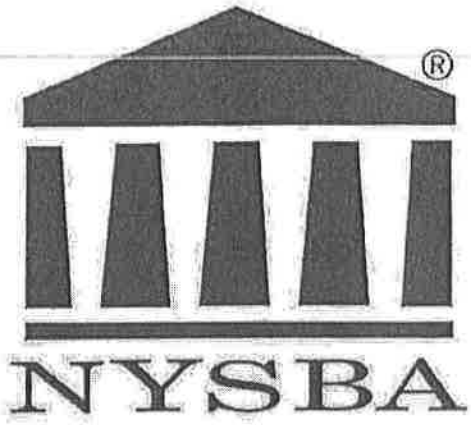

SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED JUNE 9, 2015

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

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TABLE OF CONTENTS

INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the increased use of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association, which authored these social media ethics guidelines in 2014 to assist lawyers in understanding the ethical challenges of social media, is updating them to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the "Guidelines"). In particular, these Guidelines add new sections on lawyers' competence,[1] the retention of social media by lawyers, client confidences, the tracking of client social media, communications by lawyers with judges, and lawyers' use of LinkedIn.

These Guidelines are guiding principles and are not "best practices." The world of social media is a nascent area that is rapidly changing and "best practices" will continue to evolve to keep pace with such developments. Moreover, there can be no single set of "best practices" where there are multiple ethics codes throughout the United States that govern lawyers' conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer's permitted use of social media may differ due to varying jurisdictions' different social mores, population bases and historical approaches to their own ethics rules and opinions.

These Guidelines are predicated upon the New York Rules of Professional Conduct ("NYRPC")[2] and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction's ethics opinion differs from the interpretation of the NYRPC by New York ethics authorities. In New York State, ethics opinions are issued not just by the New York State Bar Association, but also by local bar associations located throughout the State.[3]

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

One of the best ways for lawyers to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person's social

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1 As of April 2015, fourteen states have included a duty of competence in technology in their ethical codes. http://www.lawsitesblog.com/2015/03/mass-becomes-14th-state-to-adopt-duty-of-technology-competence.html (Retrieved on April 26, 2015).

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

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

media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer's research may have ethical consequences.

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

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

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

1. ATTORNEY COMPETENCE

Guideline No. 1: Attorneys' Social Media Competence

A lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.

NYRPC 1.1(a) and (b).

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

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use. This is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Opinion 466 (2014)[4] states:

> As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network.[5]

A lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the use of social media. "[A lawyer must] understand the functionality of any social media service she intends to use for . . . research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site."[6]

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[4] American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

[5] Competence may require understanding the often lengthy and unclear "terms of service" of a social media platform and whether the platform's features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such social media platform actually functions.

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

[6] Id.

Indeed, the comment to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (emphasis added).[7]

As NYRPC 1.1 (b) requires, "[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." While a lawyer may not delegate his obligation to be competent, he or she may rely, as appropriate, on professionals in the field of electronic discovery and social media to assist in obtaining such competence.

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[7] ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8; See N.H. Bar Ass'n, Ethics Corner (June 21, 2013) (lawyers "[have] a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation").

2. ATTORNEY ADVERTISING

Guideline No. 2.A: Applicability of Advertising Rules

A lawyer's social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules.[8] Hybrid accounts may need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm.[9]

NYRPC 1.0, 7.1, 7.3.

Comment: In the case of a lawyer's profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.

The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[10] According to NYCLA, Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."[11]

NYCLA, Formal Op. 748 addresses the types of content on LinkedIn that may be considered "attorney advertising" and provides:

> [i]f an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other

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

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

10 New York County Lawyers' Association ("NYCLA"), Formal Op. 748 (2015).

11 Id.

lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney should also include the disclaimer "Prior results do not guarantee a similar outcome." *See* RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).[12] An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's services" under Rule 7.1(d).[13]

An attorney's ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a "tweet") is deemed attorney advertising, the rules require that a lawyer must include disclaimers similar to those described in NYCLA Formal Op. 748.[14]

Utilizing the disclaimer "Attorney Advertising" given the confines of Twitter's 140 character limit (which in practice may be even less than 140 characters when including links, user handles or hashtags) may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, consideration should be given to only posting tweets that would not be categorized as attorney advertising.[15]

Rule 7.1(k) of the NYRPC provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication" and specifies another retention scheme for websites.[16] Rule 1.0(c) of the NYPRC defines "computer-accessed communication" as any communication made by or on behalf of a lawyer or law firm that is disseminated through "the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet

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

13 NYCLA, Formal Op. 748.

14 New York State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA"), Op. 1009 (2014).

15 NYSBA, Op. 1009.

16 Id.

presences, and any attachments or links related thereto."[17] Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."[18]

In accordance with NYSBA. Op. 1009, to the extent that a social media post is found to be a "solicitation," it is subject to filing requirements if directed to recipients in New York. Social media posts, like tweets, may or may not be prohibited "real-time or interactive" communications. That would depend on whether they are broadly distributed and/or whether the communications are more akin to asynchronous email or website postings or in functionality closer to prohibited instant messaging or chat rooms involving "real-time" or "live" responses. Practitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially "live" or real-time tools.

Guideline No. 2.B: Prohibited use of the term "Specialists" on Social Media

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.[19]

NYRPC 7.1, 7.4.

Comment: Although LinkedIn's headings no longer include the term "Specialties," lawyers still need to be cognizant of the prohibition on claiming to be a "specialist" when creating a social media profile. To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer's experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.[20]

A lawyer shall not list information under the ethically prohibited heading of "specialist" in any social media network unless appropriately certified as such. With respect to skills or practice areas on a lawyer's profile under a heading such as "Experience" or "Skills," such information does not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4.[21] Also, a lawyer may include

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17 Id.

18 Id.

19 See NYSBA. Op. 972 (2013).

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

21 NYCLA, Formal Op. 748.

information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings including "expert."

