Ethics and Social Media: Attorney Advertising and Use as a Litigation Tool

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Ethics-Related Articles

Ethics Issues When Marketing Your Firm Online
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An attorney approached the judge on her case and requested a continuance so she could attend a relative's funeral. Sympathetic to her plight, the judge complied. Unfortunately for the lawyer, she made a stupid mistake: she forgot that she was Facebook friends with the judge. When the judge checked her news feed she found photos of the lawyer, not grieving over a loved one, but rather laying out on the beach.

Given how pervasive the Internet is in our daily lives, we can easily forget the ethical obligations we must consider as lawyers with regard to our online presence. Whether we're posting updates on Facebook, emailing clients, or blogging about topics in our practice areas, there are ethical considerations that must be taken into account.

Your website is considered an advertisement, just like a radio or TV spot, but it may require more than the traditional "Attorney Advertising" disclaimers. If your website: a) contains any expectation about the results your client can expect; b) compares your services with those of other lawyers; c) features client testimonials; or d) contains statements describing or characterizing the quality of your services (which your site should), you need a disclaimer that reads "Prior results do not guarantee a similar outcome." You may want to put this disclaimer on the bottom of your website or on a separate Disclaimer webpage that is easily accessible.

Think those stock images of smiling businesspeople make your firm seem more approachable and professional? Under Rule of Professional Conduct 7.1(c), an advertisement cannot contain a fictional portrayal of clients or lawyers without a disclaimer noting the fictionalization. So, you may want to put this disclaimer on your site following your "prior results..." disclaimer. Because other small businesses don't have the ethical obligations attorneys do, web designers and do-it-yourself website building platforms don't consider the potential issues for lawyers.

When it comes to social media - don't assume you can or should friend judges. In a North Carolina case, a judge was reprimanded for communicating via Facebook with an attorney who was appearing before the judge in a case. The attorney posted that he hoped he was in his last day of trial, to which the judge replied, "You are in your last day of trial." The Bureau of Judge Conduct on Facebook was not happy about that.

Blogging is a great way to build traffic to your firm's website. It can demonstrate your acumen to prospective clients and also help you get better search visibility. As you may have guessed by now, there are a few ethical considerations when blogging. First, the content of your blog posts should be primarily to provide information to your readers. It should not be shameless self-promotion. Aside from the fact that you won't get better search engine visibility for your website by boasting about recent successes, writing blog

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posts that advertise your firm's greatness is impermissible without an advertising disclaimer. An advertisement, under Rule 1.0, consists of any communication, the primary purpose of which being for the retention of the lawyer or law firm. While many attorneys blog to get more web traffic and ultimately clients, individual blog posts should not boast about the firm; instead, put that content in your website's News page or Settlements and Verdicts page.

Review-websites like Yelp and Avvo, can be a great way to build your firm's Internet presence. They build trust with prospective clients, who look at positive reviews as validation of your abilities. Keep in mind that having members of your firm write positive reviews about the firm while posing as satisfied clients should be avoided. This practice, also called astroturfing, is a service offered by some unscrupulous marketing agencies to help their clients. Last year, New York Attorney General Schneiderman announced a settlement agreement with 19 search marketing companies to stop writing fake online reviews. The companies had to pay several hundred thousand dollars in fines for their activities. Yelp also sued a San Diego bankruptcy law firm for astroturfing, in violation of several California laws in addition to Yelp's terms of service.

Remember: No matter whether you or a third-party Internet marketing agency is engaging in activity online on your firm's behalf, you are ultimately responsible. An attorney cannot outsource his or her ethical obligations. So, be aware of what your marketing agency is doing for your firm online. Knowing is half the battle!

Some additional tips:

When sending marketing emails, the subject line must include "ATTORNEY ADVERTISING"

Your website needs to contain your firm name, office address, and phone number

You cannot feature client testimonials from clients on pending matters

You cannot represent that you are the "top" or "best" attorney on your website, online advertisements, or even in your website URL

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Ethics Issues in Lawyer PPC Marketing
November 7, 2014
From: JurisPage Blog

This post is an excerpt of our New York Times bestselling novel – *The Ultimate Guide to Attorney PPC*. (that's a joke by the way)

Now that you're confident you can create a PPC campaign, let's turn to the attorney ethics considerations. While every jurisdiction has their own ethical obligations for attorneys to adhere to, this discussion will be generally applicable to most attorneys in the United States. Always check your jurisdiction's specific ethics rules and relevant opinions.

WHAT YOU CAN'T SAY

You can't make any "false or misleading" statements, including statements that are unqualifiable, in any advertisement. This includes your website, your domain (e.g.www.yourfirm.com) and your ads themselves.

You're not the "top" or "best" attorney in your area. Though "Top injury lawyer" is a common search phrase, you most likely shouldn't be advertising towards that keyword. Why? You're only making it so your firm shows up when someone types that in. It's just the ad text. So what's the problem? The problem is, attorneys cannot create a false expectation or make a false statement to a client or prospective client. Are you really the best attorney? Statements that cannot be proven factually are impermissible.

This goes not only for the text in your ads but also your domain name and your webpages. Your homepage can't refer to you as the "Best Attorney in California" or some other unqualifiable statement.

In *Board of Managers of 60 E. 88th St. v. Adam Leitman Bailey PC* (Sup Ct NY County Jan. 29 2014), a law firm was advertising that it "gets results." Because of this statement, the judge cut the attorney fees by

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nearly half, from $112,000 to $60,000. One line of text on a website cost an attorney $52,000.

USING STOCK IMAGES

This one is one of my favorites because no one usually thinks about this one. On websites and landing pages, a lot of firms like to use stock images. Regardless of whether they're cheesy or not, the people in the stock images are often portraying attorneys or clients in different scenes. For example, you may see a stock image on a law firm website of an injured person in a hospital bed. Since it's not an actual client, you may have to disclose that the people in the stock images are not actual clients but actors.

REVIEWS

Some "marketing firms" offer attorneys the ability to pay for positive reviews on sites like Yelp and Google+ in order to suggest to prospective clients that the firm has worked with many satisfied clients in the past. This tactic, called "astroturfing" is, you guessed it, unethical. Lawyers may not make false or misleading statements to clients. Even if your firm uses outside sources to provide you false reviews, you can get in trouble for it.

Instead, get clients to provide you with positive testimonials. After an engagement, ask them if they could provide you with a positive testimonial, one that addresses how attentive and responsive you were in addition to how effective your representation was (studies show that clients care most about 1) whether the firm can handle their case effectively; and 2) how responsive the attorney will be to emails and calls).

OUTSOURCING ETHICS

Plain and simple – you can't outsource your ethical responsibilities. Each attorney is responsible for ensuring that his or her firm complies with all applicable ethics rules. Many firms use outside internet marketing agencies, whether they're shops specializing in PPC or they're attorney directory sites like Findlaw, Avvo, or Lawyers.com. When using a third-party to handle your firm's marketing, it is incumbent upon you to know what is and is not permissible under the ethics rules of your jurisdiction. If you get called to a grievance committee hearing, you can't use the defense "I didn't know my Internet marketing team was doing that."

If you do outsource your attorney marketing, make sure you have a conversation with your marketing team to find out what their PPC strategy is going to entail, and let them know of your professional obligations and what statements you can or cannot make.

Internet Legal Ethics: Lawyers, Don't Email the Judge When You're On the Jury
April 8, 2014
From: JurisPage Blog

An Atlanta in-house attorney was recently held in contempt, jailed, and fined for failing to be a cooperative juror in a case, ultimately telling the judge via an email that she would not rule in favor of the plaintiff.

Sometimes jurors are hostile, sometimes they're indifferent, and sometimes they just don't want to be there. And then, sometimes they're licensed attorneys who email the judge saying they're not going to be unbiased after they're selected to be jurors.

Trouble in this case started when the attorney-juror first refused to stand to take the oath and be sworn in as a juror. The attorney eventually swore-in though.

Later that evening, the attorney emailed the judge, saying "I cannot be fair and impartial in this case and as I advised cannot give it my best efforts."

"Although you advised work is not an excuse, the fact of the matter is that I am the only lawyer at my small company and have responsibility for HR and legal," she wrote. "We are in the midst of contract discussions with our largest customer which will not be on hold until this personal injury case is tried. So, I will now have to work in the evenings on breaks and at night to 'catch up' on my work, including now trying to reschedule a call for our largest customer, representing 29% of the company's business, for 4:00 a.m. to accommodate the trial and the European attorney's schedule to hopefully negotiate a contract our customer wants concluded this week ... all of which I blame on the plaintiff."

