



SOCIAL MEDIA ETHICS GUIDELINES
OF THE
COMMERCIAL AND FEDERAL LITIGATION SECTION
OF THE
NEW YORK STATE BAR ASSOCIATION

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

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INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the expansion of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more technologically advanced, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association developed these social media ethics guidelines (the “Guidelines”) to assist lawyers in understanding the ethical challenges of social media.

These Guidelines are merely that, and are not “best practices.” The world of social media is a nascent area that is rapidly changing and “best practices” will continue to evolve to keep pace with such developments. Moreover, there may be no single set of “best practices” where there are multiple ethics code throughout the United States that govern lawyers’ conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer’s permitted use of social media may differ due to varying jurisdictions’ different social mores, population bases and historical approaches to their own ethics rules and opinions. We specifically note this because New York State ethics rules and opinions sometimes take different approaches from other jurisdictions with the same or similar ethics rules.

These Guidelines are predicated upon the New York Rules of Professional Conduct (“NYRPC”)¹ and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction’s ethics opinion differs from New York’s interpretation of the NYRPC. In New York State, ethics opinions are issued not just by the New York State Bar Association, but by local bar associations located throughout New York.²

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

Lawyers must be conversant with the nuances of each social media network the lawyer or his or her client may use. This is a serious challenge that lawyers must appreciate and cannot take lightly.

[Lawyers must] understand the functionality of any social media service she intends to use for . . . research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that

¹ <https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>

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

particular site.³

Indeed, the comment to Rule 1.1 to the Model Rules of Professional Conduct of the American Bar Association was recently amended to provide:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.⁴

Lawyers appreciate that one of the best ways to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person's social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media communications. Unintended social media communications have ethical consequences when conducting research. For example, by viewing someone's social media profile on a network, such as LinkedIn, a lawyer may cause the holder of the account to be automatically notified by such network of the attempted or actual viewing of the profile.

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

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

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

³ [Ass'n of the Bar of the City of New York Comm. on Prof'l and Jud. Ethics \("NYCBA"\), Formal Op. 2012-2 \(2012\).](#)

⁴ [American Bar Ass'n Model Rules of Prof. Conduct, Rule 1.1, Comment 8.](#)

1. ATTORNEY ADVERTISING

Guideline No. 1.A Applicability of Advertising Rules

A lawyer’s social media profile that is used only for personal purposes (*i.e.*, to maintain contact with friends and family) is not subject to attorney advertising and solicitation rules. However, a social media profile that a lawyer primarily uses for the purpose of her and her law firm’s business is subject to such rules.⁵

NYRPC 1.0, 7.1, 7.3.

Comment: Whether a social media account is primarily used for legal or marketing purposes of the lawyer or her law firm is a question of fact. In the case of a lawyer’s profile on a hybrid account that, for instance, is used for multiple purposes, it would be prudent for the lawyer to assume that the attorney advertising and solicitation rules apply.

A lawyer’s post, including a “Tweet,” that is used to promote the lawyer’s legal services or the services of the law firm for which the lawyer works is subject to the ethical rules where the post’s primary purpose is to bring in or retain legal business. In order to satisfy Twitter’s 140-character limitation, lawyers may utilize commonly recognized abbreviations for information that is required in attorney advertisements.

Guideline No. 1.B: Prohibited Use of “Specialists” on Social Media

Lawyers and law firms shall not advertise areas of practice under headings in social media platforms that include the terms “specialist,” unless the lawyer is certified by the appropriate accrediting body in the particular area.⁶

NYRPC 7.4.

Comment: To avoid making prohibited statements about a lawyer’s qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer’s experience. Examples of such

⁵ See also [Virginia State Bar, Quick Facts about Legal Ethics and Social Networking \(last updated Feb. 22, 2011\)](#); [Cal. State Bar Standing Comm. on Prof’l Resp. and Conduct, Formal Op. No. 2012-186 \(2012\)](#).

