# ETHICAL CONSIDERATIONS FOR THE USE OF SOCIAL MEDIA IN LITIGATION

Andrew Zajac, Esq.
Dawn C. DeSimone, Esq.

McGaw, Alventosa & Zajac
Two Jericho Plaza
Jericho, New York 11753
(516) 822-8900

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## I. SOCIAL MEDIA GENERALLY

Social media are primarily internet and mobile-based tools for sharing and discussing information among human beings. The term most often refers to activities that integrate technology, telecommunications and social interaction and the construction of words, pictures, video and audio. See, creativemediafon.com/information/glossary.

The types of social media which we will be discussing include:

**Blogs**

Blogs are "personal Internet journals" that are updated on a regular basis by the author or "blogger" who often does not have any specialized training. See, Wisegeek, http://www.wisegeek.com/what-are-blogs.htm. According to "Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging," a law review article published in the Touro Law Review in 2012, blogs were "some of the earliest social media sites, first sprouting up in the earliest days of the Internet. Blogs can contain information related to a specific topic and often are written in a personal tone. Thanks in part to websites like Blogspot, Word Press and Tumblr that make blog creation relatively simple, there are now more than 165 million blogs."

**Facebook/MySpace**

Facebook and MySpace are "social networking" sites. Facebook is a place where users may "create a personal profile, add other users as friends, and exchange messages, including automatic notifications when they update their profile." (See, Wikipedia.) According to information found on Facebook's homepage, Facebook was founded on February 4, 2004, with a goal towards "giving people the power to share and make the world more open and connected." Facebook maintains that millions of people use Facebook everyday to keep up with their friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet. Facebook's "mission" is to "give people the power to share and make the world more open and connected."

According to Facebook's statistics, in 2012 Facebook had more than 1 billion daily active users, with 58% of those users signing in on any given day. See, http://www.facebook.com/press/info.php?statistics. As of 2012, each day 300 million photos were uploaded. More than 600 million active users accessed Facebook though their cell phones

It becomes clear that on social networking sites such as Facebook, information is disseminated quickly and to many people at any given time.

**Twitter**

Twitter is a "real-time information network that connects you to the latest information about what you find interesting. Simply find the public streams you find most compelling and follow the conversation." (See, Twitter information page.) The Twitter introductory page goes on to say that at "the heart of Twitter are small births of information called tweets. Each tweet is 140 characters in length, but don't let the small size fool you - you can share a lot with a little space. Connected to each tweet is a rich, detailed pane that provides additional information, deeper content and embedded media. You can tell your story within your tweet or you can think of a tweet as a headline, and use the detailed pane to tell the rest with photos, videos and other media content. The tweets are displayed on an author's profile page and are delivered to other users who have subscribed to the author's messages by following the author's account." See, what is Twitter, http://business.Twitter.com/basics/what-is-Twitter.

**LinkedIn**

According to LinkedIn's own website, LinkedIn is the "world's largest professional network with over 100,000,000 members and growing rapidly." LinkedIn "gives you the keys to controlling your on line identity and allows you to establish your professional profile, stay in touch with colleagues and friends, find experts and ideas and explore opportunities."

Unlike Facebook where you would have "friends" on LinkedIn you have "connections" and often times are asked to endorse your connections for certain aspects of their professional background.

Why is social media so important? Because of the

1. Volume – of information available;

2. Reach – of the information regionally and globally;

3. Speed – at which information is available and disseminated; and,

4. Type of information – pictures, comments, etc.

## II. SOCIAL MEDIA IN LITIGATION INCLUDING THE INTERACTIONS BETWEEN THE PARTIES AS WELL AS DISCOVERY ISSUES.

### A. A Lawyer Shall Provide Competent Representation

As it relates specifically to litigation, the inquiry then becomes what use can lawyers make of social media in the course of litigation. It appears that now social media is

accepted as a litigation tool that not only may be used, but in many instances must be used.