The next day, the judge held a contempt hearing. The judge was especially annoyed that the attorney-juror appeared to show no remorse and was generally disdainful toward the court and trial process. The judge held the attorney in contempt for failing to disclose

during *voir dire* that she would be biased against the plaintiff and because she made the e-mail *ex parte* communication.

The attorney's conduct violated Georgia Rules of Professional conduct for 1) making a false statement at trial; and 2) seeking to influence a judge by *ex parte* communication or by engaging in conduct intended to disrupt a trial.

Although this seems to be a first, it's not the first time a lawyer has violated legal ethics rules for Internet-related *ex parte* communications. In a 2009 case from North Carolina, *Matter of Terry*, the attorney was Facebook friends with the judge in a current case. The attorney posted on Facebook a status update to the effect of, "I hope tomorrow is my last day of trial," and the judge replied on Facebook "It is." In this case the judge was reprimanded for the *ex parte* communication.

In another case, *Chace v. Loisel*, (Fla. Jan. 2014), a judge friend-requested a *litigant* in a divorce case. On advice of counsel, the litigant did not accept the judge's friend request so as to avoid any issues of ex parte communications. The judge later entered a retaliatory judgment (the litigant argued), allegedly attributing most of the marital debt to said litigant and providing the opposing party with a disproportionately excessive alimony award. Florida's District Court for the Fifth Circuit held that the litigant had a well-founded fear of the judge's impartiality and disqualified the judge.

Readers – make sure you're using the Internet ethically in your practice of law, and also outside of your practice of law. As lawyers, we are held to a higher ethical standard in our daily lives. Last but not least, stay in school and don't do drugs.

Blogging Legally: Law Firm Blog Ethics Issues in 2014
January 14, 2014
From: JurisPage Blog

Don't be afraid – while the numerous ethical issues surrounding legal blogs may turn off some attorneys from blogging altogether, we've got some tips for you to consider when blogging about your practice areas to help you blog ethically.

LEGAL BLOGS AS ADVERTISEMENTS

Here's an example of when blogging gets unethical – In Hunter v. Virginia State Bar, a Virginia criminal defense lawyer had a blog where nearly every blog post was about the firm itself. He wrote about cases in which he represented the defendant and either won the case, successfully plea bargained, or had the charges reduced or diminished. The disciplinary committee observed that the blog was primarily a tool to market the firm, and did not provide any information on areas of law. Hunter tried to argue a First Amendment defense, but that didn't fly. The Bar admonished Hunter.

So how do you avoid this ethical issue? Your blog shouldn't mainly be an advertisement for your firm. Each state bar defines what is and is not an "advertisement." New York's Rules of Professional Conduct, for example, defines "advertisement" as

Any public or private communication made by or on behalf of a lawyer or law firm about the lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm.

NY RULES OF PROFESSIONAL CONDUCT, RULE 1.0(A)

So, is the "primary purpose" of your blog to get new clients? It's important to note that you can use a blog incidentally as marketing

tool, and many attorneys do. Blogging helps attorneys improve the visibility of their law firm websites in search engine results (SEO!). Many attorneys provide information that interests prospective clients to inform them, but also hoping that the prospective client will hire the firm. As long as the potential marketing is incidental, in that the "primary purpose" is to inform the public about the law, you may be within the bounds of ethics. Check your state bar for further information on what is an "advertisement."

Also, as a side note, regardless of whether you want to have an ethical blog or not, no prospective client wants to read a blog about your firm's case wins. Save that for the press releases / news section of your law firm website.

On your legal blog, write about your practice areas. If you're an injury attorney, write about the latest cases (not exclusively your cases though) and high-profile controversies; educate your audience about different types of injuries and what proceedings are involved with filing an injury lawsuit. If you're a trusts and estates lawyer, explain how wills and trusts work. You'll provide valuable information to the public, and incidentally you may get some business out of it.

Comment 9 to Rule 7.1 in New York's Rules of Professional Conduct notes:

Lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise. A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients.

NEW YORK RULES OF PROFESSIONAL CONDUCT, RULE 7.1, CMT. 9

Educating clients about the law in your law blog is OK; bragging about your firm's win record is not.

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BLOGGING ABOUT CLIENTS

Generally, I say don't do it.

Here's your scary case – In re Pershek (2009) – a public defender mentioned a client in his blog. The attorney tried to anonymize the client, but did a poor job. Anyone could have figured out who the client was based on the attorney's description. The attorney ended up getting suspended from the practice of law and lost his 20+ year job.
If you're dealing with a client's ongoing matter – you should get written permission to write about it first. Have the client even look over the blog post and give you the OK to ensure that you won't upset the client. Even if you're dealing with non-confidential information, it may be embarrassing to the client and they may not want you to share it about them.

STOCK PHOTOS / FAIR USE ON LAW BLOGS

At least in New York, you can't use stock photos that depict lawyers or clients without disclosing that the people in the image are actors or models and are not actually lawyers or clients.

Possibly of more concern is the legal liability when bloggers use copyrighted photos. Important lesson – photographers sue. Don't use their copyrighted photos on your blog without their permission. We're getting a bit into copyright law here, but if you use someone else's photo without their permission, you may be violating their rights, entitling them to damages. Copyright law offers statutory damages for registered works (and the big photograph licensors like Getty Images register all their photos) and photographers are particularly litigious when it comes to protecting their photos used without permission.

So how do you get photos on your blog? Creative Commons images. Find an image that the copyright-holder allows to be distributed via a CC license, attribute the image author in your blog post, and you're good to go.

You may want to argue – "I used the image, but it's fair use so I can use it without permission or licensing!" To be blunt, good luck with that. Fair use is taken on a case-by-case basis. If you get sued you will have to prove your fair use before a judge, and even if you win you'll end up having paid more in time and attorney fees than you would have if you licensed the photo to begin with.

So, avoid litigation with Creative Commons-licensed images on your legal blog.

Hopefully with these tips you can get your blog up, running, and complying with the ethics rules of your jurisdiction.

Fake Positive Reviews on Yelp and Google+ Violate Ethics Rules, State Laws
September 30, 2013
From: JurisPage Blog

If you're trying to get more clients for your law firm website, profiles in customer review sites like Avvo and Google+ can help. In the modern age, clients are increasingly using the Internet as a resource to find their attorneys rather than asking for referrals from friends and colleagues.

When a prospective client searches for a law firm in Google, the first organic search results (i.e. not paid advertisements) are the law firms that are in Google+ and have reviews.

Once your Google+ profile is set up and you need to get positive reviews, attorneys can be tempted to create fake reviews, ones that they, employees, or family members created.

First off – don't. Check out our article on how to get positive customer reviews. It's 7 actionable tips for you. It's easy, quick, and safe.

NEW YORK SUES 19 COMPANIES FOR FAKE REVIEWS

Recently, review sites and state attorneys general have begun to crack down on fake reviews. New York's attorney general recently filed suit against 19 companies for providing fake reviews of businesses.

[New York Attorney General Eric Schneiderman] said that 90% of consumers claim online reviews influence their buying decisions. Schneiderman cited a Harvard Business School study from 2011 that estimated that a one-star rating increase on Yelp translated to an increase of 5% to 9% in revenues for a restaurant.

Schneiderman said some so-called search engine optimization (SEO) companies routinely offered fake reviews as part of their services. When

Schneiderman's office called leading SEO companies in New York to request assistance in combating negative reviews for their fake yoghurt shop, representatives from some of these companies offered to write fake reviews . . .

DOMINIC RUSHE, THE GUARDIAN

CUSTOMER REVIEW SITE SUES LAW FIRM

Not only is this practice against many state laws regarding false advertising, it also violates the terms of service of the reviewing websites. Yelp, a popular customer review site, recently filed suit against San Diego-based law firm McMillan Law Group after the firm had its employees and friends create Yelp accounts to give the firm positive reviews. The complaint alleges that the firm also traded positive reviews with other law firms. Yelp's complaint seeks damages for breach of contract regarding Yelp's terms of service, which, among other things (*inter alia* for you law fans out there) prohibit fake reviews, compensating people for reviews, and trading positive reviews. It also contains causes of action for intentional interference with contract, and claims for false advertising and unfair competition under California law.

ETHICS AND CUSTOMER REVIEW WEBSITES

That's not all. Bringing it on home, if the fact that lawsuits brought by review websites and attorneys general weren't enough of a deterrent for you, fake reviews also likely violate your state's ethics rules.