A limited exception to identification as a specialist may exist for lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example, identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.[22]

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

A lawyer that maintains social media profiles must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media network, account, blog or profile.[23]

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she must ask that person to remove it.[24]

NYRPC 7.1, 7.2, 7.3, 7.4.

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

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22 See NYRPC Rule 7.4.

23 See also Fl. Bar Standing Comm. on Advertising, *Guidelines for Networking Sites* (revised Apr. 16, 2013).

24 See NYCLA, Formal Op. 748. See also Phila. Bar Assn. Prof'l Guidance Comm., Op. 2012-8; Virginia State Bar, *Quick Facts about Legal Ethics and Social Networking*

Guideline No. 2.D: Attorney Endorsements

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

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must, as noted above, monitor and verify that posts about them made to profile(s) the lawyer controls[25] are accurate. "Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists," as well as to confirm the accuracy of any endorsements or recommendations.[26] A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.[27] It should be noted that certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

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

26 NYCLA, Formal Op. 748.

27 See NYCLA, Formal Op. 748. See also Pa. Bar Ass'n, Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-300; North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

Guideline No. 3.B: Public Solicitation is Prohibited through "Live" Communications

Due to the "live" nature of real-time or interactive computer-accessed communications,[28] which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit"[29] business from the public through such means.[30] If a potential client[31] initiates a specific request seeking to

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

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

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

retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and attorney communications via a website or over social media platforms, such as Twitter,[32] may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client -- although the ethics rules would otherwise apply to such communications.

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

> *Comment*: Answering general questions[33] on the Internet is analogous to writing for any publication on a legal topic.[34] "Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a 'specific request' to retain the lawyer."[35] In responding to questions,[36] a lawyer may not provide answers that appear applicable to all

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

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

32 Whether a Twitter or Reddit communication is a "real-time or interactive" computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See NYSBA, Op. 1009 and page 7 *supra*.

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

34 See NYSBA, Op. 899.

35 See id.

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

apparently similar individual problems because variations in underlying facts might result in a different answer.[37] A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.

A lawyer is permitted to accept employment that results from participating in "activities designed to educate the public to recognize legal problems."[38] As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.[39] However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer's actual response should not be made through a real time communication.[40]

Guideline No. 3.C: Retention of Social Media Communications with Clients

If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

NYRPC 1.1, 1.15.

Comment: A lawyer's file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a "writing" as "a tangible or electronic record of a communication or representation...". Rule 1.0(n), Terminology. The NYRPC "does not explicitly identify the full panoply of documents that a lawyer should retain relating to a

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37 Id.

38 See id.

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

40 Id.

representation."[41] The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, such as chats and instant messages, which the lawyer believes need to be saved.[42] However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without the knowledge of the lawyer.[43] Casual communications may be deleted without impacting ethical rules.[44]

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

> As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.
>
> We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to

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41 See NYCBA, Formal Op. 2008-1 (2008).

42 Id.

43 Id. See also Pennsylvania Bar Assn. Ethics Comm., Formal Op. 2014-300 (the Pennsylvania Bar Assn. has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, an attorney "should retain records of those communications containing legal advice.").

44 Id.

protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.[45]

A lawyer shall not deactivate a social media account, which contains communications with clients, unless those communications have been appropriately preserved.

[45] NYSBA, Op. 623 opines that, with respect to documents *belonging to the lawyer*, a lawyer may destroy all those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise require, and (ii) in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents."

4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

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

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a person's social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.[46] "Public" means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. In New York, such automatic messages, as noted below, sent to a juror by a lawyer or her agent that notified the juror of the identity of who viewed her profile may constitute an ethical violation.[47] Conversely, the ABA opined that such a "passive review" of a juror's social media does not constitute an ethical violation.[48] The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Drawing upon the ethical opinions addressing issues concerning social media communications with jurors, when an attorney views the social media site of a represented witness or a represented opposing party, he or she should be aware of which networks[49] might automatically notify the owner of that account of his or her viewing, as this could be viewed an improper communication with someone who is represented by counsel.

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46 See NYSBA, Op. 843 (2010).

47 See NYCLA, Formal Op. 743 ; NYCBA, Formal Op. 2012-2.

48 See American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.

49 One network that sends automatic notifications that someone has viewed one's profile is LinkedIn.

Guideline No. 4.B: Contacting an Unrepresented Party to View a Restricted Social Media Website

A lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile.[50] However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.

NYRPC 4.1, 4.3, 8.4.

Comment: It is permissible for a lawyer to join a social media network to obtain information concerning a witness.[51] The New York City Bar Association has opined, however, that a lawyer shall not "friend" an unrepresented individual using "deception."[52]

In New York, there is no "deception" when a lawyer utilizes her "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account.[53] In New York, the lawyer is **not** required to disclose the reasons for making the "friend" request.[54]

The New Hampshire Bar Association, however, requires that a request to a "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation."[55] In Massachusetts, "it is not permissible for the lawyer who is seeking information about an unrepresented party to access the personal website of X and ask X to "friend" her without disclosing that the requester is the lawyer for a potential plaintiff."[56] The San Diego Bar requires disclosure of the lawyer's "affiliation and the purpose for the request."[57] The Philadelphia Bar Association notes that the failure to disclose that

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50 For example, this may include: (1) sending a "friend" request on Facebook, 2) requesting to be connected to someone on LinkedIn; or 3) following someone on Instagram.

51 See also N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

52 NYCBA, Formal Op. 2010-2 (2010).

53 Id.

54 See id.

55 N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

56 Massachusetts Bar Ass'n. Comm. on Prof Ethics Op. 2014-5 (2014).

57 San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011).

the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact."[58]

In Oregon, there is an opinion that if the person being sought out on social media "asks for additional information to identify [the l]awyer, or if [the l]awyer has some other reason to believe that the person misunderstands her role, [the l]awyer must provide the additional information or withdraw the request."[59]

Guideline No. 4.C: Viewing a Represented Party's Restricted Social Media Website

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

NYRPC 4.1, 4.2.