The New York Rules of Professional Conduct, Rule 1.1 is addressed to competence. Subsection (a) provides that a "lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the presentation." Similarly, ABA Model Rule 1.1 sets forth that a lawyer shall provide competent representation to the client. One of the comments to that rule clarifies that to fulfill this duty the lawyer must "maintain the requisite knowledge and skill" and "keep abreast of changes in the law and its practice." This provides support for the assertion that not only can attorneys make use of social media during the course of the litigation, but that they should.

A case illustrating on this point is the Missouri case of Johnson v. McCullough, 306 S.W.3d 551 (Sup. Ct. 2010) which seems to indicate that not only may an attorney use social media during jury selection, but in certain instances the attorney may be required or have a heightened duty of diligence to make use of social media in furtherance of his or her client's position. Johnson was a medical malpractice action. During voir dire, plaintiff's counsel asked the venire members, "now, not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" While several of the venire members indicated that they had been involved in a lawsuit, one of the jurors remained silent throughout the line of questioning. When a verdict adverse to his client was rendered in the case, plaintiff's counsel searched on case.net, a website with court filing information and learned that the silent juror had been a defendant in several cases. He then brought a post trial motion and on appeal the juror's nondisclosure of the information. It was only after trial that counsel learned that while the juror failed to answer the pertinent question on the material matter, the fact was that her involvement in prior litigation was both extensive and recent and demonstrated by counsel's subsequent litigation search on case.net.

In determining that the lower court properly considered plaintiff's counsel's juror non-disclosure argument, the appellate court determined as follows:

> [I]n light of advances in technology allowing greater access to information that can inform a trial court 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 a juror's prior litigation history when, in many instances, the search could also have been done in the final stages of jury selection or after the jury was selected but prior to the jury being impaneled. Litigants should endeavor to prevent re-trials 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 non-disclosure, a party must use reasonable efforts to examine the litigation history on case.net of those jurors selected but not impaneled and present to the trial court any relevant information prior to this trial. To facilitate this search, the trial courts are directed to insure the parties have an opportunity to make a timely search prior to the jury being impaneled and shall provide the means to do so, if counsel indicates that such means are not reasonably otherwise available.

Johnson makes clear that the court should not only allow counsel the opportunity to make such searches but they would be required to in such searches.

### B. Lawyer May Not Engage In Deceptive Conduct Or Involve Third Persons To Do So - Will You Be My Friend On Facebook?

What about information that a litigant or witness at trial puts on a social networking site such as Facebook?

This topic raises a whole host of questions such as:

- Can an attorney send a friend request to a witness using a false name?
- Can an attorney send a friend request to a witness using his or her own name?
- Can an attorney ask an employee or an acquaintance to send a friend request to a witness so that they can see what is on the witness' page?
- Can an attorney use information that is publically available on a Facebook site to either impeach a witness at the time of trial or for the sake of settlement negotiations?

It also implicates some of the Model Rules:

**Rule 4.1: Truthfulness in statements to others.**

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

**Rule 4.2: Communication with person represented by counsel.**

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, 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.

**Rule 4.3: Communicating with unrepresented persons.**

In communicating 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. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

**Rule 5.3: Lawyer's responsibility for conduct of non-lawyers.**

(b) A lawyer shall be responsible for conduct of a non lawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if,

(1) The lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) The lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the non lawyer is employed or is a lawyer who has supervisory authority over the non lawyer; and

(i) Knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) In the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

**Rule 8.4: Misconduct**

A lawyer or law firm shall not:

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

As noted above, 49 of the 50 states have in one form or another adopted the ABA model rules and abandoned the old model code. Those states that have adopted the model rules have incorporated the comments annexed to the ABA model rules in large measure. While the comments are intended as guides to interpretation, the text of each rule is authoritative and, generally speaking, mandatory.

