that the VSB's interpretation of *Rule 1.6* is unconstitutional because the matters discussed in his blogs had previously been revealed in public judicial proceedings and, therefore, as concluded matters, were protected by the *First Amendment*. Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not.

The cases cited by VSB in support of its position differ from this case in a substantial way; the cases relied upon by VSB involve pending proceedings. It is settled that attorney speech about public information from cases is protected by the *First Amendment*, [***24] but it may be regulated if it poses a substantial likelihood of materially prejudicing a pending case. *Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)*.

"[A] presumption of openness inheres in the very nature of a criminal trial [**620] under our system of justice." *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)*. Moreover,

> [a] trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. Harney, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947). All of Hunter's blog posts involved cases that had been concluded. Moreover, the VSB [*503] concedes that all of the information that was contained within Hunter's blog was public [***25] information and would have been protected speech had the news media or others disseminated it. In deciding whether the circuit court erred, we are required to make our "own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978)*. "At the very least, [the] cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the *First Amendment*, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile, 501 U.S. at 1054*. The VSB's interpretation of *Rule 1.6* fails these standards even when we

> balance "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of *First Amendment* freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved,'"

Id. (quoting [***26] *Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)*). State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. *Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979)*. The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because

an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of *Rule 1.6* violated the *First Amendment*.

[*504] C. Whether the circuit court erred in requiring Hunter to post a disclaimer on his website that does not comply with the requirements of *Rule 7.2(a)(3)* and therefore does not eliminate the misleading nature [***27] of his blog posts.

The VSB argues that the single disclaimer that the circuit court ordered Hunter to post on his blog was insufficient to comport with *Rule 7.2(a)(3)* because it did not eliminate the misleading nature of the posts.

As we have already concluded, Hunter's blogs are commercial speech and, thus, constitute lawyer advertising. When advertising cumulative or specific case results, *Rule 7.2* requires that a disclaimer

> shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to [**621] advertise the specific or cumulative case results.

Rule 7.2(a)(3).

Here, the VSB required Hunter to post a disclaimer that complies with *Rule 7.2(a)(3)* on all case-related posts. This means that Hunter's disclaimers "shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results." *Rule 7.2(a)(3)*. [***28] The circuit court, however, imposed the following disclaimer to be posted once: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case."

While the substantive meaning of the imposed disclaimer may conform to the requirements stated in *Rule 7.2(a)(3)(i) through (iii)*, it nevertheless is less than what the rule requires. In contrast to the committee's determination, there is no provision in the circuit court's order requiring that the disclaimer be formatted and presented in the manner required by *Rule 7.2(a)(3)*, and the text of the disclaimer prescribed by the circuit court is not itself formatted and presented in that manner. Even so, Hunter does not argue that the disclaimer required by the circuit court is an appropriate, less restrictive means [*505] of regulating his speech and, therefore, we decline to so hold. Based on the arguments presented to it, the circuit court erred by imposing a disclaimer that conflicted with the rule. See, e.g., *Rosillo v. Winters, 235 Va. 268, 272, 367 S.E.2d 717, 719, 4 Va. Law Rep. 2440 (1988)* (concluding that a circuit court abuses its discretion by "enter[ing an] order . . . dispens[ing] [***29] with the requirements of [a] Rule"); *Zaug v. Virginia State Bar, 285 Va. 457, 462, 737 S.E.2d 914, 917, 2013 Va. LEXIS 35, *6 (2013)* (this day decided) ("The Virginia Rules of Professional Conduct are Rules of this Court.").

III. CONCLUSION

For the foregoing reasons, we hold that Hunter's blog posts are potentially misleading commercial speech that the VSB may regulate. We further hold that circuit court did not err in determining that the VSB's interpretation of *Rule 1.6* violated the *First Amendment*. Finally, we hold that because the circuit court erred in imposing one disclaimer did not fully comply with *Rule 7.2(a)(3)*, we reverse and remand for imposition of disclaimers that fully comply with that Rule.

Affirmed in part, reversed in part, and remanded.

DISSENT

JUSTICE LEMONS, with whom JUSTICE McCLANAHAN joins, dissenting in part.

I agree with the majority's resolution of the *Rule 1.6* issue. However, I dissent from the majority's determination that Hunter is guilty of violating *Rules 7.1(a)(4)* and *7.2(a)(3)* and that Hunter must post a disclaimer that complies with *Rule 7.2(a)(3)*.

Rule 7.1 governs communications concerning a lawyer's services. *Rule 7.1(a)(4)* states:

> (a) A lawyer shall not, on behalf of the lawyer or [***30] any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:

. . . .

> [*506] (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2 is only applicable to advertisements. *Rule 7.2(a)(3)* states:

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule [**622] 7.1, an advertisement violates this Rule if it:
>
> . . . .
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon [***31] a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

[*507] The First Amendment

I believe that the articles on Hunter's blog are political speech that is protected by the *First Amendment*. The Bar concedes that if Hunter's blog is political speech, the First Amendment protects him and the Bar cannot force Hunter to post [***32] an advertising disclaimer on his blog.

Speech concerning the criminal justice system has always been viewed as political speech. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)*. As political speech, Hunter uses his blog to give detailed descriptions of how criminal trials in Virginia are conducted. He notes how the acquittal of some of his clients has exposed flaws in the criminal justice system.

The majority asserts that because Hunter only discusses his victories, his blog is commercial. The majority does not give sufficient credit to the fact that Hunter uses the outcome of his cases to illustrate his views of the system. Hunter testified that one of the reasons he maintained the blog was to combat "the public perception that is clearly on the side that people are guilty until they're proven innocent." For example, when discussing one of the cases where his client was found not guilty, he concludes the post by explaining that this case is an "example of how innocent people are often accused of committing [***33] some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him."

The majority compares Hunter's detailed discussion of criminal trials and how these outcomes illustrate the need to hold government to its burden of proof, with "opening [a] sales presentation[] with a prayer or a Pledge of Allegiance." The majority proposes that his blog is not transformed into political speech simply because he included eight posts about legal issues and cases he was not involved in. However, the twenty-two posts discussing criminal trials in Virginia are political speech in their own right, and are not dependent upon the content of the other eight posts.

The majority also focuses on the location of Hunter's blog, and asserts that because the blog is accessed through the law firm's website and is not interactive, that demonstrates the blog is commercial in nature. While going through the law firm's website is one way to [*508] access the blog, it is also possible to go directly to the blog without navigating through the firm's website.

Further, the fact that the blog is not interactive in no way commercializes [***34] the speech.

Many businesses have websites. It is not uncommon for websites to include links to related news articles or editorials. Merely because an article may be accessed through a commercial portal does not change the content of the article. It is the content of speech and the motivation of the speaker [**623] that determines the level of protection to which speech is entitled.

Hunter conceded that one of the purposes of the blog was marketing. Although the United States Supreme Court has never clearly decided whether political speech is transformed into commercial speech because one of the multiple motivations of the speaker is marketing and self-promotion, its jurisprudence leads to the conclusion that Hunter's speech is not commercial.

The traditional test for determining whether speech is commercial is if the speech "[does] no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 385, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)*(emphasis added); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)*; *Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473-74, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)*. Hunter's articles clearly do more [***35] than propose a commercial transaction. They contain detailed discussions of criminal trials in this Commonwealth, and Hunter's commentary and critique of the criminal justice system.

The United States Supreme Court has held that commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of N.Y., 447 U.S. 557, 561, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)* (emphasis added). Marketing is not Hunter's sole motivation for maintaining this blog. As discussed above, one of Hunter's motivations in maintaining the blog is to disseminate information about "the criminal justice system, the criminal trials and the manner in which the government prosecutes its citizens."

Even if marketing was Hunter's sole motivation, economic motivation cannot be the basis for determining whether otherwise political speech is protected. The United States Supreme Court recognized in Pittsburgh Press Co. that merely having some economic motivation does not create a basis for regulation. "If a newspaper's profit motive were determinative, all aspects of its operations -- from the [*509] selection of news stories to the choice of editorial position -- would [***36] be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the *First Amendment*." *413 U.S. at 385*.

The mere existence of some commercial motivation does not change otherwise political speech into commercial speech. "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Virginia Pharmacy, 425 U.S. at 761*. In discussing the economic motivations at issue in *Sorrell v. IMS Health, Inc., 564 U.S. , 131 S.Ct. 2653, 180 L. Ed. 2d 544 (2011)*, the United States Supreme Court recognized that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression." *Id. at 2665*.

Even if there is some commercial content to Hunter's speech, any commercial content is intertwined with political speech. When commercial and political elements are intertwined in speech, the heightened scrutiny test must apply to all of the speech.

> It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. But even assuming, [***37] without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.
>
> *Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781, 795-96, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)* (internal citation omitted).

In this case, the policies the Bar advances have no persuasive force when applied to Hunter's blog. The purposes of *Rules 7.1* and *7.2* are to protect the public from mis [**624] leading communications and advertisements concerning a lawyer's services. Hunter's articles contain detailed descriptions of the trials, along with his commentary on the criminal justice system. The Bar produced no evidence that anyone has found Hunter's articles to be misleading. There appears to be little benefit, if any, to the public by requiring Hunter to post a dis [*510] claimer that concedes his articles are advertisements. Hunter disagrees that his articles are advertisements, and claims they are political [***38] speech. He objects to cheapening his political speech by denominating it as advertisement material.

Accordingly, I would hold that Hunter's speech is political, is entitled to the heightened scrutiny test, and that he cannot be forced to include the advertising disclaimer under *Rule 7.2* that the Bar seeks to force upon his writings.

LEGAL ETHICS OPINION 1750 ADVERTISING ISSUES.