Rule 7.2 of the ABA's Model Rules of Professional Conduct (adopted by many states) prohibits giving "anything of value to a person for recommending the lawyer's services . . ." Moreover, Rule 7.1 prohibits

making "a false or misleading communication about the lawyer or the lawyer's services."

While attorneys have ethical obligations, they can't blame their marketers for unethical conduct. When you hire an SEO firm to do your search engine marketing, you're hiring an agent. If that agent engages in false advertising, you're on the hook. So, making sure your SEO company is acting ethically is paramount (shameful plug here for JurisPage law firm SEO).

Carolyn Elefant of MyShingle has a great article in which she points out that while it is "crystal clear that lawyers have an ethical obligation to avoid deceptive practices in advertising" state ethics boards often lack the technical savvy and resources to police review sites. So, the more significant deterrent for the attorney is not likely going to be a disciplinary board, but rather a lawsuit with the threat of a $4 million fine.

Questions to Ask Before Hiring Your Law Firm Web Designer

Don't get screwed by your web designer by:

a) getting locked into a long contract for a site that you were promised would deliver traffic but does nothing for you except cost you thousands of dollars per month;

b) paying for a poorly designed or poorly performing website; or

c) not having the appropriate legal ethics disclosures for your state.

Here are questions you should ask your law firm website designer before engaging them to design your firm's new site.

1. Is there a long-term contract?

For your website design (and I'm not talking ongoing marketing / SEO), there should be no contract. The only purpose of a contract is to get you to continually pay your designer to host and maintain your site. If they're doing a good job, they shouldn't need to keep you with a contract.

This is my single biggest point of frustration with the attorney website design industry. After clients get burned, paying thousands or tens of thousands of dollars for a site that brings in no clients or traffic when being promised tons of traffic, they distrust every other web design agency, making my job much harder.

Certain legal marketing conglomerates lock users into yearly or bi-yearly contracts on the promise that they will bring in new clients. **If**

your web design agency says they will bring in new clients - make them prove it. It may not happen in Month 1, but if it's not happening by Month 5 or Month 6, you shouldn't be stuck with them.

Avoid a long-term contract at all costs. I've spoken with too many attorneys who were promised the world and end up wasting tens of thousands of dollars on a website that, once the contract is over, isn't theirs to keep unless they renew for several more thousand dollars.

One caveat: SEO agencies (JurisPage included) usually do have 3-month minimum contracts. Why? Because with organic search results, you don't see the fruits of your labor right away. It takes a few months to start getting traffic and visibility (Google's algorithm doesn't trust your website right away).

2. Who will be hosting the website?

Two elements you need with your website - the design itself, and then the hosting to have your site online and loading quickly. Many website design agencies offer hosting as part of a package. Hosting terms can range from monthly to annually and the range can vary.

If an agency is hosting your site, you should be getting some form of ongoing support that you'll be paying for. For example, the Heartbleed bug of earlier this year - if your site was affected your web design agency should have addressed it.

3. Are you being promised "Page 1 of Google"?

This is a big red flag. If anyone says "we can get your site to the first page of Google search results" for a particular keyword, that's not a

promise that will likely be kept. There are a lot of factors involved in SEO, and some keywords are more competitive than others.

Getting to Page 1 for "New York personal injury lawyer" is a lot harder than "Tulsa bankruptcy law firm".

If you're being promised Page 1, is it for a keyword that actually gets any traffic? "New York injury lawyer" gets more traffic than "Bronx personal injury law firm", and it's much harder to rank of Page 1 for competitive keywords. Getting to Page 1 is great, but only if it's for a relevant keyword that gets traffic.

4. Is the site built on Wordpress?

Wordpress is more than a blogging platform - it powers 20% of all websites on the Internet today, including The New York Times, New Yorker, and Beyonce. More likely than not, your website is built on Wordpress, and it should be. It's incredibly search engine-friendly, extremely customizable, and once your site is live it's easy to add new pages and content. It's what we use for Jurispage.com and all of our client sites (and I bet you can't tell just by one glance that our site is built with Wordpress).

Your web design firm *should* be using Wordpress. Not Drupal. Not Joomla. Not Dreamweaver. Not Squarespace or Wix. Any good web developer or agency is powered by Wordpress. If your site isn't on Wordpress, there's a chance that you may not be able to easily export it in the event you decide that you don't want your web design agency to continue to host your site.

5. Is the site mobile responsive?

Two points:

- Your site should be mobile friendly (responsive, not a second mobile site)
- Mobile shouldn't be a premium service

First, your site should be mobile-responsive (i.e. your site should fit to the dimensions of the viewer's browser screen, whether it's a laptop, desktop, tablet, or smartphone). If there is a separate mobile site (e.g. "m.your-website.com"), that's not responsive. Separate mobile sites are not recommended as you can get penalized by Google for having duplicated content on two sites and see lower visibility in search engine results.

Mobile shouldn't be a premium because it's easy to make a site mobile-responsive in Wordpress. It shouldn't require any added labor. That being said, turning your existing site into a mobile-responsive site is not easy and if you just want to update your current site, you're often better off starting from scratch and just reusing the content.

6. Who owns the website content?

If the layout / design / content is being created for your firm, you should own the content. This means that if you do want to take your site to another host, you should be able to get all of the content. You shouldn't be "licensing" the text and layout you're paying for.

7. Do you have any references?

Want to know if the designer does a good job? Hear from current and former clients. If they can't provide any references, it should be a red flag.

Along with client references, you should be able to see examples of work the law firm web design agency has. If every website they do looks the same there probably won't be a lot of unique work going into your particular site.

8. Do you specialize in law firm marketing?

Many web design agencies target broadly, others focus on the legal profession. Why focus? Specialization. Just as you may not want your probate lawyer working on your patent application, you may not want a web designer with little familiarity with the legal profession to work on your law firm's website. Marketing to clients of law firms is different than marketing local restaurants or small businesses.

9. What do you know about ethics requirements?

Ultimately each attorney is responsible for adhering to the ethics rules of your state bar. However, it's beneficial to have someone in your corner who is at least knowledgeable about attorney ethics rules generally.

10. What kind of analytics data will be available?

How many visitors did you get last month?
How long did they stay on your website?

How many form submissions did you receive?

You should be able to find out the answers to these questions easily, and on-demand whenever you want. Analytics is easy to set up, so having this set up for your firm should be no problem.

11. Can I update the site myself?

Using a content management system (CMS) like Wordpress should allow you to be able to add new posts, pages, and make edits as needed. Your web designer should not require that they do all of the posting and design work (either with or without an additional cost), so that you end up waiting for them to make edits to your site when you could easily do them on your schedule.

12. Will the site be SEO ready?

Your web design firm should add SEO tags to all your pages and submit your site to Google and Bing, otherwise you may not end up getting search engine visibility.

13. How fast will the site load?

Take a look at some of the firm's portfolio sites. How quickly do they load? If they load slowly, chances are yours will load slowly also.

If you want to get scientific about it, you can use a tool called the Pingdom Website Speed Test. Here's an example of a test we ran on JurisPage. Sites should load in under 3 seconds. Anything between 3 and 4 is acceptable but not great, anything over 4 is unacceptable. You may want to run the test several times on the same site to get a better

sense of the true load speed because every now and then you get an outlier.

14. Do you have call tracking?

Call tracking is an amazing feature that not every web design agency offers, but it allows you to see how many phone calls you get from your website. With call tracking you can get data on how many people call your firm each month after visiting your website. This is an incredibly strong indicator as to whether you're getting traffic and whether the traffic you're getting is converting into clients.

15. Do you use templates?

Some web design agencies use templates because they make the website design process inexpensive and less labor-intensive. However, it doesn't ensure your website is personalized to your particular location and practice area.

16. How do your designs convert visitors into leads?

What elements of your website are actually working to bring in new clients? If your site is marketing-focused, geared towards getting new clients to hire your firm (as opposed to just having a website that has your bio and phone number), what elements of your site are meant to draw in clients? E.g. Are there contact forms on each page? Is the phone number highly visible? Does your page copy compel visitors to reach out to you?

Conclusion

Hope this helps you when evaluating lawyer website design firms, so that you know exactly what you're paying for and have some knowledge on what you can reasonably expect.

NYCLA ETHICS OPINION 745
JULY 2, 2013

ADVISING A CLIENT REGARDING POSTS ON SOCIAL MEDIA SITES

TOPIC: What advice is appropriate to give a client with respect to existing or proposed postings on social media sites.

DIGEST: It is the Committee's opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4.[1]

RPC: 4.1, 4.2, 3.1, 3.3, 3.4, 8.4.