⁶ See [New York State Bar Ass’n Comm. on Prof’l Ethics \(“NYSBA”\), Op. 972 \(2013\)](#). See also [Florida Bar Advisory Advertising Op. \(Sept. 11, 2013\)](#). But see [N.H. Bar Ass’n, Ethics Corner \(June 21, 2013\)](#) (“[Y]ou may list your areas of practice under Skills and Expertise, so long as you are careful not to identify yourself as a specialist. Also, be mindful that LinkedIn sometimes changes its headings. The profile section now identified as ‘Skills and Expertise’ used to be ‘Specialties,’ and listing your areas of practice as ‘Specialties’ could be problematic.”).

information include the number of years in practice and the number of cases handled in a particular field or area.⁷

If the social media network, such as LinkedIn, does not permit otherwise ethically prohibited “pre-defined” headings, such as “specialist,” to be modified, the lawyer shall not identify herself under such heading unless appropriately certified. New York has not addressed whether a lawyer or law firm could, consistent with NYRPC Rule 7.4(a), “list practice areas under other headings such as “Products & Services” or “Skills and Expertise.”⁸ However, a lawyer may include information about the lawyer’s experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under “specialist,” but also under headings including expert.⁹

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

Guideline No. 1.C: Lawyer Solicitation to View Social Media and a Lawyer’s Responsibility to Monitor Social Media Content

When inviting others to view a lawyer’s social media network, account, or profile, a lawyer must be mindful of the traditional ethical restrictions relating to solicitation and the recommendations of lawyers.¹⁰

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer is not responsible for information that another person, who is not an agent of the lawyer, posts on a lawyer’s website, unless the lawyer prompts such person to post the information or otherwise uses such person to circumvent the ethics rules concerning advertising.

A lawyer has a duty to monitor her social media profile, as well as blogs, for comments and recommendations to ensure compliance with ethics rules. If a person who is not an agent

⁷ See also [Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2012-8](#) (2012) (citing Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 85-170 (1985)).

⁸ [NYSBA Op. 972 \(2013\)](#).

⁹ [Fl. Bar Advisory Advertising Op. \(Sept. 11, 2013\)](#) (staff opinion prohibiting attorneys from listing practice areas under the “Skills & Expertise” heading in LinkedIn).

¹⁰ See also [Fl. Bar Standing Comm. on Advertising, Guidelines for Networking Sites \(revised Apr. 16, 2013\)](#).

of the lawyer unilaterally posts content to the lawyer’s social media website or profile that does not comply with ethics rules, the lawyer must remove such content if such removal is within the lawyer’s control and, if not within the lawyer’s control, she must ask that person to remove it.¹¹

NYRPC 7.1, 7.2, 7.3, 7.4.

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

¹¹ See also [id.](#); [Phila. Bar Assn. Prof’l Guidance Comm., Op. 2012-8 \(2012\)](#); [Virginia State Bar, Quick Facts about Legal Ethics and Social Networking \(last updated Feb. 22, 2011\)](#).

2. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 2.A: Provision of General Information

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

Guideline No. 2.B: Public Solicitation is Prohibited Through “Live” Communications

Due to the “live” nature of real-time or interactive computer-accessed communications,¹² which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not “solicit”¹³ business from the public through such means.¹⁴ If a potential client initiates a specific request seeking to

¹² “Computer-accessed communication” is defined by NYRPC 1.0(c) as “any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.” The official comments to NYRPC 7.3 advise: “Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.”

¹³ “Solicitation” means “any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.” NYRPC 7.3(b).

¹⁴ See [NYSBA Op. 899 \(2011\)](#). Ethics opinions in a number of states have addressed chat room communications. See also [Ill. State Bar Ass’n, Op. 96-10 \(1997\)](#); [Michigan Standing Comm. on Prof’l and Jud. Ethics, Op. RI-276 \(1996\)](#); [Utah State Bar Ethics Advisory Opinion Comm., Op. 96-10 \(1997\)](#); [Va. Bar Ass’n Standing Comm. on Advertising, Op. A-0110 \(1998\)](#); [W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 \(1998\)](#).

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

retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and solicitation on a website are not considered real-time or interactive communications. This guideline does not apply if the recipient is a close friend, relative, former client, or existing client: although ethics rules would otherwise apply to such communications.

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

Comment: Answering general questions on the Internet is analogous to writing for any publication on a legal topic.¹⁵ “Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a ‘specific request’ to retain the lawyer.”¹⁶ In responding to questions, a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.¹⁷ A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.¹⁸

A lawyer is permitted to accept employment that results from participating in “activities designed to educate the public to recognize legal problems.”¹⁹ As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.²⁰ However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer’s actual response should not be made through a real time communication.²¹

¹⁵ See [NYSBA Op. 899 \(2011\)](#).