The Standing Committee on Lawyer Advertising and Solicitation reviewed all of its previous opinions, and issued a compendium opinion March 20, 2001, summarizing many of the existing advertising opinions and incorporating previously issued legal ethics opinions on the subject of lawyer advertising. In November 2001, the Virginia Supreme Court amended Rules 7.1 and 7.2 of the Rules of Professional Conduct. Additionally, the Virginia Supreme Court approved LAO A-0114 on August 26, 2005. The Standing Committee on Lawyer Advertising and Solicitation is now issuing this updated opinion which incorporates the new rule amendments and new opinions.

Some of the issues addressed in this opinion include: use of actors; use of the phrase "no recovery, no fee;" laudatory statements by third parties; use by a law firm of a fictitious name; use of specific or cumulative case results; participation in a lawyer referral service; communications involving listing of inclusion in publications such as *The Best Lawyers in America*; and the use of the terms "Specialist" or "Specializing In." The prohibition in Rule 7.1 concerning advertising which is false, fraudulent, deceptive or misleading applies to all public communications and includes communications over the Internet. The Standing Committee on Lawyer Advertising and Solicitation also observes that a lawyer's communications over the Internet are "disseminated to the public by use of electronic media" for which the lawyer has given value, and therefore are subject to the requirements of Rule 7.1 and 7.2.

In order to provide all members of the Bar with better access to the advertising opinions, this compendium opinion, issued by the Standing Committee on Lawyer Advertising and Solicitation, will be published as a Legal Ethics Opinion. See, Rules of the Supreme Court of Virginia, Part 6, Section IV, Paragraph 10; Virginia State Bar Bylaws, Article VII, Section 5.

***Opinion*:**

The appropriate and controlling rules relevant to the questions raised are Rule 7.1 and 7.2, which state in part:

> RULE 7.1 Communications Concerning A Lawyer's Services
>
> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> (1) contains false or misleading information; or
>
> (2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

(b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3.

RULE 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:

(1) contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement; or

(2) contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization; or

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

(b) A recording of the actual electronic media advertisement shall be approved by the lawyer prior to its broadcast and retained by the lawyer for a period of one year following the last broadcast date, along with a record of when and where it was used, which recording and date shall be provided to the Standing Committee on Lawyer Advertising and Solicitation upon its request.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) A written or e-mail communication that bears the lawyer's or firm's name and the purpose of which in whole or in part is an initial contact to promote employment for a fee, sent to a prospective non-lawyer client who is not:

(1) a close friend, relative, current client, former client; or

(2) one who has initiated contact with the attorney; or

(3) one who is similarly situated with a current client of the attorney with respect to a specific matter being handled by the attorney, to the extent that the prospective client's rights may be reasonably expected to be materially affected by the outcome of the matter;

shall be identified by conspicuous display of the statement in upper case letters "ADVERTISING MATERIAL."

The required statement shall be displayed in the lower left hand corner of the address portion of the communication in type size at least equal to the largest type used on the communication and also on the front of the first page of the communication in type size at least equal to the largest type used on the page. Further, in the case of e-mail advertising or solicitation, the header shall also display the statement, in uppercase letters, "ADVERTISING MATERIAL."

Further, any such written communication shall not be sent by registered mail or other forms of restricted delivery, nor shall such written communication be sent to any person who has made known to the lawyer a desire not to receive communications from the lawyer. Lawyers who advertise or solicit by e-mail shall include instructions of how the recipient of such communications may notify the sender that they wish not to receive such communications in the future.

This paragraph does not apply to any communication which is directed to be sent by a court or tribunal, or otherwise required by law.

(e) Advertising made pursuant to this Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible

for its content or, in the alternative, a law firm may file with the Virginia State Bar a current written statement identifying the responsible attorney for the law firm's advertising and its office address, and the firm shall promptly notify the Virginia State Bar in writing of any change in status.

In the determination of whether a communication or advertisement violates this rule, the communication or advertisement shall be considered in its entirety including any qualifying statements or disclaimers contained therein.

A. Use of Actors in Lawyer Advertising

Rule 7.2(a) articulates several examples of communications which are prohibited, including an advertisement which contains a portrayal of a client by a non-client without a disclosure that the depiction is a dramatization. Rule 7.2(a)(2). The Committee considered the issue of whether a television advertisement is misleading when an attorney or law firm uses an actor to portray an attorney associated with the law firm without disclosing that fact in the advertisement.

The Committee viewed numerous advertisements in which, either by direct statement or by implication, it appears that a person is an attorney associated with the advertised law firm, even though that person is not, in fact, an employee or member of the law firm. In particular, when actors are speaking they frequently include first person references to themselves as lawyers or as members of the law firm being advertised. The Committee is of the opinion that failing to disclose that the actor is not truly an employee or member of the law firm, when the language used implies otherwise, is misleading or deceptive.

Therefore, the Committee concludes that advertisements which use actors who portray attorneys or employees of a law firm are misleading and deceptive, absent a clear disclosure that the actor is not a member or employee of the firm or that the depiction is a dramatization. See also LAO-0101.

LEO 1119 is overruled to the extent that it is inconsistent with this opinion.

B. Use of "No Recovery, No Fee"

The Committee considered whether the language "no recovery, no fee" or language of similar import contained in advertising or other public communication soliciting claims for cases in which contingent fees are permissible was misleading or deceptive pursuant to Rule 7.1(a), under circumstances in which the advertising or public communication did not also include an explanation that the client was obligated to pay litigation expenses and court costs, regardless of whether any recovery was obtained.

The Committee determined that use of the explicit phrase "no recovery, no fee" in the solicitation of contingent fee cases is misleading or deceptive without any additional explanation that litigation expenses and court costs would be payable regardless of outcome because the public generally may not distinguish the differences between the

terms “fee” and “costs.” See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 652-3 (1985)(finding that “[t]he State’s position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client’s liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed”). The statement “no recovery, no fee” is misleading in light of the fact that a client is or may be liable for costs even if there is no recovery. See Rule 1.8(e). The statement is improper unless a suitable disclaimer is added.

Also, the Committee considered the propriety of such phrases as “we guarantee to win, or you don't pay,” “we are paid only if you collect,” “no charge unless we win,” or other language not making explicit reference to a legal “fee.” Language of this type that does not make explicit reference to a “fee” is misleading and deceptive in violation of Rule 7.1(a) since the language includes the implication that the client will not be required to pay either expenses or attorney's fees if there is no recovery, but does not disclose the circumstances in which the client will be obligated to reimburse the attorney for any litigation expenses and court costs advanced, regardless of outcome. See also Rule 1.8(e). See also LAO-0102.

LEO 1029 is overruled to the extent that it is inconsistent with this opinion.

C. Use of Fictitious Names

The question arises whether and under what circumstances attorneys may advertise using a corporate, trade, or fictitious name which is not the name or names of the firm, the attorney, or the attorneys in the firm. For example, in reviewing the telephone directory yellow page advertisements, the Committee has observed instances where attorneys have used the letter “A,” “AA” or “AAA” as the first word in a name listing with the apparent intent to be in the front or near the front of the “Attorneys” or “Lawyers” section of the yellow pages.

It is misleading and deceptive under Rule 7.1(a)(1) and 7.5(d) for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. Use of a name which is not the name used in the practice is misleading and deceptive as to the identity, responsibility, and status of those using such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign. Furthermore, the usage of such name shall be in compliance with Rule 7.5 and shall comply with applicable laws, including Sections 13.l-542 et seq. or Sections 59.l-69 et seq. of the Code of Virginia.

See also LAO-0103 and LEOs 589, 935, 937, 1242, 1342, 1356, 1369.

D. Advising That An Attorney Must Be Consulted

The question arises whether it is permissible for an advertisement to state that an individual injured in an automobile accident must consult an attorney before speaking to any representative of an insurance company. While it may make good sense for an individual involved in an accident with an injury to consult with an attorney before speaking with a representative from an insurance company, there is no legal requirement for this. Since the proposed advertisement makes an explicitly false statement, to wit, that an individual "will have to consult an attorney," the proposed advertisement would be in violation of Rule 7.1. See also LAO-0104.

E. Participation in Lawyer Referral Services

Attorneys may advertise participation in lawyer referral services and joint marketing arrangements so long as the advertising is not false, fraudulent, deceptive or misleading. See Rule 7.3(a). The Committee is concerned that some advertising concerning lawyer referral services and joint marketing arrangements are deceptive. As noted in LEO 910, statements which violate the Rules of Professional Conduct and which are used in advertisements by lawyer referral service would create automatic rules violations by the participating attorneys. The Committee has opined that the following practices are deceptive and misleading:

l. Advertising participation in a Lawyer Referral Service which is not a true, qualifying Lawyer Referral Service as defined by prior opinions of the Standing Committee on Legal Ethics; see LEOs 926 and 1348;

2. Implying in advertising that a lawyer is selected for participation in a Lawyer Referral Service based on quality of services or some other process of independent endorsement when in fact no bona fide quality judgment has been objectively made;

3. Stating or implying that the Lawyer Referral Service contains all of the lawyers or law firms eligible to participate in the Service by the objective criteria of the Service when in fact the Service is closed to some lawyers or law firms who meet the objective criteria;

4. Stating or implying that there are a substantial number of attorneys or firms participating in the Service when in fact all calls in a geographic area will be directed to one or two attorneys or firms; see LEO 1543;

5. Using the name of a Lawyer Referral Service or joint marketing arrangement in a way which misleads the public as to the true identity of the advertiser.

See also LAO-0105 and LEOs 910, 926, 1014, 1175, 1348, 1543.

F. Advertising Specific or Cumulative Case Results/Jury Verdicts/Comparative Statements

The Committee considered the question of whether it is misleading to the public for an attorney to advertise results obtained in a specific case or to advertise cumulative results obtained in more than one specific case, e.g., "We've collected millions for thousands," or "We've collected $30 million in 1996."