OPINION:

This opinion provides guidance about how attorneys may advise clients concerning what may be posted or removed from social media websites. It has been estimated that Americans spend 20 percent of their free time on social media (Facebook, Twitter, Friendster, Flickr, LinkedIn, and the like). It is commonplace to post travel logs, photographs, streams of consciousness, rants, and all manner of things on websites so that family, friends, or even the public-at-large can peer into one's life. Social media enable users to publish information regionally, nationally, and even globally.

The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them. For example, teenagers and college students commonly post photographs of themselves partying, binge drinking, indulging in illegal drugs or sexual poses, and the like. The posters may not be aware, or may not care, that these posts may find their way into the hands of family, potential employers, school admission officers, romantic contacts, and others. The content of a removed social media posting may continue to exist, on the poster's computer, or in cyberspace.

[1] This opinion is limited to conduct of attorneys in connection with civil matters. Attorneys involved in criminal cases may have different ethical responsibilities.

That information posted on social media may undermine a litigant's position has not been lost on attorneys. Rather than hire investigators to follow claimants with video cameras, personal injury defendants may seek to locate YouTube videos or Facebook photos that depict a "disabled" plaintiff engaging in activities that are inconsistent with the claimed injuries. It is now common for attorneys and their investigators to seek to scour litigants' social media pages for information and photographs. Demands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine.

Recent ethics opinions have concluded that accessing a social media page open to all members of a public network is ethically permissible. New York State Bar Association Eth. Op. 843 (2010); Oregon State Bar Legal Ethics Comm., Op. 2005-164 (finding that accessing an opposing party's public website does not violate the ethics rules limiting communications with adverse parties). The reasoning behind these opinions is that accessing a public site is conceptually no different from reading a magazine article or purchasing a book written by that adverse party. Oregon Op. 2005-164 at 453.

But an attorney's ability to access social media information is not unlimited. Attorneys may not make misrepresentations to obtain information that would otherwise not be obtainable. In contact with victims, witnesses, or others involved in opposing counsel's case, attorneys should avoid misrepresentations, and, in the case of a represented party, obtain the prior consent of the party's counsel. New York Rules of Professional Conduct (RPC 4.2). See, NYCBA Eth. Op., 2010-2 (2012); NYSBA Eth. Op. 843. Using false or misleading representations to obtain evidence from a social network website is prohibited. RPC 4.1, 8.4(c).

Social media users may have some expectation of privacy in their posts, depending on the privacy settings available to them, and their use of those settings. All major social media allow members to set varying levels of security and "privacy" on their social media pages. There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client's social media pages, requiring adverse counsel to request access through formal discovery channels.

A number of recent cases have considered the extent to which courts may direct litigants to authorize adverse counsel to access the "private" portions of their social media postings. While a comprehensive review of this evolving body of law is beyond the scope of this opinion, the premise behind such cases is that social media websites may contain materials inconsistent with a party's litigation posture, and thus may be used for impeachment. The newest cases turn on whether the party seeking such disclosure has laid a sufficient foundation that such impeachment material likely exists or whether the party is engaging in a "fishing expedition" and an invasion of privacy in the hopes of stumbling onto something that may be useful.[2]

[2] In Tapp v. N.Y.S. Urban Dev. Corp., 102 A.D.3d 620, 958 N.Y.S. 2d 392 (1st Dep't 2013), the First Department held that a defendant's contention that Facebook activities "may reveal daily activities that contradict or conflict with

Given the growing volume of litigation regarding social media discovery, the question arises whether an attorney may instruct a client who does not have a social media site not to create one: May an attorney pre-screen what a client posts on a social media site? May an attorney properly instruct a client to "take down" certain materials from an existing social media site?

Preliminarily, we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media. Thus, an attorney may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes. In advising a client, attorneys should be mindful of their ethical responsibilities under RPC 3.4. That rule provides that a lawyer shall not "(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce... [nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

Attorneys' duties not to suppress or conceal evidence involve questions of substantive law and are therefore outside the purview of an ethics opinion. We do note, however, that applicable state or federal law may make it an offense to destroy material for the purpose of defeating its availability in a pending or reasonably foreseeable proceeding, even if no specific request to reveal or produce evidence has been made. Under principles of substantive law, there may be a duty to preserve "potential evidence" in advance of any request for its discovery. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S. 2d 331 (1st Dep't 2012) ("Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data."); QK Healthcare, Inc., v. Forest Laboratories, Inc., 2013 N.Y. Misc. LEXIS 2008; 2013 N.Y. Slip Op. 31028(U) (Sup. Ct. N.Y. Co., May 8, 2013); RPC 3.4, Comment [2]. Under some circumstances, where 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 destruction or spoliation of evidence, there is no ethical bar to "taking down" such material from social media publications, or prohibiting a client's attorney 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.

An attorney also 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."

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plaintiff's" claim isn't enough. "Mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.'" Also, see, Kregg v. Maldonado, 98 A.D.3d 1289, 951 N.Y.S. 2d 301 (4th Dep't 2012); Patterson v. Turner Constr. Co., 88 A.D.3d 617, 931 N.Y.S. 2d 311 (1st Dep't 2011); McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 910 N.Y.S. 2d 614 (4th Dep't 2010).

RPC 3.1(a). Frivolous conduct includes the knowing assertion of "material factual statements that are false." RPC 3.1(b)(3). Therefore, if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements. See, also, RPC 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.")

Clients are required to testify truthfully at a hearing, deposition, trial, or the like, and a lawyer may not fail to correct a false statement of material fact or offer or use evidence the lawyer knows to be false. RPC 3.3(a)(1); 3.4(a)(4). Thus, a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject. RPC 3.3 (a)(3).

We further conclude that it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication, to guide the client appropriately, including formulating a corporate policy on social media usage. Again, the above ethical rules and principles apply: An attorney may not direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim; an attorney may not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false. RPC 3.4(a)(4).[3] However, a lawyer may counsel the witness to publish truthful information favorable to the lawyer's client; discuss the significance and implications of social media posts (including their content and advisability); advise the client how social media posts may be received and/or presented by the client's legal adversaries and advise the client to consider the posts in that light; discuss the possibility that the legal adversary may obtain access to "private" social media pages through court orders or compulsory process; review how the factual context of the posts may affect their perception; review the posts that may be published and those that have already been published; and discuss possible lines of cross-examination.

CONCLUSION:

Lawyers should comply with their ethical duties in dealing with clients' social media posts. The ethical rules and concepts of fairness to opposing counsel and the court, under RPC 3.3 and 3.4, all apply. 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 violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed.

[3] We do not suggest that all information on Facebook pages would constitute admissible evidence; such determinations must be made as a matter of substantive law on a case by case basis.

NEW YORK
CITY BAR

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2010-2

OBTAINING EVIDENCE FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1(a), 5.3(c)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation.[1] In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall.[2] Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices.[3] The prevalence of these and other social networking websites, and the potential

[1] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends" – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.

[2] See, e.g., Stephanie Chen, Divorce attorneys catching cheaters on Facebook, June 1, 2010, http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html?hpt=C2.

[3] See, e.g., Bass ex rel. Bass v. Miss Porter's School, No. 3:08cv01807, 2009 WL 3724968, at *1-2 (D. Conn. Oct. 27, 2009).

benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.[4] While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party's former employee]." (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies,

[4] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).

interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a "friend request" falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a "friend request" or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder's "channel" and view all of her digital postings. By making the "friend request" or a request for access to a YouTube "channel," the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the "virtual" inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to "open the door" to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the "Rules"), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that "[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Id. 4.1. We believe these Rules are violated whenever an attorney "friends" an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) ("A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .").

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that "the evidence sought is not reasonably and readily obtainable through other lawful means"); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions – a question we do not address here – they are, at least in

most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page – through ordinary discovery of the targeted individual or of the social networking sites themselves – trickery cannot be justified as a necessary last resort.[5] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in "trickery," lawyers can – and should – seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful "friending" of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.[6]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

September 2010

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[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a "friend request". See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 ("[T]he importance of informal discovery underlie[s] our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee.").

NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 843

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion # 843 (09/10/2010)

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

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

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

QUESTION

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

OPINION

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

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York Lawyers Code of Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to

obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.*, only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.*, that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

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

CONCLUSION

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

(76-09)

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

Related Files

Lawyers access to public pages of another partys social networking site for the purpose of gathering information for client in pending litigation.(PDF File)

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134 A.D.3d 529, 22 N.Y.S.3d
178, 2015 N.Y. Slip Op. 09350

*1 Kelly Forman, Plaintiff-Appellant,—
v.
Mark Henkin, Defendant-Respondent.