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

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

The Oregon State Bar Committee has noted that "[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible."[60]

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

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58 Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009).

59 Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

60 Id. See San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2.

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

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

NYRPC 5.3, 8.4a

Comment: This would include, *inter alia*, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent[61] and could, as well, apply to the lawyer's client.[62]

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61 See NYCBA, Formal Op. 2010-2 (2010).

62 See also N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.

5. COMMUNICATING WITH CLIENTS

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

A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings.[63] A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations.[64] Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

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

> *Comment*: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation"[65] or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence,[66] there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer."[67] When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after a litigation has commenced, as long as

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63 Mark A. Berman, "Counseling a Client to Change Her Privacy Settings on Her Social Media Account," New York Legal Ethics Reporter, Feb. 2015, http://www.newyorklegalethics.com/counseling-a-client-to-change-her-privacy-settings-on-her-social-media-account/.

64 NYCLA, Formal Op. 745 (2013). See Philadelphia Bar Ass'n. Guidance Comm. Op. 2014-5 (2014).

65 VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012).

66 New York has not opined on a lawyer's obligation to produce a website link that a client has utilized, but Philadelphia Bar Ass'n. Guidance Comm. Op. 2014-5, noted that, with respect to a website link utilized by a client, if it is appropriately requested in discovery, a lawyer "must make reasonable efforts to obtain a link or other [social media] content if the lawyer knows or reasonably believes it has not been produced by the client."

67 NYCLA, Formal Op. 745.

social media is appropriately preserved in the proper format and such is not a violation of law or a court order.[68]

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

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

A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."[69]

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

Comment: A lawyer may review what a client plans to publish on a social media website in advance of publication[70] and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person's perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.

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68 North Carolina State Bar 2014 Formal Ethics Op. 5 (2014); Phila. Bar Ass'n Guidance Comm. Op. 2014-5 (2014); Florida Bar Professional Ethics Committee, Proposed Advisory Opinion 14-1 (Jan. 23, 2015)

69 NYCLA, Formal Op. 745.

70 As social media-related evidence has increased in use in litigation, a lawyer may consider periodically following or checking her client's social media communications, especially in matters where posts on social media would be relevant to her client's claims or defenses. Following a client's social media use could involve connecting with the client by establishing a LinkedIn connection, "following" the client on Twitter, or "friending" her on Facebook. Whether to follow a client's postings should be discussed with the client in advance. Monitoring a client's social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client's posts on existing or future litigation or on their implication for other issues relating to the lawyer's representation of the client

Pennsylvania Bar Ass'n Ethics Comm., Formal Op. 2014-300 notes "tracking a client's activity on social media may be appropriate for an attorney to remain informed about the developments bearing on the client's legal dispute" and "an attorney can reasonably expect that opposing counsel will monitor a client's social media account."

Guideline No. 5.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.[71]

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

> *Comment*: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[72] Frivolous conduct includes the knowing assertion of "material factual statements that are false."[73] See also NYRPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.").

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

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

NYRPC 4.2.

> *Comment*: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."[74] New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."[75]

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71 NYCLA, Formal Op. 745.

72 NYRPC 3.1(a).

73 NYRPC 3.1(b)(3).

74 NYCBA, Formal Op. 2002-3 (2002).

75 Id.

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

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

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

New Hampshire opines that a lawyer's client may, for instance, send a "friend" request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety "depends on the extent to which the lawyer directs the client who is sending the [social media] request," and whether the lawyer has complied with all other ethical obligations.[76] In addition, the client's profile needs to "reasonably reveal[] the client's identity" to the other person.[77]

The American Bar Association opines that a "lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary."[78]

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76 N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

77 Id.

78 ABA, Formal Op. 11-461 (2011).

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

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media communications and communications made on a lawyer's website or blog must comply with these limitations.[79] This prohibition applies regardless of whether the confidential client information is positive or celebratory, negative or even to something as innocuous as where a client was on a certain day.

Where a lawyer learns that a client has posted a review of her services on a website or on social media, if the lawyer chooses to respond to the client's online review, the lawyer shall not reveal confidential information relating to the representation of the client. This prohibition applies, even if the lawyer is attempting to respond to unflattering comments posted by the client.

NYRPC 1.6, 1.9(c).

Comment: A lawyer is prohibited, absent some recognized exemption, from disclosing client confidences and confidential information of a client. Under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6,[80] which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."[81] NYSBA Opinion 1032 applies such self-defense exception to "claims" and "charges" in formal proceedings or a "material threat of a proceeding," which "typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other

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79 NYRPC 1.6.

80 Comment 17 to NYRPC Rule 1.6 provides:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

81 NYSBA Op. 1032 (2014).

procedure that can result in a sanction" and the self-defense exception does not apply to a "negative web posting."[82] As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on websites such as Avvo, Yelp or Martindale Hubbell.[83]

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that "[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception."[84] Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events."[85]

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82 NYSBA, Opinion 1032.

83 See Michmerhuizen, Susan "Client reviews: Your Thumbs Down May Come Back Around."*Americanbar.org*. Your ABA, September 2014. Web. 3 March 2015.

84 Pennsylvania Bar Association Ethics Committee, Formal Op. 2014-300.

85 Pennsylvania Bar Association Ethics Committee Opinion 2014-200.

6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[86]

The ABA issued Formal Opinion 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[87] There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[88] However, Opinion 466 does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[89]

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86 See NYCBA Formal Op. 2012-2 (2012).

87 See American Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466.

88 Id.

89 Id.

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

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.[90]

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need "always use caution when conducting [jury] research" to ensure that no communication with the prospective or sitting jury takes place.[91]

Contact by a lawyer with jurors through social media is forbidden. For example, ABA, Formal Op. 466 opines that it would be a prohibited *ex parte* communication for a lawyer, or the lawyer's agent, to send an "access request" to view the private portion of a juror's or potential juror's Internet presence.[92] This type of communication would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."[93]

NYCLA, Formal Op. 743 and NYCBA, Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation. New York ethics opinions also draw a distinction between public and private juror information.[94] They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).