The Committee determined that it is misleading to the public for an attorney to advertise specific case results, whether individually or cumulatively, for two reasons:

1. The results obtained in specific cases depend on a variety of factors, and any advertisement of the results obtained in a specific case or cases that does not include all factors is inherently misleading. This is true, in part, because it is generally impossible to know all factors that have influenced a specific result or an accumulation of specific results.

2. Each legal matter consists of circumstances that are peculiar or unique to the specific case, and the result obtained under one set of circumstances does not provide useful information to the public as a predictor of the result likely to be obtained in a case that necessarily involves different circumstances.

An example will illustrate why information describing a specific case result or a blanket statement of cumulative results may be entirely accurate, but nonetheless misleading. An attorney could accurately cite in advertising a verdict of one million dollars, yet the public would plainly be deceived if the verdict were obtained under circumstances in which the offer prior to trial had been two million dollars. The same advertisement would be similarly deceptive if the one million dollar verdict were obtained against an uncollectible defendant, under circumstances in which the case was lost as to a collectible co-defendant who had made a substantial offer prior to trial. More importantly, since no member of the public is likely to have a case in which the circumstances precisely duplicate the advertised verdict, the report of a specific case result not only fails to provide helpful information to the consumer, but is likely to mislead the consumer as to the result that will be obtained in their case.

This reasoning is what led to the adoption of Rule 7.2(a)(3) in November, 2002. This rule now specifically prescribes the manner in which lawyer advertising can incorporate specific or cumulative case results, or any references thereto. The rule specifically identifies the use of a disclaimer and what the disclaimer must include, as well as the specifics of the type size of the text involved. The rule also clearly states that the disclaimer "shall precede the communication of the case results." The Committee agrees that many times this means the disclaimer must appear on a law firm's homepage of their website in order to meet these requirements. Rule 7.2(a)(3) states the following:

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers

contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

The Committee has repeatedly opined that the use of claims such as "the best lawyers," "the biggest earnings," and "the most experienced" are self-laudatory and amount to comparative statements that cannot be factually substantiated, in violation of Rule 7.1 (a)(3). (See also Comment 5 to Rule 7.1)

The Legal Ethics Committee first issued a legal ethics opinion on this topic in 1989 in LEO 1297. This Committee continues to adhere to the belief that such statements that use extravagant or self-laudatory words are designed to and in fact mislead laypersons to whom they are directed and, as such, undermine public confidence in our legal system. Comment 3 to Rule 7.2 specifically states that "[a]dvertising through which a lawyer seeks business by use of extravagant or self-laudatory statements or appeals to fears and emotions could mislead laypersons."

See also LEOs 1229, 1443.

LEOs 1297, 1321 are overruled to the extent that they are inconsistent with this opinion.

G. Statements by Third Parties

The Committee addressed whether a lawyer can circumvent the prohibition against comparative statements with the use of client testimonials. For example, a lawyer's television advertisement shows a former client making statements about the client's satisfaction and about the quality of the lawyer's services, using statements to the effect that the lawyer is "the best" and will get you "quick results."

Rule 7.1(a)(3) prohibits statements comparing attorneys' services, unless the comparison can be factually substantiated. The Committee has previously opined that a lawyer's advertising of specific case results is misleading, without the appropriate disclaimer. See Rule 7.2(a)(3). Thus, an attorney has clear guidance as to the impropriety of making certain statements in his advertising. Rule 8.4(a) states that an

attorney shall not violate a disciplinary rule through the actions of another. Moreover, the language of the restriction in Rule 7.1 makes no qualification as to the maker of the regulated statements. To the contrary, the rule's requirements are directed at any statements contained in the communication. Thus, there is no support in Virginia's Rules of Professional Conduct for affording greater leeway to advertising statements made by clients than to those made by attorneys. The standard is the same in both instances. Applying that standard to this hypothetical, the client's statements make a comparison ("the best") that cannot be factually substantiated and offer a guarantee of results ("quick"). If such improper statements are contained in the lawyer's advertisement, the lawyer would be in violation of Rule 7.1.

In further clarification, even statements of opinion by clients that contain comparative statements are not appropriate. This Committee adopts the mixed approach, used in Pennsylvania, while prohibiting testimonials regarding results and/or comparisons, it does allow "soft endorsements." Philadelphia Ethics Opinion 91-17; Pennsylvania Bar Association Ethics Opinion 88-142. Examples of "soft endorsements" include statements such as the lawyer always returned phone calls and the attorney always appeared concerned. Id.

In sum, the requirements for lawyer advertising are all intended for the protection of the public. The restrictions on advertising content are carefully chosen to avoid misleading the public as they make the important choice of whom to select for legal representation. This Committee will not erode that protection where non-lawyers or their statements appear in the advertisements. Such a distinction would violate both the language of the pertinent disciplinary rule and the spirit behind it.

See also LAO-0113.

H. Communications Involving Listing of Inclusion in *The Best Lawyers in America*

The Committee addressed this issue and stated that a lawyer may advertise the fact he/she is listed in a publication such as *The Best Lawyers in America*, or a similar publication and include additional statements, claims or characterizations based upon the lawyer's inclusion in such a publication, provided such statements, claims or characterizations do not violate Rule 7.1. If, for some reason, the lawyer is delisted by a publication, the statement in the advertisement must accurately state the year(s) or edition(s) in which the lawyer was listed.

Further, the lawyer may not ethically communicate to the public credentials that are not legitimate, such as, one that is not based upon objective criteria or a legitimate peer review process, but is available to any lawyer who is willing to pay a fee. Such a communication is misleading to the public and therefore prohibited.

Similarly, statements that explain, and do not exaggerate the meaning or significance of professional credentials, in laymen's terms are permissible. For example, if the lawyer is

communicating his/her "A.V." rating by Martindale-Hubbell, the lawyer may properly include a description that states that "A.V." represents "the highest rating" that particular service assigns. Also, if the lawyer is recognized and listed in the book *The Best Lawyers in America*, that lawyer may properly note he/she is among those lawyers "whom other lawyers have called the best." The lawyer should be mindful to exercise discretion when communicating this information, that it be objective and not misleading. For example, although the lawyer may properly characterize inclusion in the book *The Best Lawyers in America*, he/she cannot properly characterize that inclusion into statements such as "since I am included in the book, that means I am the best lawyer in America," nor can the lawyer impute any such endorsement to others in the law firm not so recognized.

The Committee's decision includes objective and factual statements and claims of such inclusions and warns that descriptive characterizations and other qualitative statements must meet the requirements of Rule 7.1.

See also LAO-0114.

I. Use of "Specialist" or "Specializing In"

Rule 7.4 permits a lawyer to hold him/herself out as limiting or concentrating the lawyer's practice in a particular area or field of law as long as that is a true and accurate statement in accordance with Rule 7.1 and 7.2.

Comment [1] to Rule 7.4 gives guidance that a lawyer can generally state that he/she is a "specialist," practices a "specialty," or "specializes in" particular fields, but the communication is subject to the "false and misleading" standard as applied in Rule 7.1 and 7.2. However, unless the lawyer is engaged in patent, admiralty or a certification recognized by the Virginia Supreme Court, the lawyer should only use the term "certified specialist" in accordance with Rule 7.4.

The Committee cautions that if the lawyer uses terms such as "specialist" or "specializing in," he/she should be mindful of Rule 7.4's requirement that only certain specialties have been certified and recognized by the Virginia Supreme Court; otherwise the lawyer can only communicate the fact he/she is certified as a specialist with an appropriate disclaimer that there is no procedure in Virginia for approving certifying organizations.

See also LAO-0111 and LEOs 1475, 1425, 1385, 1292, 1231, and 923.

J. Use of "Expert" and "Expertise"

Rule 7.1 prohibits a lawyer from using or participating in the use of any form of public communication which contains a false, fraudulent, misleading, or deceptive statement or claim. Rule 7.1(a)(3) further prohibits a lawyer from comparing the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated. The Committee opines that a lawyer's use of the words "expert" or "expertise" in public

communications amounts to a comparative statement and is therefore prohibited, unless the claim can be factually substantiated.

See also Legal Ethics Opinions 1292, 1406 and 1425.

Committee Opinion
March 20, 2001

Committee Revised Opinion
April 4, 2006

Committee Revised Opinion
December 18, 2008

LEGAL ETHICS OPINION 1846 IS IT ETHICAL FOR A LAWYER TO BECOME A MEMBER OF A LEAD-SHARING ORGANIZATION?

In this hypothetical, an attorney wishes to become a member of a lead-sharing organization, which can be either a for-profit or not-for-profit association, in which members pay a $500 membership fee, and meet once a week. The membership fee is not distributed, in whole or in part, back to any member, but rather pays administrative costs of the organization and goes towards the profit of the association. Part of the oath associated with membership is that each member will maintain a high degree of professionalism in dealing with their leads, including, inter alia, timeliness and quality of services. Membership is often dependent on the number of leads a member passes. During the meetings, members take turns giving a 30-second promotional, stating any of the following: their name, professional title, industry, place of employment, and who would represent a "good lead" for them. On an alternating basis, one member per meeting gets to present a fifteen minute presentation in which they can discuss any aspect of their industry they deem appropriate. The presentation may be educational, a plea for business, etc. The meeting then involves members passing leads to other members. These leads represent potential clients and may have been actively solicited by the lead-passing member whether they know of a particular professional in the lead-receiving member's industry. The lead-receiving member has no control over how the lead was generated, but the lead-receiving member retains full control over their representation of the client, and need not disclose any details of that relationship to any other person or entity. At the end of the meeting, the 30-second promotional process is usually repeated.