OPINION
Supreme Court, Appellate Division,
First Department, New York
14906N 113059/11
Decided on December 17, 2015

Acosta, J.P., Saxe, Moskowitz, Richter, Kapnick, JJ.

APPEARANCES OF COUNSEL
Ronemus & Vilensky, New York (Chandra Whalen of counsel), for appellant.
Wade Clark Mulcahy, New York (Brian Gibbons of counsel), for respondent.

Order, Supreme Court, New York County (Lucy Billings, J.), entered March 19, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion to compel to the extent of directing plaintiff to produce all photographs of plaintiff privately posted on Facebook prior to the accident at issue that she intends to introduce at trial, all photographs of plaintiff privately posted on Facebook after the accident that do not show nudity or romantic encounters, and authorizations for defendant to obtain records from Facebook showing each time plaintiff posted a private message after the accident and the number of characters or words in those messages, modified, on the law and the facts, to vacate those portions of the order directing plaintiff to produce photographs of herself posted to Facebook after the accident that she does not intend to introduce at trial, and authorizations related to plaintiff's private Facebook messages, and otherwise affirmed, without costs.

In this personal injury action, plaintiff alleges that while riding one of defendant's horses, the stirrup leather attached to the saddle broke, causing her to lose her balance and fall to the ground. Plaintiff claims that defendant was negligent because, inter alia, he failed to properly prepare the horse for riding, and neglected to maintain and inspect the equipment. Plaintiff alleges that the accident resulted in cognitive and physical injuries that have limited her ability to participate in social and recreational activities. At her deposition, plaintiff testified that she maintained and posted to a Facebook account prior to the accident, but deactivated the account at some point after.

Defendant sought an order compelling plaintiff to provide an unlimited authorization to obtain records from her Facebook account, including all photographs, status updates and instant messages. The motion court granted the motion to the extent of directing plaintiff to produce: (a) all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial; (b) all photographs of herself privately posted on Facebook after the accident that do not show nudity or romantic encounters; and (c) authorizations for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in those messages. Plaintiff now appeals.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." In determining whether the information sought is subject to discovery, "[t]he test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Vyas v Campbell*, 4 AD3d 417, 418 [2d Dept 2004], quoting *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; *see also GS Plasticos Limitada v Bureau Veritas Consumer Prods. Servs., Inc.*, 112 AD3d 539, 540 [1st Dept 2013] [sufficient factual predicate required for discovery demands]; *Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 277 AD2d 186 [1st Dept 2000]). Discovery demands are improper if they are based *2 upon "hypothetical speculations calculated to justify a fishing expedition" (*Budano v Gurdon*, 97 AD3d 497, 499 [1st Dept 2012], quoting *Manley v New York City Hous. Auth.*, 190 AD2d 600, 601 [1st Dept 1993]).

This Court has consistently applied these settled principles in the context of discovery requests seeking a party's social media information. For example, in *Tapp v New York State Urban Dev. Corp.* (102 AD3d 620 [1st Dept 2013]), we denied the defendants' request for an authorization for the plaintiff's Facebook records, concluding that the mere fact that the plaintiff used Facebook was an insufficient basis to provide the defendant with access to the account. Likewise, in

Peclle v Titan Capital Group, LLC (113 AD3d 526 [1st Dept 2014]), we concluded that vague and generalized assertions that information in the plaintiff's social media sites might contradict the plaintiff's claims of emotional distress were not a proper basis for disclosure (*see also Abrams v Peclle* (83 AD3d 527 [1st Dept 2011] [rejecting the defendant's demand for access to the plaintiff's social networking sites because there was no showing that information in those accounts would lead to relevant evidence bearing on the plaintiff's claims]).

Other Departments of the Appellate Division, consistent with well-established case law governing disclosure, have required some threshold showing before allowing access to a party's private social media information (*see e.g. Richards v Hertz Corp.*, 100 AD3d 728, 730-731 [2d Dept 2012] [striking demand for Facebook information of one of the plaintiffs because there was no showing that the disclosure of that material would result in disclosure of relevant evidence or would be reasonably calculated to lead to discovery of information bearing on the claim]; *McCann v Harleysville Ins. Co. of N.Y.*, 78 AD3d 1524, 1525 [4th Dept 2010] [denying authorization for the plaintiff's Facebook information where the defendant failed to establish a factual predicate of relevancy, and characterizing the request as "a fishing expedition . . . based on the mere hope of finding relevant evidence"] [internal quotation marks omitted]).Guided by these principles, we conclude that defendant has failed to establish entitlement to either plaintiff's private Facebook photographs, or information about the times and length of plaintiff's private Facebook messages. The fact that plaintiff had previously used Facebook to post pictures of herself or to send messages is insufficient to warrant discovery of this information (*see Tapp*, 102 AD3d at 620 [the plaintiff's mere utilization of a Facebook account is not enough]). Likewise, defendant's speculation that the requested information might be relevant to rebut plaintiff's claims of injury or disability is not a proper basis for requiring access to plaintiff's Facebook account (*see id.* at 621 [the defendants' argument that the plaintiff's Facebook postings might reveal daily activities that contradict claims of disability is "nothing more than a request for permission to conduct a fishing expedition"] [internal quotation marks omitted]; *Pecile*, 113 AD3d at 527 [vague and generalized assertions that the information sought might conflict with the plaintiff's claims of emotional distress insufficient]). [1]

However, in accordance with standard pretrial procedures, plaintiff must provide defendant with all photographs of herself posted on Facebook, either before or after the accident, that she intends to use at trial. Plaintiff concedes that she cannot use these photographs at trial without having first disclosed them to defendant.

We disagree with the dissent's position that we should reconsider the well-settled body of case law, from both this Court and other Departments, governing the disclosure of social media information. Both parties here agree with the general legal principles set forth in the existing case law and differ only as to the application of those principles to the specific facts of this case. Neither party asks us to revisit our controlling precedent, and the doctrine of stare decisis requires us to adhere to our prior decisions (*see* *3 *People v Aarons*, 305 AD2d 45, 56 [1st Dept 2003] ["stare decisis stands as a check on a court's temptation to overrule recent precedent. Only compelling circumstances should require us to depart from this doctrine"], *affd* 2 NY3d 547 [2004]). Although we agree with the dissent that social media is constantly evolving, there is no reason to alter the existing legal framework simply because the potential exists that new social network practices may surface. Furthermore, there is no dispute that the features of Facebook at issue here (i.e., the ability to post photographs and send messages) have been around for many years.

Contrary to the dissent's view, this Court's prior decisions do not stand for the proposition that different discovery rules exist for social media information. The discovery standard we have applied in the social media context is the same as in all other situations — a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims (*see e.g. GS Plasticos Limitada*, 112 AD3d at 540; *Budano*, 97 AD3d at 499; *Sexter*, 277 AD2d at 187; *Manley*, 190 AD2d at 601). This threshold factual predicate, or "reasoned basis" in the words of the dissent, stands as a check against parties conducting "fishing expeditions" based on mere speculation (*see Devore v Pfizer Inc.*, 58 AD3d 138, 144 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009] [parties cannot use discovery "as a fishing expedition when they cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions"]).

Although we agree with the dissent that the discovery standard is the same regardless of whether the information requested is contained in social media accounts or elsewhere, we disagree with the dissent's analysis as to how that standard

should work in the personal injury context. According to the dissent, "[i]f a plaintiff claims to be physically unable to engage in activities due to the defendant's alleged negligence, posted information, including photographs and the various forms of communications (such as status updates and messages) that establish or illustrate the plaintiff's former or current activities or abilities will be discoverable." This view, however, is contrary to our established precedent holding otherwise (*see Pecile v Titan*, 113 AD3d at 526; *Tapp*, 102 AD3d at 620; *Abrams*, 83 AD3d at 527). We are bound by principles of stare decisis to follow this prior precedent, particularly here where no party asks us to revisit it, and we believe that this precedent results in the correct outcome here.

Taken to its logical conclusion, the dissent's position would allow for discovery of all photographs of a personal injury plaintiff after the accident, whether stored on social media, a cell phone or a camera, or located in a photo album or file cabinet. Likewise, it would require production of all communications about the plaintiff's activities that exist not only on social media, but in diaries, letters, text messages and emails. Allowing the unbridled disclosure of such information, based merely on speculation that some relevant information might be found, is the very type of "fishing expedition" that cannot be countenanced. Contrary to the dissent's view, there is no analogy between the defense litigation tool of surveillance video and the wholesale discovery of private social media information. The surveillance of a personal injury plaintiff in public places is a far cry from trying to uncover a person's private social media postings in the absence of any factual predicate.