In contrast to the above New York opinions, ABA, Formal Op. 466 opined that "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does *not* constitute a communication from the lawyer in violation" of the Rules of Professional Conduct (emphasis added).[95] According to ABA, Formal Op. 466, this type of notice is "akin to a neighbor's recognizing a lawyer's car driving down the

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

91 Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, 85 N.Y. St. B.A.J. 50 (2013).

92 See ABA, Formal Op. 14-466.

93 Id.

94 Id.

95 See ABA Formal Op. 14-466.

juror's street and telling the juror that the lawyer had been seen driving down the street."[96]

While ABA, Formal Op. 466 noted that an automatic notice[97] sent to a juror, from a lawyer passively viewing a juror's social media network does not constitute an improper communication, a lawyer must: (1) "be aware of these automatic, subscriber-notification procedures" and (2) make sure "that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding."[98] Moreover, ABA, Formal Op. 466 suggests that "judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds," including a juror's or potential juror's social media presence.[99]

The American Bar Association's view has been criticized on the basis of the possible impact such communication might have on a juror's state of mind and has been deemed more analogous to the improper communication where, for instance, "[a] lawyer purposefully drives down a juror's street, observes the juror's property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial knowing that a neighbor will advise the juror of this drive-by and the signage."[100]

A lawyer must take measures to ensure that a lawyer's social media research does not come to the attention of the juror or prospective juror. Accordingly, due to the ethics opinions issued in New York on this topic, a lawyer in New York when reviewing social media to perform juror research needs to perform such research in a way that does not leave any "footprint" or notify the juror that the lawyer or her agent has been viewing the juror's social media profile. [101]

The New York opinions cited above draw a distinction between public and private juror information.[102] They opine that viewing the public portion of a social

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96 Id. See Pennsylvania Bar Ass'n Ethics Comm., Formal Op. 2014-300 ("[t]here is no *ex parte* communications if the social networking website independently notifies users when the page has been viewed.").

97 For instance, currently, if a lawyer logs into LinkedIn, as it is currently configured, and performs a search and clicks on a link to a LinkedIn profile of a juror, an automatic message may well be sent by LinkedIn to the juror whose profile was viewed advising of the identity of the LinkedIn subscriber who viewed the juror's profile. In order for that reviewer's profile not to be identified through LinkedIn, that person must change her settings so that she is anonymous or, alternatively, to be fully logged out of her LinkedIn account.

98 Id.

99 Id.

100 See Mark A. Berman, Ignatius A. Grande, and Ronald J. Hedges, "Why American Bar Association Opinion on Jurors and Social Media Falls Short," New York Law Journal (May 5, 2014).

101 See NYCBA, Formal Op. 2012-2 and NYCLA, Formal Op. 743.

102 See Id.

media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror's profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

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

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: An "attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable."[103]

Guideline No. 6.D: Juror Contact During Trial

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

A lawyer must exercise extreme caution when "passively" monitoring a sitting juror's social media presence. The lawyer needs to be aware of how any social media service operates, especially whether that service would notify the juror of such monitoring or the juror could otherwise become aware of such monitoring or viewing by lawyer. Further, the lawyer's review of the juror's social media shall not

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[103] See Id.

burden or embarrass the juror or burden or delay the proceeding.

These later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.[104]

> [W]hile an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.[105]

ABA, Formal Op. 466 permits passive review of juror social media postings, in which an automated response is sent to the juror, of a reviewer's Internet "presence," even during trial absent court instructions prohibiting such conduct. In one New York case, the review by a lawyer of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this to the attention of the court stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."[106] This case demonstrates that a lawyer must take caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.[107]

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA, Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."[108]

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

105 See NYCBA, Formal Op. 2012-2.

106 See Richard Vanderford, "LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial," Law360 (Sept. 27, 2013).

107 Id.

108 ABA, Formal Op. 14-466.

Guideline No. 6.E: Juror Misconduct

In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.[109]

NYRPC 3.5, 8.4.

Comments: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[110]

New York, however, provides that "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge."[111] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[112] "Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney."[113]

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109 See NYCLA, Op. 743; NYCBA, Op. 2012-2.

110 See ABA, Formal Op. 14-466.

111 NYRPC 3.5(d).

112 NYCBA, Op. 2012-2.

113 Id. See Pennsylvania Bar Assn. Ethics Comm., Formal Op. 2014-300 ("a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").

7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

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

NYRPC 3.5, 8.2 and 8.4.

> *Comment*: There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should not be surprised that any such communication is fraught with peril as the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether retweeting a judge's own tweets would be improper.
>
> A lawyer may communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,"[114] which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."[115]

It should be noted that New York Advisory Opinion 08-176 (Jan. 29, 2009) provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."[116] New York Advisory Committee on Judicial Ethics Opinion 08-176 further opines that:

> [A] judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online

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114 Pennsylvania Bar Assn. Ethics Comm., Formal Op. 2014-300.

115 NYRPC 3.5(a)(1).

116 New York Advisory Committee on Judicial Ethics Opinion 08-176

connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

See New York Advisory Committee on Judicial Ethics Opinion 13-39 (May 28, 2013) ("the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously 'friended' certain individuals who are now involved in some manner in a pending action.").

APPENDIX

DEFINITIONS

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

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

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

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

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

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

Admission and Use of Social Media Evidence at IAB Hearings

Prepared by: Susan D. Mack, Esq.

This Board is charged with the duty of ensuring that a fair hearing on the merits of a case is held so that there is a just determination of every petition. *See* DEL. CODE ANN. tit. 19, § 2301A(i). Evidentiary decisions by the IAB must therefore be made to ensure a fair hearing on the merits and a just determination of every petition. This applies to social media evidence the same as any other evidence.

What Do the Delaware IAB Rules Say About the Admission of Evidence?

Del. IAB Rule No. 14(C), Evidence:

> The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed insofar as practicable; however, that evidence will be considered by the Board which, in its opinion, possesses any probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of discretion.