QUESTIONS PRESENTED:

1) Is it ethical for a lawyer to become a member of a lead-sharing organization and use that organization to receive leads for legal services from other members of the organization?

2) Can a lawyer have an ownership interest in a lead-sharing organization that is either for-profit or not-for-profit?

3) Under the same set of hypothetical facts, can a lawyer be a member of a lead-sharing organization when the lawyer is also a licensed title insurance agent, or any other business professional, that provides services through an ancillary business, and solicits business only with respect to real estate closings and title insurance sales or referrals directed to his non-legal business?

4) Assuming that the lawyer may participate in this lead-sharing organization, are there any restrictions on what may be included in their 15-minute presentation?

APPLICABLE RULES & OPINIONS

The rules applicable to these questions are Rule 7.3(d) and 7.2(c), which qualify that a lawyer may not give anything of value to another for securing employment by a client; Rule 5.4(c), regarding the professional independence of the lawyer; Rule 1.7(a), regarding general

conflict's analysis; and Rule 1.6(a), that qualifies client confidentiality. Also pertinent to the Committee's analysis is LEO 1348.

ANALYSIS

The Committee believes that the arrangement as described in this hypothetical does not fall within the parameters of a lawyer referral service as described in LEO 1348. Further, the Committee would like to preface its analysis by stating that this opinion is not intended to discourage the development and use of lawyer referral services.[1] Nevertheless, the Committee believes that the arrangement as described in this hypothetical may create undisclosed conflicts of interest, compromise a lawyer's professional independence, and risk violation of the solicitation rules.

The Committee's analysis starts with Rule 7.3(d) and Rule 7.2(c) and the basic prohibition against a lawyer giving anything of value to a person or organization for securing employment by a client or as a reward for having made a recommendation resulting in employment by a client.[2] This prohibition is designed to prohibit lawyers from compensating another for recommendations or as a reward for influencing a prospective client to employ the lawyer. The Committee considers the "leads" or referrals exchanged among members of this group to be things of value. The Committee finds that this practice of reciprocal referrals amounts to *quid pro quo* payment for services, in violation of Rules 7.3(d) and 7.2(c) and possibly in violation of Virginia's statutory prohibition on "running and capping.".[3] The lawyer, in this hypothetical, would be giving something of value to another organizational member in the form of return referrals as a term of membership. When membership in a lead-sharing organization is dependent on the number of leads a member passes, the Committee finds that this type of membership requires the lawyer to exchange something of value for referrals.

The rationale against permitting a lawyer to make such exclusive or *quid pro quo* referrals is that this activity may compromise the professional judgment of the lawyer. Rule 5.4 precludes the lawyer from allowing another person who recommends the lawyer from directing or regulating the lawyer's judgment.[4] A lawyer who is beholden to an organization may feel obligated to accept a case he is not competent to handle, or conversely, a lawyer may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client's needs. Either of these situations may put the client's interests at risk.

The prior analysis deals with a lawyer's acceptance of leads, however, there are additional concerns raised by a lawyer's passing leads. The passing of leads creates potential conflicts of interest for the lawyer pursuant to Rule 1.7(a)(2).[5] This rule specifically cautions the lawyer regarding potential conflicts stemming from the lawyer's personal interests. Participation in a lead-sharing organization potentially creates such a conflict when the lawyer's membership is dependent on the number of leads the member lawyer passes, thereby impacting the lawyer's freedom to choose the most appropriate specialty provider for a client.

Other issues triggered by your hypothetical are the confidentiality provisions that protect the client, even to the level of client identity in some representations. A lawyer may not

participate in a plan that requires the lawyer to disclose information relating to the representation of a client except in compliance with Rule 1.6.[6] The mere disclosure of a client's name and specific need in certain circumstances may be enough to violate the Rule without consent of the client.

CONCLUSION:

In conclusion, the answers to your specific questions are as follows:

1) This Committee finds that it is unethical for a lawyer to participate in a lead-sharing organization such as the one described in this hypothetical, for all the afore-mentioned reasons.

2) This Committee finds that there would be nothing unethical in a lawyer owning an interest in a company that is a lead-sharing organization as long as the lawyer is not a member.

3) This Committee finds there to be no ethical violation when a lawyer participates in a lead-sharing organization as a title insurance agent or in some other professional capacity, operating through an ancillary business as long as the lawyer does not violate any of the Rules of Professional Conduct.

4) Since the Committee has found the lawyer's participation in this lead-sharing organization to be unethical, this question is rendered moot.

These same questions have been addressed by the states of Maryland, Massachusetts, Arizona, New Hampshire, Oregon, New York, and Montana, all of which have come to the same conclusion that membership in such an organization compromises the lawyer's independence, potentially creates undisclosed conflicts of interest, and violates solicitation rules.[7]

This opinion is not intended to diminish the importance of the ethical practice of lawyer to lawyer referrals in the professional world and the benefits of *bona fide* lawyer referral programs. Referring clients to other lawyers with expertise in certain areas, or receiving such referrals, goes a long way toward sustaining the legal profession and the provision of legal services in many communities. The prohibitions and cautions of this opinion are predicated and indeed limited to a hypothetical organization which bases membership on a commitment to provide referrals. Nothing in this opinion is intended to preclude a lawyer's involvement or membership in organizations that promote the interplay of lawyers and other professionals for education, community action, or social goals, out of which networking and referrals may develop.

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

Committee Opinion
February 2, 2009
Committee Revised
December 29, 2010

[1] Rule 7.3 Direct Contact With Prospective Clients and Recommendations Of Professional Employment Comment [7] The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

[2] Rule 7.3 Direct Contact With Prospective Clients and Recommendations Of Professional Employment (d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and 7.2 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.

Rule 7.2 Advertising (c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal services organization; and

(3) pay for a lawyer practice in accordance with Rule 1.17.

[3] *See* Letter from Att'y Gen. of Virginia Kenneth T. Cuccinelli, II to Karen A. Gould, Executive Director, Virginia State Bar (December 7, 2010) (on file with the Virginia State Bar), which cites to §54.1-3939 and §54.1-3941.

[4] Rule 5.4 Professional Independence Of A Lawyer (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[5] Rule 1.7 Conflict of Interest: General Rule (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[6] Rule 1.6 Confidentiality of Information (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

[7] *See*, Maryland State Bar Association Committee on Ethics Docket 2007-16 and 2005-11; Massachusetts Bar Association Ethics Opinion 08-01; New Hampshire Bar Association Ethics Committee Opinion #2005-06/6; Oregon State Bar Legal Ethics Committee Formal Opinion No. 2005-175; New York State Bar Association Committee on Professional Ethics Opinion 791-2/1/06; and State Bar of Montana Ethics Committee Opinion 960227.

Legal Ethics Opinion No. 1438

Splitting Fees With a Nonlawyer: Attorney Compensating An Advertising Agency Based on a Profit-Sharing Plan

You have presented a hypothetical situation in which an attorney hires an advertising agency to place advertisements for him. The attorney wishes to compensate the advertising agency, in part, based on a profit-sharing plan.

You have asked the committee to opine whether, under the facts of the inquiry, the attorney's planned compensation of the advertising agency violates the provision of DR 3-102(A)(3).

Disciplinary Rule DR 3-102(A)(3) provides that a lawyer or law firm shall not share legal fees with a nonlawyer, except that a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided such plan does not circumvent another Disciplinary Rule.

The committee has previously opined that it is not improper to compensate nonlawyer personnel on a profit-sharing basis, either in lieu of salary or in addition to salary. See LEOs #LEO #767, 806, and 885.

Notwithstanding the cited Disciplinary Rule and prior Legal Ethics Opinions, however, under the facts you have presented, the committee is of the opinion that unless the advertising agency occupies a position with the attorney's firm such that it is a bona fide and regular employee of the lawyer or law firm, the general rule of DR 3-l02, which prohibits a lawyer from sharing legal fees with a nonlawyer is the operative requirement. The committee is of the opinion that the exception articulated in DR 3-102(A)(3), permitting a lawyer to share legal fees with nonlawyer employees [emphasis added], is inapplicable to the question you pose since the advertising agency is independent of the lawyer or law firm and does not operate as a bona fide regular employee of the lawyer or law firm. The committee opines, thus, that the proposed profit-sharing compensation plan involves sharing legal fees with a nonlawyer, in violation of DR3-102(A).

Committee Opinion
October 21, 1991

Cloud Computing — A Silver Lining or Ethical Thunderstorm for Lawyers?

by James M. McCauley, Ethics Counsel, Virginia State Bar

Because of the flagging economy, businesses and professionals are searching for increased efficiency and reduced costs and risks in their endeavors. This is especially true for the ever-increasing risks and costs associated with information technology (IT) management. Today, the business world is overrun with entreaties by IT firms offering "cloud computing services" who advertise that "the future is here and it is in the clouds."

What Is Cloud Computing?

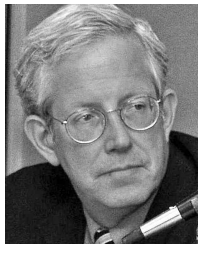
There is no one agreed definition of "cloud computing."[1] Software as a Service (SaaS) is but one form of cloud computing referring to a category of software delivered via the Internet to a web browser (such as Internet Explorer) rather than installed directly onto the user's computer. The resulting data is held by the third-party service provider (or maybe by a data center provider by companies like Amazon, RackSpace or other host), not on a computer or server within the law firm. Cloud computing is not new, but it has become a hot topic in the IT and business world. Software has been employed over networks for decades, including through application service providers that rose to prominence in the 1990s and then fizzled out with other tech companies that went bust in the early 2000s. Some lawyers already use web-based applications in their practice, including online legal research (Westlaw, LexisNexis, CaseFinder or Fastcase), web-based e-mail (Gmail, Yahoo, or Hotmail), document creation or collaboration tools (Google Docs), and data backup services (Mozy, i365, IBackup, Steel Mountain, and Carbonite). These are all examples of cloud computing. Although the concept of cloud computing is not new, its rapid expansion and diversification in the IT and business world are recent.