These issues were addressed by various committees, including the Philadelphia Bar Association Professional Guidance Committee (Opinion 2009-02, March 2009), The Association of the Bar of the City of New York Committee on Professional Ethics (Formal Opinion 2010-2 – September 2012), and The New York State Bar Association Committee on Professional Ethics (Ethics Opinion 843-9/10/2010). Each had a slightly different issue posed to them.

In the Philadelphia Bar Association matter, the inquirer deposed an 18-year-old woman. The witness was not a party to the litigation nor was she represented. During the course of the deposition, the witness revealed that she had a Facebook and a MySpace account. The attorney asking the Philadelphia Bar Association for guidance believed that the pages maintained by the witness could contain information relevant to the matter in which the witness was deposed and could be used to impeach the witness' testimony should she testify at trial. The attorney went back and tried to access the witness' Facebook and MySpace account pages, but they were set to private. The attorney then proposed to ask a third person, i.e., an investigator, and someone whose name the witness would not recognize to go to the Facebook and MySpace websites, contact the witness and seek to friend her in order to obtain information from the site.

In determining that the behavior would not be appropriate, the committee first relied upon one of Pennsylvania's Rules of Professional Conduct dealing with the responsibilities regarding non-lawyer assistance. Here, the committee noted that the proposed course of conduct involved a third person. Turning to the ethical substance of the inquiry, the committee concluded that the proposed course contemplated by the inquirer would violate Rule 8.4 (c) because the planned communication by the third party with the witness is deceptive. In so determining, the committee set forth that:

> It omits a highly material fact, namely that the third party who asks to be allowed access to the witness' page is doing so only because he or she is intent on obtaining information and sharing it with the lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposely conceal the fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer, and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

> The fact that the inquirer asserts he does not know if the witness would permit access to him if he simply asked in forthright fashion does not remove the deception.....
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> The possibility or even the certainty that the witness would permit access to her pages to a person not associated with the inquirer who provided no more identifying information than would be provided by the third person associated with the lawyer does not change the committee's conclusion. Even if, by allowing virtually all would-be "friends" on to her FaceBook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper. Deception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficientlyy wary of deceit by unknown internet users, does not mean the deception at the direction of the inquirer is ethical.

The New York City Bar was faced with the question of whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation". The City Bar similarly concluded that a lawyer may not use deception to access information from a social networking web page. Rather, that committee concluded that a lawyer should rely on the informal and formal discovery procedures sanctioned by the Ethical Rules and case law to obtain relevant evidence.

The New York State Bar Association was also faced with the question of whether a lawyer may view and access a Facebook or MySpace page of another party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members of the network. In rendering its determination, the New York State Bar Association Ethics Committee noted that this case was in contrast to the Philadelphia case, where in the Philadelphia situation, the information was private and a "friend" request was necessary. Thus, the committee concluded:

> Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4, would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way. (including, for example, employing deception to become a

> member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that a lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in the litigation, as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

## C. Researching Jurors

The question posed to NYCLA Committee on Professional Ethics (Formal Opinion 743 - May 18, 2011) was:

> After voir dire is completed and the trial commences, may a lawyer routinely conduct ongoing research on a juror on Twitter, Facebook and other social networking sites? If so, what are the lawyer's duties to the court under Rule of Professional Conduct 3.5?

The opinion notes that these are 3 distinct times of potential contact between the lawyer and the jurors:

(i) during voir dire or jury selection

(ii) the trial (passive monitoring)

(iii) post-verdict contact

NYCLA referenced the NYS Bar Ass'n Committee on Professional Ethics Opinion (Opin 843) wherein the NYSBA concluded that a lawyer "may ethically view and access the Facebook and My Space profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so". Based on this, NYCLA concluded "[d]rawing an analogy to jurors, we conclude that passive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible."

The opinion went on to note that:

> During a trial, lawyers may not communicate with jurors outside the courtroom. Not only is direct or indirect juror contact during trial proscribed as a matter of attorney ethics, as a matter of law (which is outside the scope

of this committee's jurisdiction), the courts proscribe any unauthorized contact between lawyers and sitting jurors.