¹⁶ See *id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ *Id.*

²¹ *Id.*

3. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

Guideline No. 3.A: Viewing a Public Portion of a Social Media Website

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a person’s social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.²² Public means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Such automatic messages, as noted below, have been specifically found to lead to an ethical violation when seeking to investigate or monitor jurors.

Guideline No. 3.B: Contacting an Unrepresented Party to View a Restricted Portion of a Social Media Website

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

NYRPC 4.1, 4.3, 8.4.

²² See [NYSBA Op. 843 \(2010\)](#).

Comment: It is permissible for a lawyer to join a social media network to obtain information concerning a witness.²³ The New York City Bar Association has opined, however, that a lawyer shall not “friend” an unrepresented individual using “deception.”²⁴

In New York, there is no “deception” when a lawyer utilizes her “real name and profile” to send a “friend” request to obtain information from an unrepresented person’s social media account.²⁵ In New York, the lawyer is not required to disclose the reasons for making the “friend” request.²⁶

New Hampshire, however, requires that a request to a “friend” must “inform the witness of the lawyer’s involvement in the disputed or litigated matter,” the disclosure of the “lawyer by name as a lawyer” and the identification of “the client and the matter in litigation.”²⁷ San Diego requires disclosure of the lawyer’s “affiliation and the purpose for the request.”²⁸ Philadelphia notes that the failure to disclose that the “intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness” constitutes an impermissible omission of a “highly material fact.”²⁹

In Oregon, there is an opinion that, if the person being sought out on social media “asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request.”³⁰

Guideline No. 3.C: Viewing A Represented Party’s Restricted Social Media Website

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

NYRPC 4.1, 4.2.

²³ See also [N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

²⁴ [NYCBA Formal Op. 2010-2 \(2010\)](#).

²⁵ Id.

²⁶ See id.

²⁷ [N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

²⁸ [San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2 \(2011\)](#).

²⁹ [Phila. Bar Ass’n Prof’l Guidance Comm., Op. Bar 2009-2 \(2009\)](#).

³⁰ [Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 \(2013\)](#).

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

The Oregon State Bar Committee has noted that “[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible.”³¹

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

Guideline No. 3.D: Lawyer’s Use of Agents to Contact a Represented Party

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

NYRPC 5.3, 8.4.

Comment: This would include, *inter alia*, a lawyer’s investigator, legal assistant, secretary, or agent³² and could, as well, apply to the lawyer’s client.³³

³¹ Id. See [San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2 \(2011\)](#).

³² See [NYCBA Formal Op. 2010-2 \(2010\)](#).

³³ See also [N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

4. ETHICALLY COMMUNICATING WITH CLIENTS

Guideline No. 4.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be “taken down” or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information.³⁴ Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.

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

Comment: A lawyer must ensure that potentially relevant information is not destroyed “once a party reasonably anticipates litigation”³⁵ or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. “[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence, there is no ethical bar to ‘taking down’ such material from social media publications, or prohibiting a client’s lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user’s computer.”³⁶ When litigation is not pending or “reasonably anticipated,” a lawyer may more freely advise a client on what to maintain or remove from her social media profile.

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

³⁴ [New York County Lawyers’ Ass’n Comm. on Prof’l Ethics \(“NYCLA”\), Formal Op. 745 \(2013\).](#)

³⁵ [VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 \(1st Dep’t 2012\).](#)

³⁶ [NYCLA Formal Op. 745 \(July 2, 2013\).](#)

Guideline No. 4.B: Adding New Social Media Content

A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim.”³⁷

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

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

Guideline No. 4.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client’s social media posting that a client’s lawsuit involves the assertion of material false factual statement or evidence supports such a conclusion.³⁸

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

Comment: A lawyer has an ethical obligation not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” NYRPC 3.1(a). Frivolous conduct includes the knowing assertion of “material factual statements that are false.” NYRPC 3.1(b)(3). See also NYRPC 3.3; 4.1 (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”).

³⁷ Id.

³⁸ Id.