Cloud computing might also be described as shifting information technology responsibility from the consumer to service providers who deliver IT services via the Internet — the "cloud." The consumer relinquishes control over IT functions compared with legacy systems. Responsibility shifts from the consumer to a third party for infrastructure, application software, development platforms, developer and programming staff, licensing and updates, security, and maintenance. Some might describe cloud computing as the virtualization of the computing process or as outsourcing IT.[2]

Many firms today are considering switching from obtaining and loading software on their own computers to SaaS platforms to facilitate their practices, particularly in the areas of case management and time and billing platforms. There are arguments for and against using SaaS. Examine those issues before you decide to switch over. Cloud computing liberates the consumer from many of the burdens of IT management issues, enabling the consumer to focus on core activity. Cloud computing also reduces costs and expenses associated with purchasing and maintaining the hardware and software necessary to run applications, security measures, backup, and disaster recovery.

Benefits of Cloud Computing

- **Save money:** Cloud computing applications greatly reduce the costs of electronic data management. These applications are less expensive than designing your own program or modifying an existing program. Focus your technology budget on competitive advantage rather than infrastructure.
- **Identified cost:** Your investment in hardware and software is minimized. Cost for the SaaS model can be based on the number of users or the amount of data storage volume; it is easy to identify and budget for monthly or annually. For the best pricing, the contract terms are often multiyear commitments — sometimes three to five years.
- **Save time:** There is no installation, and the SaaS provider takes care of updates, including security, and is responsible for data storage and retrieval.
- **Intuitive:** SaaS programs are more intuitive and easier to use than traditional software. However, because they



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are newer, they sometimes have more limited features than older software programs.

- **Staying current:** Gain immediate access to the latest innovations and updates at the provider's expense.

- **Mobility:** SaaS products allow lawyers to access their software and their data from many locations, without additional cost (with an Internet connection). Because most SaaS is accessed through a web browser, system requirements are minimal.

- **Service:** You may get better service from a vendor. If you are considering SaaS, ask a vendor about a service level agreement. A good agreement should guarantee both a certain level of uptime for the product and a response time for technical and support service requests.

Ethical Concerns for Lawyers Using Cloud Computing

Concerns about Security and Reliability. There are always concerns about a new technology's security and reliability. Comment 16 to American Bar Association Model Rule 1.6 states that "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are under the lawyer's supervision." Comment 17 states that "the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

There is no basis in the Virginia Rules of Professional Conduct for an unqualified prohibition of lawyers managing their office software applications and client data using cloud computing. Lawyers have always had an ethical duty to safeguard confidential client information. Rule 1.6. However, lawyers may share information protected under Rule 1.6 with third parties as needed to perform necessary office management functions, if the lawyer exercises reasonable care in the selection of the third-party vendor and secures an agreement that the vendor will safeguard the confidentiality of the information shared. Va. Rule 1.6(b)(6). In the past, lawyers have outsourced copying and document production to third-party vendors. Confidentiality of client information was protected by contractual arrangements between the law firm and the third-party vendor. In other advisory opinions, the VSB Standing Committee on Legal Ethics has emphasized that lawyers must act competently to protect the confidentiality of information relating to the representation of their clients, including protecting both open and closed client files.[3]

In ABA Formal Opinion 95-398 (1995) the American Bar Association's Standing Committee on Legal Ethics and Professionalism recognized that "in this era of rapidly developing technology, lawyers frequently use outside agencies for numerous functions such as accounting, data processing, photocopying, computer servicing, storage and paper disposal and that lawyers retaining such outside service providers are required to make reasonable efforts to prevent unauthorized disclosures of client information." The opinion states that outside service providers would be considered to be nonlawyer assistants under Model Rule 5.3, which states that lawyers have an obligation to ensure that the conduct of the nonlawyer employees they employ, retain, or become associated with is compatible with the professional obligations of the lawyer. But how does a lawyer exercise the supervision required of Rule 5.3 over a company such as Google or Yahoo that essentially offers cloud computing contracts on a take-it-or-leave-it basis?

In addressing attorney use of the Internet for client file storage, the State Bar of Arizona's Ethics Committee has stated:

> [A]n attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed. In order to do that, an attorney must be competent to evaluate the nature of the potential threat to client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end. An attorney who lacks or cannot reasonably obtain that competence is ethically required to retain an expert consultant who does have such competence. Arizona State Bar Op. 05-04.

The Massachusetts Bar Association Committee on Professional Ethics issued an ethics opinion that "A law firm may provide a third-party software vendor with access to confidential client information stored on the firm's computer system for the purpose of allowing the vendor to support and maintain a computer software application utilized by the law firm. … However, the law firm must 'make reasonable efforts to ensure' that the conduct of the software vendor (or any other independent service provider that the firm utilizes) 'is compatible with the professional obligations of the lawyer[s],' including the obligation to protect confidential client information reflected in Rule 1.6(a). The fact that the vendor will provide technical support and updates for its product remotely via the Internet does not alter the Committee's opinion." Massachusetts Bar Op. 2005-04 (March 3, 2005).

Attorneys are not required to guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to the representation of a client. Nevada's Ethics Committee addressed the question of whether an outside party could be used to store files in digital format or if this would be considered a breach of confidentiality. In reaching a decision, the Nevada committee analogized storing digital files on an off-site server to storing paper documents in an off-site storage facility operated by a third party. In reviewing prior ABA opinions, the committee concluded that as long as the lawyer exercises care in the selection of the vendor, has a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and

instructs the vendor to preserve the confidentiality of the information, the requirements of Rule 1.6 are met. Nevada Formal Op. 33 (2006).

A recent Alabama ethics opinion takes a similar approach consistent with the Nevada and Arizona opinions. Alabama lawyers may outsource the storage of client files using cloud computing if they keep abreast of appropriate security safeguards and take reasonable steps to make sure the off-premises provider uses sound methods to protect the data. Alabama State Bar Disciplinary Comm'n, Op. 2010-02.

Although Virginia has not issued an ethics advisory opinion on a lawyer's use of cloud computing, Virginia Rule 1.6(b)(6) appears similar to Alabama's. The rule allows lawyers to share confidential information with an outside agency if "necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential." This rule does not require the lawyer to obtain the client's consent before disclosing information to the outside agency. In LEO 1818 (2005) the Virginia State Bar's Standing Committee on Legal Ethics concluded that a lawyer or law firm may store a client's file or information in electronic or digital format. In so doing, the committee acknowledged in a footnote that it may be necessary for the lawyer to rely on outside technical support to develop a paperless office.[4]

If you are using a SaaS provider, protect your confidential data and information. Secure portals and secure transmission protect client confidentiality. Is the transmission of the data encrypted to preserve confidentiality? Are you using a safe password or even biometrics for access?

Laws Protecting Privacy of Data

Laws in the United States and overseas protect privacy of data or information. They include the Family Educational Rights and Privacy Act of 1974; the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996), 42 U.S.C. 1320d et seq., 45 C.F.R. Parts 160 & 164; and the Gramm-Leach-Bliley Act, 15 USC 6801et seq. Various states may have data protection or security laws, such as Massachusetts General Law Chapter 93H, Regulations 201 CMR 17.00; the New Jersey Identity Theft Protection Act, N.J.S.A. 56:11-44 to 50 and 56:8-161 to 166; and the Virginia Health Records Privacy Act, Va. Code § 32.1-127.1:03.

The Federal Trade Commission has posted enforcement actions for security breaches by cloud computing providers.[5] The European Union also has laws protecting the privacy of information that may affect users of cloud computing.[6]

There has been much discussion in the legal community over whether lawyers should convert to SaaS. Opponents argue that lawyers should not be the first to test the water. Rather, lawyers should consider letting problems be resolved by other businesses. Lawyers should protect of their data and their clients' data. Putting it in the hands of a third party is a loss of control that should not be risked. On the other hand, proponents of SaaS say that lawyers have shared client information with third-party vendors for decades and that data stored in the cloud is at least as safe and secure, if not more so, than data stored locally. They argue that most SaaS vendors use sophisticated data centers to house their customer's data. These data centers feature elaborate, redundant security and backup systems to ensure that data is protected from accidental loss and unauthorized access. The technology and the expertise employed by SaaS vendors are greater than at most law firms. Carefully consider the pros and cons before you decide what's right for your firm and your clients.

Because of the complexity of this ever-changing technology, lawyers have to be careful with cloud computing. The primary concern for most is control over the data. While the customer owns the data, the data is stored on a third-party server, the location of which may not be known to the customer. The cloud computing service provider may move the data for its own reasons to another server in another country.

Questions You Need Answered

Cloud computing is a global undertaking. Considerations should include:

- Where will users be located?
- Where will the data be processed?
- Where will the data be stored?
- Where is the disaster-recovery and backup site located?
- Where are the data subjects located?
- Where will support services be based, and will support have access to sensitive data?
- Will subcontractors or outsourcing be utilized for any functions having access to sensitive data?
- Does the customer have the right to approve in advance any transfer of data to another state or country?
- Who will have access to the data and will there be different levels of access?
- Who will supervise the project and will there be monitoring and auditing of policies and procedures?

To see how some of these questions are addressed by Google, you might check out Google's cloud computing contract. A Google Apps Premier Edition Online Agreement can be found at http://www.google.com/apps/intl/en/terms/education_terms.html.