The question of whether a court should conduct an in camera review of social media information is not presented on this appeal. The court below did not order an in camera review, nor do the parties on appeal request any such relief. Further, the dissent is mistaken that our prior decisions in this area require a court to conduct an in camera review in all circumstances where a sufficient factual predicate is established. The decision whether to order an in camera review rests in the sound discretion of the trial court, or in this Court's discretion if we choose to exercise it (*see Gottlieb v Northriver Trading Co. LLC*, 106 AD3d 580 [1st Dept 2013]; *Horizon Asset Mgt., Inc. v Duffy*, 82 AD3d 442, 443 [1st Dept 2011]). The cases cited by the dissent in which an in camera review was directed stand simply for the proposition that those courts, in their discretion, believed that such review was appropriate.

Finally, plaintiff's claim that the motion court erred in sua sponte ordering a physical and psychological examination of her is based on a misreading of the court's decision. As defendant acknowledges, the court did not grant such relief, but merely referenced the previously scheduled examination discussed at oral argument.

All concur except Acosta, J.P., and Saxe, J., who dissent in a memorandum by Saxe, J., as follows:

SAXE, J. (dissenting)

This appeal, concerning whether defendant is entitled to disclosure of information that plaintiff posted on the nonpublic portion of her Facebook page before she deactivated her account, prompts me to suggest that we reconsider this Court's recent decisions on the subject (*see e.g. Patterson v Turner Constr. Co.*, 88 AD3d 617 [1st Dept 2011]; *Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]; *Spearin v Linmar, L.P.*, 129 AD3d 528 [1st Dept 2015]). There are two aspects of these previous rulings that are problematic: first, the showing necessary to obtain discovery of relevant information posted on Facebook or other social networking sites, and second, the procedure requiring that once a threshold showing is made, the trial court must conduct an in camera review of the posted contents in each case to ensure that the defendant's access is limited to relevant information. In view of how recently our initial rulings on the subject were issued, it makes sense to revisit those initial rulings sooner rather than later; in any event, the topic is too new to warrant rigid adherence at this time to our initial rulings under the doctrine of stare decisis.

Facts

Plaintiff Kelly Forman alleges that she was injured on June 20, 2011 while visiting defendant Mark Henkin in Westhampton. The two were on what was to be a leisurely horseback ride, when plaintiff fell off of the animal, allegedly due to negligence on the part of Henkin and his employees in failing to correctly tack up the saddle and providing faulty equipment. Plaintiff alleges serious and debilitating injuries, including traumatic brain injury and spinal injuries, causing cognitive deficits, memory loss, inability to concentrate, difficulty in communicating, and social isolation, severely restricting her daily life. Approximately five months later, she commenced this action.

In a written statement plaintiff provided to defendant at her deposition, she described the nature of her claimed physical, mental and psychological injuries. Among the assertions she made was that after the accident, her "social network went from huge to nothing." At her deposition, plaintiff testified that before the accident she had maintained a Facebook page and had posted photographs showing her doing fun things, but that she deactivated her Facebook page some months after the accident (and after the commencement of this action), some time between June and August of 2012. She said that due to her current difficulties with memory, she could not recall the exact nature or extent of her Facebook activity from the time of the accident until she deactivated the account.

Defendant demanded an authorization to obtain plaintiff's Facebook records, unlimited in time and scope. When the issue was raised by motion, defendant argued that the requested material was necessary for his defense, as it was relevant to the issue of plaintiff's credibility. Plaintiff opposed the motion, arguing that defendant had not shown that the material requested was reasonably calculated to result in the disclosure of relevant evidence, or was material and necessary to the defense of the claims, but that rather, defendant was only speculating that materials posted in her Facebook account after the accident contained such evidence.

The court directed disclosure of any photographs posted after the accident which do not depict nudity or romantic encounters, along with any photographs posted before the accident that plaintiff intends to use at trial, as well as any private Facebook messages plaintiff sent after the accident, redacted so that the only information provided is the amount of characters and the time at which the message was sent. On plaintiff's appeal, the majority concludes that the direction for the disclosure of photographs and information about private messages must be vacated, in the absence of a factual predicate that contradicts or conflicts with plaintiff's claims. We disagree with that approach to the subject, although it comports with our current case law.

Discussion

A few basic concepts about Facebook must be understood for this discussion (*see generally* http://www.facebook.com/help [accessed July 21, 2015]). Every person who subscribes to Facebook has a "public page" containing information that the subscriber allows to *4 be viewed by the general public, which may include content such as photographs, status updates, or shared links. Each subscriber may choose to make each piece of posted content publicly available, or may limit the posted content so that it can only be viewed by a more limited group, such as the individuals identified by the subscriber as "friends," or a customized list of people. Subscribers can also use Facebook to send messages to other subscribers in a manner similar to text messaging. Those messages will not be visible to anyone not involved in them.

If a subscriber opts to deactivate his or her Facebook page, that person's page is no longer viewable. However, deactivating one's Facebook page does not erase the information that was previously posted there. Instead that information remains present in Facebook's internal records, so that it can be restored by reactivation of an account, or obtained through a court order. [1]

Over the past few years, as social networking sites have become increasingly ubiquitous, courts across the country have adopted a variety of approaches to discovery of social media accounts (*see generally* Rick E. Kubler and Holly A. Miller, "Recent Developments in Discovery of Social Media Content," ABA Section of Litigation, Insurance Coverage Litigation Committee CLE Seminar, available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/24_1_recent_developements_in_discovery_of_soci [accessed Sept. 28, 2015]). It is clear that "discovery of social networking information is a developing body of jurisprudence" (Mallory Allen & Aaron Orheim, *Get Outta My Face[book]: The Discoverability of Social Networking Data and the Passwords Needed to Access Them*, 8 Wash J L Tech & Arts 137, 152 [2012]).

The case law that has emerged in this state in the last few years regarding discovery of information posted on personal social networking sites holds that a defendant will be permitted to seek discovery of the nonpublic information a plaintiff posted on social media, *if, and only if,* the defendant can first unearth some item from the plaintiff's publicly available social media postings that tends to conflict with or contradict the plaintiff's claims. Even if that hurdle is passed, then the trial court must conduct an in camera review of the materials posted by the plaintiff to ensure that the defendant is provided only with relevant materials.

The first New York State appellate case considering a demand for the contents of a plaintiff's Facebook account was issued by the Fourth Department in 2010, affirming the denial of the defendant's motion for such an authorization

(*McCann v Harleysville Ins. Co. of New York*, 78 AD3d 1524 [4th Dept 2010]). In rejecting the defendant's assertion that the information was relevant to whether the plaintiff had sustained a serious injury in the accident, the Fourth Department observed that the demand was essentially "a fishing expedition" into the plaintiff's Facebook account in the hope of finding relevant evidence (*id.* at 1525). It is worth noting that the demand in *McCann* was for the entire contents of the plaintiff's Facebook account; the defendant made no effort to tailor the demand to limit it to relevant, discoverable materials contained there.

The Fourth Department elaborated on the point in *Kregg v Maldonado* (98 AD3d 1289 [4th Dept 2012]). In *Kregg*, upon learning that family members of the injured party had established Facebook and MySpace accounts for him and had posted material on his behalf in connection with those accounts, the defendants requested the disclosure of the contents of those and any other social media accounts maintained by or on behalf of the injured party. The Court explained that the request was made without "a factual predicate with respect to the relevancy of the evidence" (*id.* at 1290, quoting *McCann* at 1525; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]), observing that "there [was] no contention that the information in the social media accounts contradict[ed] plaintiff's claims for the diminution of *5 the injured party's enjoyment of life" (*Kregg* at 1290). The prerequisite of a "factual predicate" contradicting the plaintiff's claims, imposed in *McCann* and *Kregg*, has been incorporated into the decisions that followed on discovery of material posted on social media.

In *Tapp v New York State Urban Dev. Corp.* (102 AD3d 620 [1st Dept 2013], *supra*), this Court concluded that merely having a Facebook account does not establish a factual predicate for discovery of private material posted to a Facebook page. *Tapp* used the *Kregg* concept of requiring a "factual predicate" before allowing a defendant to obtain discovery of information the plaintiff posted on social media: "defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*id.* quoting *Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept 2011], *supra*, *Kregg*, 98 AD3d at 1290). Indeed, in *Tapp*, this Court explicitly rejected the defendant's rationale that "plaintiff's Facebook postings may reveal daily activities that contradict or conflict with plaintiff's claim of disability," asserting that the argument amounted to a "fishing expedition" (*id.* at 621, citing *McCann* at 1525).