Del. IAB Rule No. 9(B)(5)(g) requires the Pre-trial Memorandum to contain "notice of the intent to use any movie, video or still picture and either a copy of the same or information as to where the same may be viewed." Rule No. 9(B)(6) allows for amendment of the Pre-Trial Memorandum at any time prior to 30 days before the hearing. The 30-day notice requirement may be waived or modified by consent of the parties or by the Board upon written motion.

What Have the Courts said About the Applicability of Rules of Evidence to the IAB?

The Courts have long recognized that an administrative board such as the Industrial Accident Board is not bound by the formal rules of evidence that govern jury trials. *Delaware Home and Hospital v. Martin,* C.A. No. K11A-07-001, slip op. at *5 (Del. Super. Ct.,Feb. 21, 2012) (citing *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995)). This is because administrative agencies operate less formally than courts of law. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993). Generally, the Board will hear "all evidence which could conceivably throw light on the controversy." *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 240 (Del. Super. Ct. 1979). Nonetheless, the Board may not relax rules which are designed to ensure the fairness of the procedure, for example, the fundamental right to confront witnesses, to cross-examine them, to refute them, and to have a record of their testimony. *Delaware Home and Hospital*, C.A. No. K11A-07-001, slip op. at *5-*6. In other words, fundamental principles of justice, such as due process, need to be observed. *See General Chemical Div., Allied Chemical & Dye Corp. v. Fasano*, 94 A.2d 600, 601 (Del. Super. 1953).

Superior Court's Role in Reviewing Evidentiary Decisions

MacFadyen v. Total Care Physicians, C.A. No. N15A-05-001, 2015 WL 9303624 (Del. Super. Ct. Dec. 15, 2015).

Claimant appealed Board decision in part based on its decision allowing the employer to use photographs taken from claimant's public Facebook profile as impeachment evidence without prior notice to claimant. The Court found that the Board did not abuse its discretion in permitting the Facebook photos as impeachment evidence, despite the employer's failure to adhere to Board Rule 9(B)(5)(f), which requires pre-trial notice of the intent to use any movie, video or still picture. The Court first noted that the Board had not actually admitted the photographs as substantive evidence, but rather limited their use to impeachment of claimant's testimony. The Court then described its "limited role in Board decisions, particularly with respect to evidentiary considerations," and found the Board to be "well within its authority to permit Employer to use Claimant's Facebook photos as impeachment evidence in this context." *Id.* at *4. The Court found that the Board's decision was not clearly unreasonable or capricious and it did not exceed the bounds of reason in view of the circumstances or produce injustice. Claimant had testified that she could not hold her grandchildren with her injured arm, and the Court concluded that fairness required the employer to be able to impeach claimant, including with photographs showing claimant holding her grandchildren with her injured arm.

Notably, the Court in *MacFadyen* compared its decision to the seemingly opposite decision in *Harasika v. State*, 2013 WL 1411233 (Del. Super. Ct. Feb. 28, 2013). In *Harasika*, the Board refused to allow the employee to use photographs to impeach an expert medical witness where the employee failed to provide proper notice of the intent to use the photos pursuant to Board Rule 9. The Superior Court affirmed the Board's decision. The Court in *MacFadyen* noted that, in both *MacFadyen* and *Harasika*, the Superior Court refused to disrupt the Board's decision due to the Court's limited role of review on appeal, particularly for evidentiary issues.

IAB Cases Discussing Social Media

Production and Preservation of Social Media Evidence

The Employer moved to compel Claimant to fully comply with its request for production of social media information, specifically the postings on Claimant's Facebook page since the date of the accident. Claimant had raised privacy objections to producing information that was not accessible to the general public on Facebook. The Employer clarified that it was not requesting private messages to and from Facebook friends. The Employer was requesting wall posts/comments, photographs, videos, status updates, events and/or groups. The Board granted the motion and ordered production of the requested social media. *Stokes v. Lyneer Staffing*, Del. IAB, Hrg. No. 1421064 (April 16, 2015) (Order). [available on database]

The Employer moved to compel Claimant to permit the Employer to inspect and obtain relevant information from her social networking sites and to compel Claimant to preserve all relevant information contained on her social networking sites since the occurrence of the alleged work accident. The Employer learned about relevant social media information from co-workers and then later was told some of the information had been removed or deleted from Claimant's

Facebook page. The motion was granted by the Board. *Baker v. State of Delaware*, Del. IAB, Hrg. No. 1420321 (Feb. 12, 2015) (Order). [available on database]

The Hearing Officer found no actual prejudice to Employer from spoliation of social media evidence where the Employer had obtained and retained photographs posted to Claimant's Facebook page prior to Claimant deleting the photographs. The claims adjuster had performed a Facebook investigation of Claimant and obtained photographs of Claimant's engaging in various social activities. These photographs were produced to Claimant by the Employer during discovery. The Employer was permitted to use the photographs to impeach Claimant's testimony during the hearing but the photos were not admitted into evidence. *Wright v. Christiana Care Health Svcs.*, Del. IAB, Hrg. No. 1401923, slip op. at *20 and n.13 (Dec. 29, 2014).

Use of Social Media Evidence at IAB Hearings

On Petition for Review, Claimant insisted he was still totally disabled from work despite medical evidence from the treating physicians and the employer's doctor indicating he could return to limited duty work. The Employer presented videos claimant had posted of himself on You Tube that showed him lip syncing while dancing, singing, playing keyboards, and sitting in a swivel chair and swiveling while singing. Claimant testified that he has posted other videos showing him crying, describing his unbearable pain, and describing his depression. The Hearing Officer relied on the medical testimony to terminate total disability. In a footnote, the Hearing Officer indicated the You Tube videos did not affect the outcome of the case. Nonetheless, she noted that Claimant did not present as totally disabled on the videos. Claimant appeared physically fit, moved well, maintained focus, and displayed the capability to do various activities. *Atkinson v. A.T. Systems*, Del. IAB, Hrg. No. 1245432 (May 30, 2012). [available on database]

For a DCD petition, Claimant produced Facebook photos to the Employer and these were introduced into evidence at the hearing. The photos showed claimant going out and socializing and on two trips for her husband's softball tournaments during a time period when she claimed to be disabled. A supervisor testified that two co-workers brought the Facebook posts to his attention while claimant was out of work. He acknowledged that claimant had some issues with her peers. Claimant pointed out during her testimony that the photos did not show her engaging in any physical activity. *Baker v. State of Delaware*, Del. IAB, Hrg. No. 1420321 (July 23, 2015).