Guideline No. 4.D: A Lawyer's Use of Client-Provided Social Media Information

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

NYRPC 4.2.

Comment: One party may always seek to communicate with another party. Where a “client conceives the idea to communicate with a represented party,” a lawyer is not precluded “from advising the client concerning the substance of the communication” and the “lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.”³⁹ New York interprets “overreaching” as prohibiting “the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient.”⁴⁰

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

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

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

New Hampshire opines that a lawyer’s client may, for instance, send a “friend” request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety “depends on the extent to which the lawyer directs the client who is sending the [social media] request,” and whether the lawyer has complied with all other ethical obligations.⁴¹

³⁹ [NYCBA Formal Op. 2002-3 \(2002\)](#).

⁴⁰ [Id.](#)

⁴¹ [N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 \(2012\)](#).

In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.⁴²

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."⁴³

⁴² Id.

⁴³ [American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 \(2011\).](#)

5. **RESEARCHING SOCIAL MEDIA PROFILES OR POSTS OF PROSPECTIVE AND SITTING JURORS AND REPORTING JUROR MISCONDUCT**

Guideline No. 5.A: Lawyers May Conduct Social Media Research

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

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: “Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”⁴⁴

Guideline No. 5.B: A Juror’s Social Media Website, Profile, or Posts May Be Viewed As Long As There Is No Communication with the Juror

A lawyer may view the social media website, profile, or posts of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, agent or automatically generated by the social media network) with the juror.⁴⁵

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers should “always use caution when conducting [jury] research” to ensure that no communication with the prospective or sitting jury takes place.⁴⁶ New York opinions have stated that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice sent by a social media network may be considered a technical ethical violation. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.⁴⁷

⁴⁴ See [NYCBA Formal Op. 2012-02 \(2012\)](#).

⁴⁵ See [NYCLA Formal Op. 743 \(2011\)](#); [NYCBA Formal Op. 2012-2 \(2012\)](#); see also [Oregon State Bar Comm. on Legal Ethics, Formal Op. 189 \(2013\)](#).

⁴⁶ [Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, 85 N.Y. St. B.A.J. 50 \(2013\)](#).

⁴⁷ See [NYCBA Formal Op. 2012-2 \(2012\)](#); [NYCLA Formal Op. 743 \(2011\)](#).

A lawyer reviewing social media to perform juror research must be aware that an automated notice may be sent to the prospective or sitting juror identifying the name of the person viewing the juror's social media account.⁴⁸ For instance, currently, if a lawyer logged into LinkedIn then performed a simple Google search and clicked on a link to a LinkedIn account of a juror an automatic message may be sent by LinkedIn to the person whose profile is viewed. In order for the lawyer's profile not to be identified through LinkedIn when viewing a person's public LinkedIn profile, the lawyer must change her settings so that she is anonymous or, alternatively, be fully logged out of her LinkedIn account.

New York opinions draw a distinction between public and private juror information.⁴⁹ They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing). New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror's view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members.

Guideline No. 5.C: Deceit Shall Not Be Used to View a Juror's Social Media Profile

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

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: An “attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable”.⁵⁰

Guideline No. 5.D: Juror Contact During Trial

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

NYRPC 3.5, 4.1, 5.3, 8.4.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ See [NYCBA Formal Op. 2012-02 \(2012\)](#); [NYCLA Formal Op. 743 \(2011\)](#).

Comment: The concerns and issues identified in the comments to Guideline No. 5.C. are also applicable during the evidentiary and deliberative phases of a trial. These phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of a litigation are greater than during the jury selection process and could result in a mistrial.⁵¹

[W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.⁵²

Guideline No. 5.E: Juror Misconduct

In the event a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.⁵³

NYRPC 3.5, 8.4.

Comments: “[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.” NYRPC 3.5(d). If a lawyer learns of juror misconduct due to social media research, he or she must promptly notify the court.⁵⁴

⁵¹ Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.

⁵² See [NYCBA Formal Op. 2012-2 \(2012\)](#).

⁵³ See [NYCLA Op. 743 \(2011\)](#); [NYCBA Op. 2012-2 \(2012\)](#).

⁵⁴ Id.

APPENDIX

DEFINITIONS

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

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

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

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

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

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