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. We believe that such contact would be impermissible communication with a juror.

Moreover, under some circumstances a juror may become aware of a lawyer's visit to the juror's website. 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.

Bottom Line: There can be no impermissible communication. This leaves the question:: what is considered a "communication."

What if the lawyer learns that a juror is acting improperly?

In New York, according to the NYCLA opinion:

Lawyers who learn of impeachment or other useful material about an adverse party, assuming that they otherwise conform with the rules of the court, have no obligation to come forward affirmatively to inform the court of their findings. Such lawyers, absent other obligations under court rules or the RPC, may sit back confidently, waiting to spring their trap at trial. On the other hand, a lawyer who learns of juror impropriety is bound by RPC 3.5 to promptly report such impropriety to the court. That rule provides that: "A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge." RPC 3.5(d).

* * * *

Any lawyer who learns of juror misconduct, such as substantial violations of the court's instructions, is ethically bound to report such misconduct to the court under RPC 3.5, and the lawyer would violate RPC 3.5 if he or she learned of such misconduct yet failed to notify the court. This is so even should the client notify the lawyer that she does not wish the lawyer to comply with the requirements of RPC 3.5. Of course, the lawyer has no ethical duty to routinely monitor the web posting or Twitter musings of jurors, but merely to promptly notify the court of any impropriety of which the lawyer becomes aware.

Further, the lawyer who learns of improper juror deliberations may not use this information to benefit the lawyer's client in settlement negotiations, or

> even to inform the lawyer's settlement negotiations. The lawyer may not research a juror's social networking site, ascertain the status of improper juror deliberations and then accept a settlement offer based on that information, prior to notifying the court. Rather, the lawyer must "promptly" notify the court of the impropriety - *i.e.*, before taking any further significant action on the case.

NYCLA thus concluded that:

> It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentations or engage in deceit, directly or indirectly, in reviewing juror social networking sites. In the event the lawyer learns of juror misconduct, including deliberations that violate the court's instructions, the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must promptly comply with RPC 3.5(d) and bring such misconduct to the attention of the court, before engaging in any further significant activity in the case.

The New York City Bar Association Ethics Committee (Formal Opinion 2012-2) also spoke to the issue of whether attorney could use social media websites for juror research. The actual question presented was "[w]hat ethical restrictions, if any, apply to an attorney's use of social medial websites to research potential or sitting jurors?"

The determinative issue, the Committee stated, was whether the research was private or involved some "interactive, interpersonal communication," and more specifically that:

> The Committee believes that the principal interpretive issue is what constitutes a "communication" under Rule 3.5. We conclude that if a juror were to (i) receive a "friend" request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended. In addition, the 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. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror's social media activities, the lawyer must promptly reveal the improper conduct to the court.

What exactly is a communication? The Committee addressed the issue, setting forth that:

> Any research conducted by an attorney into a juror or member of the venire's background or behavior is governed in part by Rule 3.5(a)(4), which states: "a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order." The Rule does not contain a *mens rea* requirement; by its literal terms, it prohibits *all* communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney's purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for the very purpose of communication, and automatic features or user settings may cause a "communication" to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror's social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of "communicate" and "communication," which are not defined either in the Rule or the American Bar Association Model Rules.
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> Black's Law Dictionary (9th Ed.) defines "communication" as: "1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The information so expressed or exchanged." The Oxford English Dictionary defines "communicate" as: "To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across." Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines "communication" (for the purposes of discovery requests) as: "the transmittal of information (in the form of facts, ideas, inquiries or otherwise)."

> Under the above definitions, whether the communicator intends to "impart" a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the "transmission of," "exchange of" or "process of bringing" information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the "sender" was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

So, if there is no communication, can you research a juror? And whose responsibility is it to know these things?