On DACD petition, the Board allowed the Employer to cross-examine the Claimant about a Facebook photograph showing him holding a trophy from a basketball league. Claimant had testified that he was captain of a basketball team but did not actually play. Claimant objected to the use of the photograph. The Employer admitted that the photo was not produced until the day before the hearing, but the Employer represented that the picture is publicly available on Facebook. In a footnote, the Board explained that because the photograph was publicly available and used for impeachment purposes, they allowed questioning about the photo. *Ortiz v. County Environmental Co.*, Del. IAB, Hrg. No. 1341710 (Nov. 12, 2013). [available on database]

In contrast to *Ortiz*, the Board in another case did not permit use of photographs, including some from Facebook, during cross-examination of Claimant where the photographs were not produced 30 days before the hearing. Employer was allowed to use Facebook photos of Claimant riding a mechanical bull that were produced 30 days in advance to impeach Claimant on crossexam. However, the photos were undated, according to the testimony, and Dr. Rodgers commented that he could not tell if Claimant was shown still or in motion. Claimant admitted riding a mechanical bull one time but he could not recall whether this was before or after the work accident. The Board found Claimant's overall testimony very credible and awarded permanency benefits for the low back based on the opinion of Dr. Rodgers. *Hynes v. Urgent Ambulance Service*, Del. IAB, Hrg. No. 1401914 (Oct. 29, 2015). [available on database]

Agreement as to Compensation Declared Null and Void Based on Social Media Evidence

The Board relies in part on social media evidence to declare an Agreement as to Compensation null and void on the basis of fraud. Prior to the hearing on Employer's petition for review of the workers' compensation agreement, Claimant had entered into a consent agreement with the Delaware Department of Insurance to pay restitution to the workers' compensation insurance company and fines due to her failure to disclose she was gainfully employed while the insurer was paying her total disability benefits. Facebook entries that post-dated the work accident provided evidence that Claimant was in fact working at the same time she was receiving total disability pursuant to the Agreement as to Compensation she had entered into with the Employer. In addition, a Facebook entry revealed a slip and fall on ice that occurred the day before the agreed-upon work accident date, which was also a slip and fall on ice. The Board agreed to declare the Agreement as to Compensation null and void because of Claimant's misconduct, misrepresentations, and false representations. *Scott v. Caring for Life*, Del. IAB, Hrg. No. 1407950 (Jan. 26, 2015). [available on database]

Referral to Fraud Prevention Bureau Based on Social Media Evidence

At a legal hearing, the Employer requested immediate termination of total disability and referral of claimant to the State Fraud Prevention Bureau based on Claimant running home-based businesses and receiving income from them. A private investigator reviewed claimant's Facebook page and other social media and concluded that claimant was actively operating a home-based business over the internet. Claimant produced a Paypal transaction ledger that reflected transactions on her Paypal debit card, and this was offered into evidence by the employer. Claimant admitted setting up the business several months after going onto total disability and the business had a webpage and a Facebook business page. She did not notify the insurance adjustor of the business or her earnings from the business. The Board referred the matter to the Fraud Prevention Bureau for further proceedings and terminated total disability as of the date of the legal hearing. The Board also established a partial disability rate based on a minimal amount of earnings shown by the Paypal log. *Beatson v. Domino's Pizza*, Del. IAB, Hrg. No. 1398518 (July 29, 2015).

AMERICAN BAR ASSOCIATION

Formal Opinion 462 **February 21, 2013**
Judge's Use of Electronic Social Networking Media

A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.[1]

In this opinion, the Committee discusses a judge's participation in electronic social networking. The Committee will use the term "electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons.[2]

Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge's participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."[3] Although judges are full-fledged members of their communities, nevertheless, they "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens...."[4] All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and must "avoid impropriety and the appearance of impropriety."[5] This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives."[6] Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

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[1] This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

[3] Model Code, Preamble [1].

[4] Model Code Rule 1.2 cmt. 2.

[5] Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, "Tweet Justice," SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to "de-friend" her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), *article available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

[6] Model Code, Preamble [2].

compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.[7]

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.[8]

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.[9] These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may "friend" lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.[10] A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.[11] In this regard, context is significant.[12] Simple

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[7] *See* Model Code Rule 1.2 cmt. 3. *Cf.* New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared. They can eliminate this risk by deactivating their accounts.

[8] Jeffrey Rosen, "The Web Means the End of Forgetting", N.Y. TIMES MAGAZINE (July 21, 2010) *accessible at* http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all.

[9] *See, e.g.*, California Judges Ass'n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge); Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle); Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (judges should be mindful of "whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship'" that should be disclosed and/or require recusal); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules); South Carolina Jud. Dep't Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge's judicial position). *See also* John Schwartz, "For Judges on Facebook, Friendship Has Limits," N.Y. TIMES, Dec. 11, 2009, at A25. *Cf.* Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge's judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge's office).

[10] *See* discussion in Geyh, Alfini, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5th Edition, forthcoming), Section 10.05E.

[11] California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). *See also* New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).

[12] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization's ESM site; members use the site to communicate among themselves about organization and other non-legal matters). *See also* Raymond McKoski,

designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person. [13]

Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.[14] The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally. [15] A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.[16] For example, a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

Judges' Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge's or campaign committee's method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate.[17] Websites and ESM promoting the candidacy of a judge or judicial candidate may be

"Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'," 99 KY. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, *supra* note 9 ("Judges do not drop out of society when they become judges.... The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.") (quoting New York University Prof. Stephen Gillers).