Even where some factual predicate for the disclosure of information posted on social media is established, this Court has required that an in camera review be performed so that the defendant is not made privy to non-relevant content. This procedure was imposed in *Patterson v Turner Constr.* and the recent case of *Spearin v Linmar, L.P.* (129 AD3d 528 [1st Dept 2015], *supra*). In *Patterson*, where the defendant requested an authorization for all of the plaintiff's Facebook records after the incident, the motion court conducted an in camera review and determined that at least some of the information contained there would "result in the disclosure of relevant evidence" or was "reasonably calculated to lead to the discovery of information bearing on the claims," and consequently ordered the plaintiff to provide the requested authorization. This Court remanded the matter back to the motion court for a more specific determination, explaining that "it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action" (88 AD2d at 618).

In *Spearin*, the plaintiff's public profile picture from his Facebook account, uploaded after his accident, depicted the plaintiff sitting in front of a piano, which tended to contradict his testimony that, as a result of the claimed accident he could longer play the piano (*id.* at 528). Even so, this Court modified an order that required the plaintiff to provide an authorization for access to his Facebook account; we required, instead, an in camera review of the plaintiff's post-accident Facebook postings for identification of information relevant to the plaintiff's alleged injuries (*id.*). The Second Department ruled similarly in *Richards v Hertz Corp.*, (100 AD3d 728, 730 [2nd Dept 2012]), where the plaintiff claimed she could no longer ski, yet after the accident a picture was uploaded depicting her on skis. This factual predicate was held to entitle the defendant *not* to an authorization for all of the material posted to Facebook by the plaintiff, but to an in camera review of those items and a determination of which ones were relevant to the claims (*id.*).

The procedure created by these cases, by which a defendant may obtain discovery of nonpublic information posted on a social media source in a plaintiff's control only if that defendant has first found an item tending to contradict the plaintiff's claims, at which time the trial court must conduct an in camera review of all the items contained in that social

media source, imposes a substantial -- and unnecessary -- burden on trial courts. As one Suffolk County justice has observed, "[I]n camera inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel cannot honestly and accurately perform the review function" (*Melissa "G" v North Babylon Union Free Sch. Dist.*, 48 Misc 3d 389, 393 [Sup Ct, Suffolk County 2015]).

Moreover, as the numbers of people who maintain social networking site accounts increase over time, there will be a commensurate increase in the burden on the trial courts handling personal injury litigation to conduct in camera reviews of litigants' social media postings. Our trial courts are already overburdened; we should think twice about unnecessarily adding to their workload.

Moreover, the extra burden is clearly unnecessary since the procedure we are currently *6 employing stands in marked contrast to the standard discovery procedure in civil litigation generally.

All discovery issues in this state are controlled by CPLR 3101(a), which provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The term "material and necessary" has long been interpreted liberally in New York, "to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial" (*Allen v Cromwell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [1st Dept 2006]). As the Court of Appeals has more recently put it, "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184, 193 [1992], *cert denied sub nom Poole v Consolidated Rail Corp.*, 510 US 816 [1993]).

It is true that the law does not allow "fishing expeditions," that is, the use of a disclosure demand based solely on "hypothetical speculations" (*Manley v New York City Hous. Auth.*, 190 AD2d 600, 601 [1st Dept 1993] [internal quotation marks omitted]), "merely to see what beneficial things might be inadvertently discovered from the other side" (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3101, C3101:8). However, that does not mean that there is a preliminary requirement that the party seeking discovery must be able to prove that the other side has in its possession an item or items answering to the description in the discovery demand. Rather, the "material and necessary" standard only requires a reasoned basis for asserting that the requested category of items "bear[s] on the controversy" (*see id.*), or a showing that it is likely to produce relevant evidence (Anne M. Payne and Arlene Zalayet, Modern New York Discovery [2d ed 2004] 2015 Supp § 22.55.60 at 245).

Of course, the statute creates exceptions for privileged matter, attorney's work product, and materials prepared in anticipation of litigation (*see* CPLR 3101[b], [c], [d][2]); but, beyond such statutory protections, "if nothing unusual can be shown to invoke the court's protective order powers under CPLR 3103(a), as with a showing that the disclosure devices are being used for harassment or delay, the party is entitled to the disclosure" (Connors, Practice Commentaries, at C3101:8). Finally, a demand may not be overbroad; it must seek only materials relevant to the issues raised in the litigation, and if it fails to distinguish between relevant and irrelevant items, a protective order pursuant to CPLR 3103(a) may be issued.

In accordance with the foregoing, generally, in a personal injury action, a defendant may serve on a plaintiff a notice to produce tangible documents or other items in the plaintiff's possession or control, describing the type of content that is relevant to the claimed event and injuries. Assuming that the demand is sufficiently tailored to the issues, and unless a claim of privilege is made, normally the plaintiff must then search through those items to locate any items that meet the demand, and provide those items. There is not usually a need for the trial court to sift through the contents of the plaintiff's filing cabinets to determine which documents are relevant to the issues raised in the litigation.

One federal magistrate judge provided a cogent analysis of why the rule our courts have adopted regarding discovery from social media accounts should be changed, and a traditional approach used instead:

"Some courts have held that the private section of a Facebook account is only discoverable if the party seeking the information can make a threshold evidentiary showing that the plaintiff's public Facebook profile contains information that undermines the plaintiff's claims. This approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. *On the other hand, a plaintiff should be required to review the private section*

and produce any relevant information, regardless of what is reflected in the public section. *7 The Federal Rules of Civil Procedure do not require a party to prove the existence of relevant material before requesting it. Furthermore, this approach improperly shields from discovery the information of Facebook users who do not share any information publicly. For all of the foregoing reasons, the Court will conduct a traditional relevance analysis" [emphasis added].

(*Giacchetto v Patchogue-Medford Union Free Sch. Dist.*, 293 FRD 112, 114 n 1 [ED NY 2013] [internal citations omitted]).

There is no reason why the traditional discovery process cannot be used equally well where a defendant wants disclosure of information in digital form and under the plaintiff's control, posted on a social networking site. The demand, like any valid discovery demand, would have to be limited to reasonably defined categories of items that are relevant to the issues raised. Upon receipt of an appropriately tailored demand, a plaintiff's obligation would be no different than if the demand concerned hard copies of documents in filing cabinets. A search would be conducted through those documents for responsive relevant documents, and, barring legitimate privilege issues, such responsive relevant documents would be turned over; and if they could not be accessed, an authorization for them would be provided.

There is no particular difficulty in applying our traditional approach to discovery requests for information posted on social networking sites. If a plaintiff claims to be physically unable to engage in activities due to the defendant's alleged negligence, posted information, including photographs and the various forms of communications (such as status updates and messages) that establish or illustrate the plaintiff's former or current activities or abilities will be discoverable. If a plaintiff's claims are for emotional or psychological injury, it may be more difficult to frame a discovery demand, but it can certainly be done without resorting to a blanket demand for everything posted to the account (*see e.g. Giacchetto*, 293 FRD at 112; *Equal Empl. Opportunity Commn. v Simply Storage Mgt., LLC*, 270 FRD 430 [SD Ind 2010]).

Using the approach I suggest would also obviate the need for the awkward and questionable procedure adopted by the motion court in this matter with regard to posted messages; the order on appeal allowed defendant access to only the number of characters per message and the time each was sent on plaintiff's Facebook page, but not the content. If the traditional approach to discovery were applied to posted messages, they could be treated exactly as any other letter, notice or document.

Of course, categorizing posted material as "private" does not constitute a legitimate basis for protecting it from discovery. There can be no reasonable expectation of privacy in communications that have reached their intended recipients (*see United States v Lifshitz*, 369 F3d 173, 190 [2d Cir 2004]; *see generally Romano v Steelcase Inc.*, 30 Misc 3d 426, 432-434 [Sup Ct Suffolk County 2010]). As long as the item is relevant and responsive to an appropriate discovery demand, it is discoverable. To the extent disclosure of contents of a social media account could reveal embarrassing information, "that is the inevitable result of alleging these sorts of injuries" (*Equal Empl. Opportunity Commn. v Simply Storage*, 270 FRD at 437).