Best Practices for Cloud Computing Vendors

- **Transparency**: Cloud computing platforms should explain their information handling practices and disclose the performance and reliability of their services on their public web sites.
- **Use limitation:** A cloud provider should claim no ownership rights in

customer data and should use customer data only as its customers instruct or to fulfill contractual or legal obligations.

- **Disclosure**: A cloud provider should disclose customer data only if required by law and should provide affected customers prior notice of any compelled disclosure.

- **Security management system:** A cloud provider should maintain a robust security management system that is based on an internationally accepted security framework (such as ISO 27001) to protect customer data.

- **Customer security features:** A cloud provider should provide customers with configurable security features to implement in their usage of the cloud computing services.
- **Data location:** A cloud provider should tell customers the countries in which customer data is hosted.

- **Breach notification:** A cloud provider should notify customers of known security breaches that affect the confidentiality or security of the customer data.

- **Audit:** A cloud provider should use third-party auditors to ensure compliance with its security management system.

- **Data portability:** A cloud provider should make available to customers their data in an industry-standard, downloadable format.

- **Accountability:** A cloud provider should work with customers to designate appropriate roles for privacy and security accountability.

Data May Be Subject to E-Discovery Rules

A client's data may be subject to discovery in pending or anticipated litigation; a lawyer may be ethically obligated to take measures reasonably necessary to preserve client data and avoid spoliation claims. Rule 3.4(a) provides that [a] lawyer shall not:

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

Rule 3.4(e) requires a lawyer "to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

In dealing with cloud providers, lawyers must consider issues regarding access to data, contractual provisions for disclosure of confidential information including customer data to third parties, including via subpoena or other compelled disclosure, and litigation holds may require nondestruction of cloud provider records and backup media.

Conclusion

With any emerging technology, lawyers must confront ethical issues that arise when the lawyer considers using that new technology. Because data security is the lawyer's primary concern, lawyers need to approach the issue of cloud computing carefully. "When going to the cloud, you've got to do some due diligence," to ensure not only that the provider can do what you need it to do, but that it will be around long enough to do it when you need it.[7] Finally, lawyers should consider that there may be particular types of information too valuable or critical to store in the cloud. As David Cearley put it, "I wouldn't ever put the formula for Coca-Cola in the cloud."[8]

Endnotes:

1 For a very technical and detailed definition see the National Institute of Standards and Technology's "NIST Definition of Cloud Computing," authors: Peter Mell and Tim Grance, Version 15, 10-7-09, at http://csrc.nist.gov/groups/SNS/cloud-computing/, last updated Aug. 27, 2010.

2 Kevin F. Brady, "Cloud Computing: Panacea or Ethical 'Black Hole' for Lawyers," *The Bencher*, Nov.-Dec. 2010 at 17.

3 Virginia LEO 1305 (lawyers must destroy and cannot simply dump closed client files). Also, this obligation of confidentiality survives the death of the client. *See* Virginia LEO 1207 (1989). In addition, lawyers may convert paper files into electronically stored data. LEO 1818 (2005).

4 Va. Legal Ethics Op. 1818 (2005) at n.2.

5 ChoicePoint – settlement of data security breach charges in violation of Fair Credit Reporting Act and Federal Trade Commission Act. The settlement included $10million in civil penalties — the largest in FTC's history — and further required $5 million for consumer redress as well as implementation of new procedures. *See* http://www.ftc.gov/opa/2006/01/choicepoint.shtm; and recently filed complaint with the FTC: *IMO Google Inc. and Cloud Computing Services*, seeking injunctive relief and investigation into Google Inc. and its provision of cloud computing services alleging failure to adequately safeguard confidential information)(Complaint available at http://epic.org/privacy/cloudcomputing/google/ftc031709.pdf.)

6 (a) European Union Directive on Data Protection, effective October 1998 (Directive 95/46/EC), prohibits transfer of personal data to non-EU countries if they do not meet EU "adequacy standard" for protection of privacy.

(b) Swiss Federal Act on Data Protection regulates the processing of data about physical and legal persons

(c) Various EU member s may implement their own data protection laws, e.g., German data protection authorities issued April 29, 2010, resolution requiring additional diligence when transferring data to parties who are self-certified under the Safe Harbor program; data protection authority of the German federal state of Schleswig-Holstein issued a June 18, 2010, legal opinion concluding that clouds outside of the EU are unlawful, even if the EU commission has issued an adequacy decision in favor of that country.

7 John Tomaszewski, general counsel of TRUSTe, an Internet privacy services provider in San Francisco, who was a panelist speaking at a presentation titled

Cloud continued on page 54

Cloud continued from page 52

"The Real Realities of Cloud Computing: Will the Cloud Produce Smooth Sailing or Stormy Weather?" on Aug. 7, 2010, offered by the American Bar Association Section of Science and Technology Law. Participants in the program looked at security risks to law firms that choose to move data application and storage into the cloud of the Internet.

8 David W. Cearley, a vice-president at the technology research company Gartner Inc., in Stamford, CT, who was a copanelist at the program cited in note 8, *supra*.

Attorneys May Submit Ethics Questions by E-mail

The Virginia State Bar now responds to lawyer's ethics questions submitted by e-mail, as well as telephone.

E-mail:
Go to http://www.vsb.org/site/regulation/ethics/ and click the blue box, "E-mail Your Ethics Questions."

Phone:
Call (804) 775-0564 and leave a voice mail. Your call will be returned.

The ethics staff tries to respond to questions on the same business day they are received.

FORMAL OPINION 2014-300

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

I. Introduction and Summary

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

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

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

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

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

10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

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

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

II. Background

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

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to "friend" them) as well as to invite friends of friends or others.

Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the "public," "friends," and "others." For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows "friends of friends" to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person's posts and other items.

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

III. Discussion

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

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

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

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

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

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

Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

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

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

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

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

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

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

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

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

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

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

Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client's social media account.

For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer.[2] However, he forfeited that settlement after his daughter posted on her Facebook page "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

The Virginia State Bar Disciplinary Board[3] suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.[4]

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

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

Rule 3.3 states:

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

[2] "Girl costs father $80,000 with 'SUCK IT' Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

[3] *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

[4] *Lester v. Allied Concrete Co.,* Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)

or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

Rule 3.4 states:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

Rule 4.1 states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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

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

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

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

> to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises [5]

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.[6]

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

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

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

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

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

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

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[5] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted).

[6] http://www.ncbar.com/ethics/printopinion.asp?id=894

3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited,[7] it would also be prohibited while using social networking websites.

Rule 4.2 states:

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

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

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02,[8] that an attorney may not use an intermediary to access a witness' social media profiles. The inquirer sought access to a witness' social media account for impeachment purposes. The inquirer wanted to ask a third person, *i.e.*, "someone whose name the witness will not recognize," to go to Facebook and Myspace and attempt to "friend" the witness to gain access to the information on the pages. The Committee found that this type of pretextual "friending" violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2,[9] concluding that an attorney is prohibited from making an *ex parte* "friend" request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that "friending" a represented party violates Rule 4.2.

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

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

[8] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).

[9] San Diego County Bar Assn., Legal Ethics Comm., Op. 2011-2 (2011).

Bar Association Committee on Professional Ethics issued Opinion 843,[10] concluded that lawyers may access the public portions of other parties' social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

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

4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information[11]

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

Rule 4.3 states in relevant part:

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

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

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony[12]. He was fired for "unethical behavior," which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

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[10] New York State Bar Assn., Comm. on Prof'l Ethics, Op. 843 (2010).

[11] Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

[12] "Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook," June 7, 2013. http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee[13] concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, "[t]he underlying principles of fairness and honesty are the same, regardless of context."[14] The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02,[15] the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness' social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05,[16] concluding that a lawyer may not use deception to access the private portions of an unrepresented person's social networking account. The Committee noted, "A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge."

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189,[17] concluding that a lawyer may request access to an unrepresented party's social networking website if the lawyer is truthful and does not employ deception.

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

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

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

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

[13] Kentucky Bar Assn., Ethics Comm., Formal Op. KBA E-434 (2012).
[14] *Id.* at 2.
[15] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).
[16] New Hampshire Bar Assn., Ethics Comm., Op. 2012-13/05 (2012).
[17] Oregon State Bar, Legal Ethics Comm., Op. 2013-189 (2013).

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

For example, in 2011, a New York[18] court ruled against a wife's claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife's postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

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

For example, in *McMillen v. Hummingbird Speedway, Inc.,*[19] the Court of Common Pleas of Jefferson County, Pennsylvania granted a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.,*[20] the Court similarly granted a defendant's request for access to a plaintiff's social media accounts because the Court believed, based on the public portions of plaintiff's account, that the information may be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In *Largent v. Reed,*[21] a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff's social media accounts. The Court engaged in a lengthy discussion of Facebook's privacy policy and Facebook's ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in *McCann v. Harleysville Insurance Co.,*[22] a New York court denied a defendant access to a plaintiff's social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a "fishing expedition" that was too broad to be granted. Similarly, in *Trail v. Lesko,*[23] Judge R. Stanton Wettick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a

[18] *B.M. v D.M.,* 31 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).
[19] *McMillen v. Hummingbird Speedway, Inc.,* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).
[20] *Romano v Steelcase Inc.,* 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).
[21] *Largent v. Reed*, No. 2009-1823 (Pa.Ct.Com.Pl. Franklin Cty. 2011).
[22] *McCann v. Harleysville Ins. Co. of N.Y.,* 78 A.D.3d 1524 (N.Y. App. Div. 4th Dep't 2010).
[23] *Trail v. Lesko,* 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Pa. County Ct. 2012).

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

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

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

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

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

Rule 7.2 states, in relevant part:

> (d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.
> (e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

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

[24] In *Dwyer v. Cappell*, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.

media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

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

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8,[25] concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted.[26] Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer's services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client's level of satisfaction with the lawyer-client relationship.