[13] *See* Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

[14] *See, e.g.*, New York Judicial Ethics Advisory Opinion 08-176, *supra* n. 8. *See also* Ashby Jones, "Why You Shouldn't Take It Hard If a Judge Rejects Your Friend Request," WALL ST. J. LAW BLOG (Dec. 9, 2009) ("'friending' may be more than say an exchange of business cards but it is well short of any true friendship"); Jennifer Ellis, "Should Judges Recuse Themselves Because of a Facebook Friendship?" (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), *available at* http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/.

[15] *See* Jeremy M. Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)," 33 PEPPERDINE L. REV. 575, 578 (2012) ("Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge").

[16] Rule 2.11 cmt. 5.

[17] In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (July 31, 2012), *available at* http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/.

established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.[18]

Sitting judges and judicial candidates are expressly prohibited from "publicly endorsing or opposing a candidate for any public office."[19] Some ESM sites allow users to indicate approval by applying "like" labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others' political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.[20] On the other hand, it is unlikely to raise an ethics issue for a judge if someone "likes" or becomes a "fan" of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public.[21] This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge's ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

[18] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).
[19] Model Code Rule 4.1(A)(3).
[20] *See* "Kansas judge causes stir with Facebook 'like'," The Associated Press, July 29, 2012, *available at* http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook__like_.html.
[21] *See* Nevada Comm'n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) ("In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.").

Committee on Codes of Conduct Advisory Opinion
No. 112: Use of Electronic Social Media by Judges and Judicial Employees

This opinion provides the Committee's guidance on an array of ethical issues that may arise from the use of social media by judges and judicial employees, particularly members of a judge's personal staff. This guidance is intended to supplement information the Committee developed in 2011 to assist courts with the development of guidelines on the use of social media by judicial employees. *See* Resource Packet for Developing Guidelines on Use of Social Media for Judicial Employees. The Committee noted in the Resource Packet that "[t]he Code of Conduct for Judicial Employees applies to all online activities, including social media. The advent of social media does not broaden ethical restrictions; rather, the existing Code extends to the use of social media." The Committee also recognizes that electronic social media may provide valuable new tools for the courts, and that some courts have begun to use social media for official court purposes. This opinion is not intended to discourage the official use of social media by the courts in a manner that does not otherwise raise ethics concerns. Nor is this opinion intended to supplant any social media policy enacted within each judge's chambers which may govern that specific judge's internal chambers' operation. If an individual judge's personal chambers' policy is stricter than that set forth below, the individual judge's policy should prevail.

I. Ethical Implications of Social Media

The use of social media by judges and judicial employees raises several ethical considerations, including: (1) confidentiality; (2) avoiding impropriety in all conduct; (3) not lending the prestige of the office; (4) not detracting from the dignity of the court or reflecting adversely on the court; (5) not demonstrating special access to the court or favoritism; (6) not commenting on pending matters; (7) remaining within restrictions on fundraising; (8) not engaging in prohibited political activity; and (9) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate. These considerations implicate Canons 2, 3D, 4A, and 5 of the Code of Conduct for Judicial Employees, and Canons 2, 3A(6), 4, and 5 of the Code of Conduct for United States Judges. The Committee recognizes that due to the ever-broadening variety of social media forums and technologies available, different types of social media will implicate different Canons and to varying degrees. For that reason, many of the proscriptions set forth in this opinion, like those set forth in the Employees' and Judges' Code, are cast in general terms. The Committee's advice is to be construed to further the objective of "[a]n independent and honorable judiciary." Canon 1.

Social media include an array of different communication tools that can mimic interpersonal communication on the one hand, and act as a news broadcast to a larger audience on the other. For example, some social media sites can serve primarily as communication tools to connect families, friends, and colleagues and provide for sharing private and direct messages, posting of photos, comments, and articles in a tight-knit community limited by the user's security preferences. The same media,

however, can serve to broadcast to a broader audience with fewer restrictions. Similarly, some social media sites can serve as semi-private communication media depending on how they are used, or can instantly serve as a connection to a large audience. Aside from social communication sites, users also have access to others' sites where they may comment on everything from the posting of a photograph, to a legal or political argument, or to the quality of a meal at a restaurant. This type of media can implicate other concerns since the user is now validating or endorsing the image, person, product, or service. Finally, there are media where the user is personally publishing commentary in the form of blogs. The Committee recognizes that the Canons cover all aspects of communication, whatever form they may take, and therefore offers general advice that can be applied to the specific mode. In short, although the format may change, the considerations regarding impropriety, confidentiality, appearance of impropriety and security remain the same.

II. Appearance of Impropriety

Canon 2 of the Employees' Code provides: "A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Similarly, Canon 2 of the Judges' Code states that "a judge should avoid impropriety and the appearance of impropriety in all activities." The Codes forbid judges and judicial employees from using, or appearing to use, the prestige of the office to advance the private interests of others. Canon 2 therefore is implicated when an employee or judge engages in the use of social media while also listing his or her affiliation with the court. For example, the Committee has advised that a law clerk who chooses to maintain a blog should remove all references to the clerk's employment. The Committee concluded that such reference would implicate Canon 2 concerning the use of the prestige of the office and the appearance of impropriety. The same can be true for a judge if she is using the prestige of the office in some manner in social media that could be viewed as advancing the private interest of another. For example, if the judge is using the media to support a particular establishment known to be frequented by lawyers near the courthouse, and the judge identifies herself as the supporter, the judge has used her office to aid that establishment's success. Similarly, if a judge comments on a blog that supports a particular cause or individual, the judge may be deemed as endorsing that position or individual. The Committee therefore cautions judges to analyze the post, comment, or blog in order to take into account the Canons that prohibit the judge from endorsing political views, engaging in dialogue that demeans the prestige of the office, commenting on issues that may arise before the court, or sending the impression that another has unique access to the Court.