Here, the Committee noted that:

> The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be wilful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably "communicated" with the juror. The transmission of the information that the attorney viewed the juror's page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), *infra.*
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> Although the text of Rule 3.5(a)(4) would appear to make any "communication"— even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror 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, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee's current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney's research or actions. However, other services may be more difficult to navigate depending on their functionality and each user's particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites' social functionality. An attorney may not, for example, send a chat, message or "friend request" to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a "communication" would be generated by the website.

Bottom Line: It is the duty of the attorney to understand the functionality and privacy Setup of any service she wishes to utilize for research, and to be aware of any changes to the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

Again, this Committee concluded that an attorney must reveal Improper Juror Conduct to the Court. Notably, this view, that an attorney is obligated to report juror misconduct is the minority view. The other states whose ethical rules are the same as California, Connecticut, Ohio, Texas and Virginia.

**D. Can an attorney advise a client what they should/should not post on social media and what existing posts they may or may not remove?**

Yes, according to NYCLA Ethics Opinion 745 (July 2, 2103). Here the Committee concluded: "An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violationof the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advise as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed.

## E. Judicial Code of Conduct

Recent statistics show that approximately 40% of judges nationwide utilize social networking sites for personal, professional and electoral purposes. At this juncture, various states including California, Florida, Kentucky, Maryland, Massachusetts, New York, Ohio, Oklahoma and South Carolina have weighed in on the issue as to whether or not a judge can "friend" certain individuals on Facebook and the extent of the communications that are permitted on Facebook.

Florida, for example, prohibits judges from adding lawyers who appear before them as "friends" on social networking sites. In an ethics advisory committee opinion (opinion number 2009-20) issued in November 2009, the ethics advisory committee concluded that a judge may not add a lawyer who may appear before the judge as a "friend" on the social networking site because the committee believed 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." Similarly, in Massachusetts (Massachusetts Committee on Judicial Ethics, Opinion Number 2011-6 issued on December 28, 2011) the advisory committee there determined that while a judge is not prohibited from joining a social networking site as long as the judge's activities conform with the Judicial Code of Conduct, a judge's "friending" of an attorney on the social networking site creates the impression that the attorney is in a special position to influence the judge and thus the code, according to the Massachusetts committee on judicial ethics does not permit a judge to friend any attorney who may appear before him or her. The Oklahoma Judicial Ethics Advisory Panel, via judicial ethics opinion 2011-3, also determined that a judge may hold an internet social account such as Facebook, Twitter, or Linked In without violating the code of judicial conduct but that the judge who has such an internet based media account may not add court staff, law enforcement officers, social workers, attorneys and officers who may appear in his or her court as "friends" on the account.

In California, the Judicial Ethics Committee (California Judges Association Formal Opinion Number 66 - 2011) determined that a judge may be a member of a social networking community and a judge may include lawyers who may appear before the judge in the judge's online social networking but that a judge may not include a lawyer who has a case currently pending before the judge to the judge's online social networking.

**What is the rationale that's been employed by some of these ethics committee in reaching their results?**

For example, the ethics committee of the Kentucky judiciary issued a Formal Judicial Ethics Opinion (JE-119) in January 2010. The question before the Committee was may a Kentucky judge or justice, consistent with the code of judicial conduct, participate in an internet-based social networking site, such as Facebook, Linked In, My Space or Twitter, and be "friends" with various persons who appear before the judge in court, such as attorneys, social workers and/or law enforcement officials. The committee concluded

that the answer to the question was a qualified yes. The opinion is predicated on the following rationale:

> - while the nomenclature of a social networking site may designate certain participants as 'friends,' the view of the committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge;
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> - While social networking sites may create a more public means of indicating a connection, the committee's view is that the designation of a 'friend' on a social networking site does not, in and of itself, indicate a degree or intensity of a judge's relationship with the person who is the 'friend.' The committee can see such terms as 'friend,' 'fan,' and 'follower,' to be terms of art used by the site, not the ordinary sense of those words.