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

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

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

This Committee has opined, in Formal Opinion 2014-200,[27] that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as "information relating to representation," which is generally very broad. While there are

[25] North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

[26] Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.

[27] Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-200 (2014).

certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client
> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
> (e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

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

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

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

[28] *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).
[29] *Id.* at 59.
[30] *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

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

Also relevant is Rule 3.6, which states:

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

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

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

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

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

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

[31] *In Re Peshek*, No. M.R. 23794 (Il. 2010); Compl.., *In Re Peshek*, Comm. No. 09 CH 89 (Il. 2009).

misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror's Internet Presence

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

Rule 3.5 states:

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

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

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

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

This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5's prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

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

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.[32]

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

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

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

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

IV. Conclusion

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

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

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

influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

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

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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

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

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

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

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

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

Juror Internet Presence

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

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

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

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

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

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

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

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

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

Trial Management and Jury Instructions

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

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

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

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

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

Reviewing Juror Internet Presence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discovery of Juror Misconduct

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

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

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

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

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

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

11. *Id.* at 66.

12. *Id.* at 87.

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

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

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

Model Rule 3.3(b) reads:

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

Comment [12] to Rule 3.3 provides:

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED JUNE 9, 2015

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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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TABLE OF CONTENTS

Page

INTRODUCTION

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

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

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

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

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

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

[2] https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

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

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

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

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

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

1. ATTORNEY COMPETENCE

Guideline No. 1: Attorneys' Social Media Competence

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

NYRPC 1.1(a) and (b).

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

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use. This is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Opinion 466 (2014)[4] 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.[5]

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

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[4] American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

[5] Competence may require understanding the often lengthy and unclear "terms of service" of a social media platform and whether the platform's features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such social media platform actually functions.

[5] Ass'n of the Bar of the City of New York Comm. on Prof'l and Jud. Ethics ("NYCBA"), Formal Op. 2012-2 (2012).

[6] Id.

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

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

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

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

2. ATTORNEY ADVERTISING

Guideline No. 2.A: Applicability of Advertising Rules

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

NYRPC 1.0, 7.1, 7.3.

> *Comment*: In the case of a lawyer's profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.
>
> The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[10] 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."[11]
>
> NYCLA, Formal Op. 748 addresses the types of content on LinkedIn that may be considered "attorney advertising" and provides:
>
> > [i]f an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other

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

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

[10] New York County Lawyers' Association ("NYCLA"), Formal Op. 748 (2015).

[11] Id.

> lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." *See* RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[12] An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).[13]

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

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

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

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

13 NYCLA, Formal Op. 748.

14 New York State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA"), Op. 1009 (2014).

15 NYSBA, Op. 1009.

16 Id.

presences, and any attachments or links related thereto."[17] Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."[18]

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

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

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[19]

NYRPC 7.1, 7.4.

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

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

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17 Id.

18 Id.

19 See NYSBA, Op. 972 (2013).

20 See also Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2012-8 (2012) (citing Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 85-170 (1985)).

21 NYCLA, Formal Op. 748.

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

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

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

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

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

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[22] See NYRPC Rule 7.4.

[23] See also Fl. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised Apr. 16, 2013).

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

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

> *Comment*: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must, as noted above, monitor and verify that posts about them made to profile(s) the lawyer controls[25] 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.[26] 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.[27] It should be noted that certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

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

[26] NYCLA, Formal Op. 748.

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

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

Guideline No. 3.B: Public Solicitation is Prohibited through "Live" Communications

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

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

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

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

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

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

> *Comment*: Answering general questions[33] on the Internet is analogous to writing for any publication on a legal topic.[34] "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."[35] In responding to questions,[36] a lawyer may not provide answers that appear applicable to all

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

[31] 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.").

[32] Whether a Twitter or Reddit communication is a "real-time or interactive" computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See NYSBA, Op. 1009 and page 7 *supra*.

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

[34] See NYSBA, Op. 899.

[35] See id.

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

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

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[38] 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.[39] 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.[40]

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

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

NYRPC 1.1, 1.15.

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

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[37] Id.

[38] See id.

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

[40] Id.

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

The lawyer must take affirmative steps to preserve those emails and social media communications, such as chats and instant messages, which the lawyer believes need to be saved.[42] 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.[43] Casual communications may be deleted without impacting ethical rules.[44]

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

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

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41 See NYCBA, Formal Op. 2008-1 (2008).

42 Id.

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

44 Id.

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

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

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

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

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

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

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

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

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[46] See NYSBA, Op. 843 (2010).

[47] See NYCLA, Formal Op. 743 ; NYCBA, Formal Op. 2012-2.

[48] See American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.

[49] One network that sends automatic notifications that someone has viewed one's profile is LinkedIn.

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

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

NYRPC 4.1, 4.3, 8.4.

Comment: It is permissible for a lawyer to join a social media network to obtain information concerning a witness.[51] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using "deception."[52]

In New York, there is no "deception" when a lawyer utilizes her "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account.[53] In New York, the lawyer is **not** required to disclose the reasons for making the "friend" request.[54]

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

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

51 See also N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

52 NYCBA, Formal Op. 2010-2 (2010).

53 Id.

54 See id.

55 N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

56 Massachusetts Bar Ass'n. Comm. on Prof Ethics Op. 2014-5 (2014).

57 San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011).

the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact."[58]

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

Guideline No. 4.C: Viewing a Represented Party's Restricted Social Media Website

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

NYRPC 4.1, 4.2.

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

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

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible."[60]

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

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58 Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009).

59 Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

60 Id. See San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2.

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

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

NYRPC 5.3, 8.4.

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

[61] See NYCBA, Formal Op. 2010-2 (2010).

[62] See also N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

5. COMMUNICATING WITH CLIENTS

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

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

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

> *Comment*: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[65] or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,[66] 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."[67] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after a litigation has commenced, as long as

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

64 NYCLA, Formal Op. 745 (2013). See Philadelphia Bar Ass'n. Guidance Comm. Op. 2014-5 (2014).

65 VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012).

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

67 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.[68]

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

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

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

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

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

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68 North Carolina State Bar 2014 Formal Ethics Op. 5 (2014); Phila. Bar Ass'n Guidance Comm. Op. 2014-5 (2014); Florida Bar Professional Ethics Committee, Proposed Advisory Opinion 14-1 (Jan. 23, 2015)

69 NYCLA, Formal Op. 745.

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

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

Guideline No. 5.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.[71]

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."[72] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[73] See also NYRPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.").

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

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

NYRPC 4.2.

> *Comment*: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[74] 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."[75]

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71 NYCLA, Formal Op. 745.

72 NYRPC 3.1(a).

73 NYRPC 3.1(b)(3).

74 NYCBA, Formal Op. 2002-3 (2002).

75 Id.

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

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

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

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

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."[78]

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76 N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

77 Id.

78 ABA, Formal Op. 11-461 (2011).

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

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

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

NYRPC 1.6, 1.9(c).

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

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79 NYRPC 1.6.

80 Comment 17 to NYRPC Rule 1.6 provides:

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

81 NYSBA Op. 1032 (2014).

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

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."[84] 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."[85]

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82 NYSBA, Opinion 1032.

83 See Michmerhuizen, Susan "Client reviews: Your Thumbs Down May Come Back Around."*Americanbar.org*. Your ABA, September 2014. Web. 3 March 2015.

84 Pennsylvania Bar Association Ethics Committee, Formal Op. 2014-300.

85 Pennsylvania Bar Association Ethics Committee Opinion 2014-200.

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[86]
>
> The ABA issued Formal Opinion 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[87] There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[88] However, Opinion 466 does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[89]

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86 See NYCBA Formal Op. 2012-2 (2012).

87 See American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.

88 Id.

89 Id.

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[91]

Contact by a lawyer with jurors through social media is forbidden. For example, ABA, Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.[92] 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."[93]

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

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

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90 See NYCLA, Formal Op. 743 (2011); NYCBA, Formal Op. 2012-2; see also Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 (2013).

91 Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, 85 N.Y. St. B.A.J. 50 (2013).

92 See ABA, Formal Op. 14-466.

93 Id.

94 Id.

95 See ABA Formal Op. 14-466.

juror's street and telling the juror that the lawyer had been seen driving down the street."[96]

While ABA, Formal Op. 466 noted that an automatic notice[97] sent to a juror, from a lawyer passively viewing a juror's social media network does not constitute an improper communication, a lawyer must: (1) "be aware of these automatic, subscriber-notification procedures" and (2) make sure "that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[98] 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.[99]

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

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

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

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

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

[98] Id.

[99] Id.

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

[101] See NYCBA, Formal Op. 2012-2 and NYCLA, Formal Op. 743.

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

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

Guideline No. 6.C: <u>Deceit Shall Not Be Used to View a Juror's Social Media</u>.

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."[103]

Guideline No. 6.D: <u>Juror Contact During Trial</u>

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

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

[103] <u>See Id.</u>

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

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

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

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

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."[108]

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104 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.

105 See NYCBA, Formal Op. 2012-2.

106 See Richard Vanderford, "LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial," Law360 (Sept. 27, 2013).

107 Id.

108 ABA, Formal Op. 14-466.

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

In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[109]

NYRPC 3.5, 8.4.

> *Comments*: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[110]
>
> New York, however, provides that "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge."[111] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[112] "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."[113]

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109 See NYCLA, Op. 743; NYCBA, Op. 2012-2.

110 See ABA, Formal Op. 14-466.

111 NYRPC 3.5(d).

112 NYCBA, Op. 2012-2.

113 Id. See Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300 ("a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

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

NYRPC 3.5, 8.2 and 8.4.