Nor should it matter that the account was "deactivated," since apparently a deactivated account may easily be "reactivated," thereby giving the subscriber access to the previously posted material (*see generally* http://www.facebook.com/help [accessed July 21, 2015]). An authorization for the site itself to provide posted content would be necessary only if previously posted materials became inaccessible to the subscriber.

The majority suggests that the doctrine of stare decisis precludes us from altering our previous rulings. However, in my view this so-called "well-settled body of case law" is not so long-established that it is deserving of immutable stare decisis treatment. "[T]he relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned" (*Montejo v Louisiana*, 556 US 778, 792-793 [2009]). Not only are the precedents under consideration here only a few years old, but they concern social networking practices that are still in the process of developing. Under these circumstances, the relationship of social media and the *8 law ought to be flexible, open to discussion and re-examination, rather than bound by our initial views regarding the optimal procedure to be used.

In addition to relying on stare decisis, the majority concludes that there is no need to "alter the existing legal framework." Little is said about how the existing decisions have unfairly created a rule of judicial protectionism for the digital messages and images created by social networking site users,

in contrast to how discovery of tangible documents is treated under the CPLR.

In this context — the area where litigation and social media converge — it is important to keep in mind that in recent years social media profiles have become virtual windows into subscribers' lives. The breadth of information posted by many people on a daily basis creates ongoing portrayals of those individuals' lives that are sometimes so detailed that they can rival the defense litigation tool referred to as a "day in the life" surveillance video. And, just as "day in the life" videos are a staple of tort practice (*see* Ken Strutin, *The Use of Social Media in Sentencing Advocacy; Technology Today*, NYLJ, Sept. 28, 2010 at 5, col 1), the contents of a self-made portrait of a plaintiff's day-to-day life may contain information appropriate for discovery in personal injury litigation.

Facebook and other similar social networking sites are so popular that it will soon be uncommon to find a personal injury plaintiff who does not maintain such an on-line presence. We should keep that in mind when unnecessarily creating new discovery procedures for them, especially when those procedures are unduly burdensome on our trial courts.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 17, 2015

CLERK

FOOTNOTES

Footnotes

1 The fact that plaintiff deactivated her Facebook account is not a basis to conclude that relevant information is contained therein. In any event, in the motion papers below, defendant's counsel conceded that he conducted a search of plaintiff's public Facebook profile before she deactivated it and found nothing but an old picture of her.

1 It is also possible for an account to be permanently deleted, an option not relevant to this discussion, but which could, in certain circumstances, lead to a spoliation claim (*see Gallo v United Air Lines, Inc.*, 2013 US Dist LEXIS 41909, 2013 WL 1285285 [D NJ March 25, 2013]

The Association of the Bar of the City of New York Committee on Professional Ethics

Formal Opinion 2012-2: JURY RESEARCH AND SOCIAL MEDIA

TOPIC: Jury Research and Social Media

DIGEST: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.

RULES: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

Question: What ethical restrictions, if any, apply to an attorney's use of social media websites to research potential or sitting jurors?

OPINION

I. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (*see* American Bar Association Formal Opinion 319 ("ABA 319")), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venire but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (*see WSJ Law Blog* (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont Supreme Court recently overturned a child sexual assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. *State v. Abdi*, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook to discuss their views of the case before deliberations. (*Juror's Tweets Upend Trials,* Wall Street Journal, March 2, 2012.) Courts have responded in various ways to this problem. Some judges have held jurors in contempt or declared mistrials (see *id.*) and other courts now include jury instructions on juror use of the internet. (*See* New York Pattern Jury Instructions, Section III, *Infra.*)However, 79% of judges who responded to a Federal Judicial Center survey admitted that "they had no way of knowing whether jurors had violated a social-media ban." (*Juror's Tweets, supra.*) In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

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. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal "communication." Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the "Rules"), specifically Rule

3.5, to juror research in the internet context, and particularly to research using social networking services and websites.[1]

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.

II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney's Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for *not* conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff's counsel investigated the juror's civil litigation history using Missouri's automated case record service and found that the juror had failed to disclosure that she was previously a defendant in several debt collection cases and a personal injury action.[2] Although the court upheld plaintiff's request for a new trial based on juror nondisclosure, the court noted that "in 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." *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that "litigants should endeavor to prevent retrials by completing an early investigation." *Id.* at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge "acted unreasonably" by preventing plaintiff's counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff's counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff's attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court's ruling was not prejudicial, the Superior Court stated that "there was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.' The 'playing field' was, in fact, already 'level' because internet access was open to both counsel." *Carino v. Muenzen*, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).[3]

Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 ("SDCBA 2011-2") examined whether an attorney can send a "friend request" to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to "friend" a party, even if the "friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication" and is therefore *prohibited* by the rule against *ex parte* communications with represented parties.[4] In addition, the New York State Bar Association ("NYSBA") found that obtaining information from an adverse party's social networking personal webpage, which is accessible to all website users, "is similar to

obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly *permitted*." (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers' Association ("NYCLA") published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 ("NYCLA 743") examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is "proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided 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 or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring." (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety "before taking any further significant action in the case." *Id.* NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.[5]

We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user's chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a "Communication"?

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.[6]

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.

3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

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 willful 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*.

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.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation.[7] In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney's associations or membership in a network or group in order to access a juror's information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating *any* Rule "through the acts of another." Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney's benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 ("PBA 2009-02") concluded that if an attorney uses a third party to "friend" a witness in order to access information, she is guilty of deception because "[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness' pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit." (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent, and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to "friend" an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys *may not* shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no "communication" occurs, the Committee notes the potential impact of jury research on potential jurors' perception of jury service. It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives. The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

In general, attorneys should only view information that potential jurors intend to be—and make—public. Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption. The potential juror is aware that her information and images are available for public consumption. The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available. However, in the Committee's view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private. Just as the attorney must monitor

technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, *infra*, great benefit that can be derived from detecting instances when jurors are not following a court's instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while 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.

III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: "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." Although the Committee concludes that an attorney may conduct jury research on social media websites as long as "communication" is avoided, if an attorney learns of juror misconduct through such research, she *must* promptly[8] notify the court. 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.[9]

On this issue, the Committee notes that New York Pattern Jury Instructions ("PJI") now include suggested jury charges that expressly prohibit *juror* use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: "please do not discuss this case either among yourselves or with anyone else during the course of the trial. . . . It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial . . . For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom." Moreover, PJI 1:10 states, in part, "in addition, please do not attempt to view the scene by using computer programs such as Goggle Earth. Viewing the scene either in person or through a computer program would be unfair to the parties . . . ." New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney's 2002).

The law requires jurors to comply with the judge's charge[10] and courts are increasingly called upon to determine whether jurors' social media postings require a new trial. *See, e.g.,Smead v. CL Financial Corp.*, No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror's posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror's conduct is *mis*conduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a "conversation," it may not always be obvious whether a particular post is "connected with" the trial. Moreover, a juror may be permitted to post a comment "about the fact [of] service on jury duty."[11]

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless "(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service." Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that "lawyers may communicate with jurors concerning the verdict and case." (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that "it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror" to obtain information or her testimony to support a motion for a new trial. (ABA 319.)

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. "Communication," in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney's research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is *the process of bringing an idea, information or knowledge to another's perception*—including the fact that they have been researched.In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.

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1. Rule 3.5(a)(4) 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."

2. Missouri Rule of Professional Conduct 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."

3. The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that "if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the in court voir dire, the Court's supervisory control over the jury selection process would, as a practical matter, be obliterated." (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet.) The Committee is unable to determine the court's ruling from the public file.

4. California Rule of Profession Conduct 2-100 states, in part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

5. As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.

6. Although the New York City Bar Association Formal Opinion 2010-2 ("NYCBA 2010-2") and SDCBA 2011-2 (both addressing social media "communication" in the context of the "No Contact" rule) were helpful precedent for the Committee's analysis, the Committee is unaware of any opinion setting forth a definition of "communicate" as that term is used in Rule 4.2 or any other ethics rule.

7. Rule 8.4 prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," and also states "a lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts or another." (Rule 8.4(c),(a).)

8. New York City Bar Association Formal Opinion 2012-1 defined "promptly" to mean "as soon as reasonably possible."

9. Although the Committee is not opining on the obligations of jurors (which is beyond the Committee's purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

10. *People v. Clarke*, 168 A.D.2d 686 (2d Dep't 1990) (holding that jurors must comply with the jury charge).

11. *US v. Fumo*, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) *aff'd*, 655 F.3d 288 (3d Cir. 2011) ("[The juror's] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.") (internal citations omitted).

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