The committee did go on to note, however, that "social networking sites are fraught with peril for Kentucky judges and that this opinion should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public." The committee concluded that "[i]n the final analysis, the reality that Kentucky judges are elected and should not be isolated from the community in which they served, tipped the committee's decision. Thus, the committee believes that a Kentucky judge or justice's participation in social networking sites is permissible, but that the judge or justice should be **extremely cautious** [bold appears in original] such that participation does not otherwise result in a violation of the Code of Judicial Conduct."

This opinion is in sharp contrast to the afore mentioned issued by the Florida Supreme Court Judicial Ethics Advisory Committee. In Opinion number 2009-20, one issue was whether a judge may post comments and other materials on a judge's page on a social networking site, if the publication of such material does not otherwise violate the Judicial Code of Conduct. Here, the committee answered the question in the affirmative. However, when the issue became whether a judge may add lawyers who appear before the judge as "friends," on a social networking site, [and whether lawyers can add judges as their "friends,"] the committee answered the question in the negative.

In addressing that issue, the committee went on to note that the "second question poses a fundamentally different issue because the inquiring judge proposes to permit lawyers who may appear before the judge to be identified as 'friends' on the judge's social networking page. Similarly, the inquiring judge contemplates the lawyers who may appear before the judge will list the judge as a 'friend' on their page, such listing requiring the consent of the judge in order to take effect." The focus of its opinion was on Canon 2b of the Judicial Code of Conduct, which states that "a judge shall not leave the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge

convey or permit others to convey the impression that they are in a special position to influence the judge."

The committee noted that the issue is not whether or not the lawyer is actually in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on a social networking site would convey the impression that the lawyer was in a position to influence the judge. The committee concluded that "such identification in a public forum of a lawyer, who may appear before the judge does convey the impression and, therefore, it is not permitted." In concluding, the judicial ethics advisory committee set forth as follows:

> The committee notes, in coming to this conclusion that social networking sites are broadly available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the code, its recusal provisions, and other requirements which seek to assure the judge's impartiality. However, the test for Canon 2B is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed this way, the committee concludes that identifying lawyers who may appear before the judge as "friends" on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of information being available for viewing on the internet, violates Canon 2B.
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> The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as "friends" on the social networking site and has not asked about the identification of others who do not fall into that category as "friends." The opinion should not be interpreted to mean that the inquiring judge is prevented from identifying any person as a "friend" on a social networking site.
>
> Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as "friends" persons other than lawyers or to listing as "friends" lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the judge's recusal list so that their cases are not assigned to the judge.

In New York Judicial Ethics Advisory Opinion 08-176, the New York Judicial Ethics Committee concluded that judges may belong to internet based network sites but should exercise discretion and otherwise comply with the rules governing judicial conduct. In rendering its opinion, the New York Advisory Board determined that there are "multiple reasons why a judge might wish to be part of a social network: reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family."

The opinion goes on to note that the committee "cannot discern anything inherently inappropriate about the judge joining and making use of the social network. A judge generally may socialize in person with attorneys who appear on the judge's court, subject to the rules governing judicial conduct."

The committee concluded that a judge must avoid the appearance of impropriety in all of the judge's activities and that judges should be mindful of the appearance created when he or she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. The committee here stated that "this is no different from adding a person's contact information to the judge's Rolodex or address book or speaking to them in a public setting." However, the committee was mindful that the "public nature of such a link 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 the very least, the appearance of a stronger bond. The judge must, therefore, consider whether any such on-line connections, alone or in combination with other facts, rise to the level of a 'close social relationship' requiring disclosure and/or recusal."

In noting some of the other difficulties with the judge having a Facebook page, the committee went on to note "other users of the social network, upon learning of the judge's identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advise. As is true in face-to-face meetings, a judge may not engage in these communications. The rules bar all judges from commenting publically on pending or impending matters . . . Likewise a full-time judge may not practice law and can only act pro se or give uncompensated advise to a family member . . . Part-time judges, to the extent permitted to practice law . . . should be mindful of the public nature of communications via social network."