> *Comment*: There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should not be surprised that any such communication is fraught with peril as the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether retweeting a judge's own tweets would be improper.
>
> A lawyer may communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"[114] 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."[115]

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

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

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114 Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300.

115 NYRPC 3.5(a)(1).

116 New York Advisory Committee on Judicial Ethics Opinion 08-176

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

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

APPENDIX

DEFINITIONS

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

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

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

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

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

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

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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of SVITLANA E. SANGARY, Member No. 232282, A Member of the State Bar.	Case Nos.: 13-O-13838-DFM (13-O-14282); 13-O-17014 (Cons.) DECISION

INTRODUCTION

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

PERTINENT PROCEDURAL HISTORY

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

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

matter. The State Bar was represented by Eli Morgenstern. Respondent did not appear. Because the court had not received a response by Respondent to the NDC, the State Bar was ordered to file a motion for entry of Respondent's default by February 14, 2014, in the event that a response was not filed.

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

> Also, with regard to false statements and misleading advertisement, none other than Natalie Portman comes to mind. The online media extensively covers the controversy surrounding Natalie Portman's performance in the film Black Swan. The ballet dancer who performed in the Black Swan, Sarah Lane, has come forward to revel [*sic*] a "cover-up" and says that Natalie Portman's head was superimposed on to Sarah Lane's body, and that Natalie Portman lied. Please see Exibit [*sic*] 21, 3 articles that appeared on www.theguardian.com, htttp://news.softpedia.com and www.thehuffingtonpost.com.
>
> Despite the foregoing, Natalie Portman has won an Oscar for her performance in Black Swan.
>
> [Respondent's January 27, 2014 response, p. 12.]

Later in her response, Respondent concluded by stating:

> There is a popular expression, 'sweet sixteen'. The foregoing 16 pages can be characterized as bitter-sweet sixteen, in SANGARY's view. It goes without saying as to why they are bitter. Can one envision the acts in the civil arena, more unseemly than the ones described above? But what SANGARY views as sweet is that this country, the United States of America, is truly the land of opportunity, where anything and everything is possible. SVITLANA SANGARY came to this country in her twenties, with nothing, and married another immigrant, who also had nothing. SANGARY passed LSAT [*sic*] without taking the preparation course, graduated *cum laude* from the Pepperdine University School of Law, and passed the bar without even taking the Barbri course. SANGARY's American dream has come true, as she has been able to achieve a point wherein now, in her thirties,

> SANGARY is a prominent donor and philanthropist, supporting important social causes, who had recently received the email from President Obama, with the subject line 'I need your help today', asking SVITLANA SANGARY for an additional donation. Please see Exhibit 30.
>
> God Bless America!
>
> [Respondent's January 27, 2014 response, p. 17.]

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

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

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

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

On May 6, 2014, this court issued an order setting forth the new trial date, together with deadlines for the parties to comply with their pretrial obligations and to file a pretrial statement. In addition, the court ordered the parties to participate in a settlement conference with Judge Pro tem George Scott on May 19, 2014. A copy of that order was mailed to both Respondent and to attorney Frank Lincoln.

On May 22, 2014, the State Bar filed an NDC in case No. 13-O-17014. The NDC consists of a single count, alleging Respondent's failure to cooperate in the State Bar's investigation in that matter, including failing to appear for an investigative deposition on April 4, 2014. The new case was assigned to the undersigned.

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

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

investigation, Respondent denied the allegation and proceeded to compose another bizarre soliloquy, at one point stating:

> What is also unbelievable is that SVETLANA KONOVITCH, a woman in her forties, living in the United States, is "milking" her mother, living in Ukraine, for money! SVETLANA KONOVITCH's mother, as stated by SVETLANA KONOVITCH herself in the said posting on www.yelp.com, is "90% blind 73 year old lady". Can you imagine this??!!!!! Can you believe this??!!!! Instead of a young daughter living in the United States supporting her elderly 90% blind mother living in the Ukraine, it is the mother, who is 73 years old and blind, living in the Ukraine, who supports her daughter, who is in her forties and lives in the United States. Wow!!! And, after all, having received her mother's money from SVITLANA SANGARY, the daughter SVETLANA KONOVITCH has the audacity to make a posting on www.yelp.com, explaining to the whole world that she is sucking the last dollars (or maybe even pennies) from her elderly disabled mother, and falsely claiming that SVITLANA SANGARY stole the money. If this is not perverse, sick and ridiculous, what is??!!!
>
> [Respondent's June 30, 2014 response, p. 6.]

Respondent ultimately concluded her response by writing:

> SVITLANA SANGARY did not have to deal with lemon law. She is dealing with other type [*sic*] of "lemons", such as the ones revealed here. And a proverbial phrase comes to mind. "When life gives you lemons, make lemonade". Wikipedia says that it is a proverbial phrase used to encourage optimism and a can-do attitude in the face of adversity or misfortune.
>
> Wikipedia describes it. SANGARY exemplifies it.
>
> And, such lemonade tastes great. It may have blood, sweat, and tears in it, but it is so enjoyable. The more challenges, the more lemons – the more lemonade!
>
> God bless America, the land of opportunity!!!
>
> [Respondent's June 30, 2014 response, p. 12.]

On the same day, June 30, 2014, the pretrial conference in this consolidated matter was held, as previously scheduled in this court's trial-setting order of June 3, 2014. Neither

Respondent nor Frank Lincoln appeared for it. Respondent also did not file a pretrial conference statement, despite this court's prior order.

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Jurisdiction

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

Case No. 13-O-13838

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

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

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

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

advertisement or solicitation directed to the general public that was false and deceptive, in willful violation of rule 1-400(D)(2).

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

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

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

Section 6068, subdivision (i), of the Business and Professions Code, subject to constitutional and statutory privileges, requires attorneys to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against that attorney. Respondent's failure to respond to investigator's August 20, 2014 letter constituted a willful violation of her duties under section 6068, subdivision (i). (*In the Matter of Bach*

(Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 644 [attorney may be found culpable of violating § 6068, subd. (i), for failing to respond to State Bar investigator's letter, even if attorney later appears and fully participates in formal disciplinary proceeding].)

Case No. 13-O-14282

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

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

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

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

not the attorney has been paid for his or her services. *John F. Maiull & Assocites, Inc. v. Cloutier* (1987) 194 Cal. App. 3d 1049; *Kalen v. Delug* (1984) 157 Cal. App. 3d 940.

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

An attorney may not withhold client's papers. *Academy of Cal. Optometrists, Inc. v. Superior Court* (1975) 51 Cal. App. 3d 999.

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

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

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

Case No. 13-O-17014

On January 16, 2014, a State Bar investigator sent Respondent a letter as a result of a complaint received from Hasmik Jasmine Ohanian, Esq. In that letter, the investigator informed Respondent that Ohanian had complained that Respondent had sued a former client for fees without first offering to arbitrate the matter. In addition, Ohanian had complained that Respondent's website, including the various "Publicity" photos and numerous purported testimonials, was false and misleading. Respondent was directed to provide a written response, including providing specified documents, regarding the Ohanian complaints by January 30, 2014. This letter also reminded Respondent that "it is the duty of an attorney to cooperate and participate in any State Bar investigation."

On January 29, 2014, Respondent requested and was subsequently granted a two-week extension. On February 17, 2014, after the extended deadline had passed, Respondent sent an email to the State Bar, indicating that she was "working" on her response and needed another extension. That request was denied, and Respondent was admonished to provide her response as soon as possible. Despite that admonition, no response was ever provided by Respondent to the State Bar's January 16, 2014 investigation letter.

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

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

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,[2] std. 1.5.) The court finds the following with respect to aggravating circumstances.

Multiple Acts of Misconduct

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

Lack of Insight

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

[2] All further references to standard(s) or std. are to this source.

Contempt for Disciplinary Proceedings

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

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

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

Mitigating Circumstances

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

No Prior Record of Discipline

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

[3] The court takes judicial notice of the fact that Respondent has no previous record of discipline.

mitigation. (Std. 1.6(a), *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 752 [eight years of unblemished practice not a significant mitigating circumstance].)

DISCUSSION

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

Standard 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most

severe sanction for Respondent's misconduct is found in standard 2.15, which provides that suspension not to exceed three years or reproval is appropriate for a violation of the Business and Professions Code or the Rules of Professional Conduct not otherwise specified in the Standards.

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

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

In *Mitchell*, an attorney seeking employment distributed his resume containing misleading information about his education to various law firms over a three-year period. The attorney also provided dishonest responses to the State Bar's interrogatories. In aggravation, the attorney committed multiple acts of misconduct and demonstrated a lack of insight into his

misconduct. In mitigation, the attorney was experiencing emotional stress at the time of the misconduct. Specifically, the attorney's wife, who had previously experienced a late-term miscarriage, was again pregnant. The attorney's judgment was clouded by his fear that the stress associated with his unemployment could result in a second miscarriage. Considering that there was no evidence that the false resumes affected any hiring decisions, the Review Department recommended that the attorney be actually suspended for 60 days.

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

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

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

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[4] There is no indication that these images have since been removed from Respondent's website.

Recommendations

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

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

2. Respondent must also comply with the following additional conditions of probation:

   i. During the period of probation, Respondent must comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California.

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

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

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

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

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

probation, Respondent must promptly meet with the probation deputy as directed and upon request.

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

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

California Rules of Court, Rule 9.20

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

Multistate Professional Responsibility Examination

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

Costs

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

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

Dated: September 11, 2014

DONALD F. MILES
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on September 11, 2014, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

SVITLANA E. SANGARY
LAW OFC SVITLANA E SANGARY
12100 WILSHIRE BVLD #800
LOS ANGELES, CA 90025

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

ELI MORGENSTERN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 11, 2014.

Rose M. Luthi
Case Administrator
State Bar Court