III. Improper Communications with Lawyers or Others

Another example of social media activity that raises concerns under Canon 2 is the exchange of frequent messages, "wall posts," or "tweets" between a judge or judicial employee and a "friend" on a social network who is also counsel in a case pending

before the court. In the Committee's view, social media exchanges need not directly concern litigation to raise an appearance of impropriety issue; rather, any frequent interaction between a judge or judicial employee and a lawyer who appears before the court may "put into question the propriety of the judicial employee's conduct in carrying out the duties of the office." Employees' Code, Canon 2. With respect to judges, communication of this nature may "convey or permit others to convey the impression that they are in a special position to influence the judge." Judges' Code, Canon 2B. A similar concern arises where a judge or judicial employee uses social media to comment—favorably or unfavorably—about the competence of a particular law firm or attorney. Of course, any comment or exchange between an attorney and the judge must also be scrutinized so as not to constitute an ex parte communication. At all times, the Court must be screening for potential conflicts with those she communicates with on social media, and the Canon 3C provisions which govern recusal situations may be implicated and may require analysis.

The connection with a litigant need not be so direct and obvious to raise ethics concerns. The same Canon 2 concern arises, for example, when a judge or judicial employee demonstrates on a social media site a comparatively weak but obvious affiliation with an organization that frequently litigates before the court (i.e., identifying oneself as a "fan" of an organization), or where a judge or judicial employee circulates a fundraising appeal to a large group of social network site "friends" that includes individuals who practice before the court.

IV. Extrajudicial Activities

Circumstances such as those described above also implicate Canon 4 of both the Employees' and Judges' Codes, which govern participation in outside activities. Canon 4 of the Employees' Code provides that "[i]n engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements." Canon 4 of the Judges' Code states that a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, or lead to frequent disqualification. Invoking Canon 4 of the Employees' Code, the Committee has advised that maintaining a blog that expresses opinions on topics that are both politically sensitive and currently active, and which could potentially come before the employee's own court, conflicts with Canon 4. Such opinions have the potential to reflect poorly upon the judiciary by suggesting that cases may not be impartially considered or decided. This advice would also apply to judges' use of social media. A judge would be permitted to discuss and exchange ideas about outside activities that would not pose any conflict with official duties, (e.g., gardening, sports, cooking), yet the judge must always consider whether those outside activities invoke a potentially debatable issue that might present itself to the court, or an issue that involves a political position.

V. Identification of the Judge or Judicial Employee

Canons 2 and 4 are also implicated when a judge or judicial employee identifies himself as such on a social networking site. Through self-description or the use of a court email address, for example, the judge or employee highlights his affiliation with the federal judiciary in a manner that may lend the court's prestige. This issue has previously been presented to the Committee, and it is the Committee's view that judicial employees should, at the very least, be restricted from identifying themselves with a specific judge. *See* Resource Packet, at 23 (describing a policy allowing judicial employees to identify themselves as an employee of the federal courts generally, without specifying which court or judge, as the "least restrictive" of several suggested recommendations). The Committee also advises against any use of a judge's or judicial employee's court email address to engage in social media or professional social networking. The court employee or judge should consult the court's policies on permitted and prohibited use of court email, and the court's guidance on the employee's conduct while using a court email server and court email address. Similarly, the court email address should not be used for forwarding "chain letter type" correspondences, the solicitation of donations, the posting of property for sale or rent, or the operation of a business enterprise. *See Guide to Judiciary Policy*, Vol. 15, § 525.50 ("Inappropriate personal use of government-owned equipment includes ... using equipment for commercial activities or in support of commercial activities or in support of outside employment or business activity...." This policy also prohibits use of the email system for "fund-raising activity, endorsing any product or service, participating in any lobbying activity, or engaging in any partisan political activity.")

VI. Dignity of the Court

Furthermore, Canon 4A of the Employees' Code provides that "[a] judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves." Certain uses of social media raise concerns under Canon 4A that are not within the ambit of Canon 2. For example, a judge or judicial employee may detract from the dignity of the court by posting inappropriate photos, videos, or comments on a social networking site. The Committee advises that all judges and judicial employees behave in a manner that avoids bringing embarrassment upon the court. Due to the ubiquitous nature of information transmitted through the use of social media, judges and employees should assume that virtually all communication through social media can be saved, electronically re-transmitted to others without the judge's or employee's knowledge or permission, or made available later for public consumption.

VII. Confidentiality

Canon 3D of the Employees' Code provides in relevant part that a "judicial employee should avoid making public comment on the merits of a pending or impending

action ...." Canon 3D further states that a judicial employee "should never disclose any confidential information received in the course of official duties except as required in performance of such duties, nor should a judicial employee employ such information for personal gain." Canon 3A(6) of the Judges' Code provides that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." Canon 4D(5) of the Judges' Code provides that "a judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties." Most social media forums provide at least one—and often several—tools to communicate instantaneously with anywhere from a few to thousands of individuals. Any posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations violates Canon 3D. Such communications need not be case-specific to implicate Canon 3; even commenting vaguely on a legal issue without directly mentioning a particular case may raise confidentiality concerns and impropriety concerns. Thus the Committee advises that in all online activities involving social media, the employee may not reveal any confidential, sensitive, or non-public information obtained through the court. The Committee further advises that judicial employees who are on the judge's personal staff refrain from participating in any social media that relate to a matter likely to result in litigation or to any organization that frequently litigates in court. Lastly, the Committee reminds that former judicial employees should also observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

VIII. Political Activity

Canon 5 of the Employees' Code specifically addresses political activity: "A judicial employee should refrain from inappropriate political activity." Similarly, Canon 5 of the Judges' Code states that a "judge should not ... publicly endorse or oppose a candidate for public office" or "engage in any other political activity." Judges' Code, Canon 5A(2), 5(C). In the social media context, judges and judicial employees should avoid any activity that affiliates the judge or employee to any degree with political activity. This includes but is not limited to posting materials in support of or endorsing a candidate or issue, "liking" or becoming a "fan" of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate. Furthermore, the Committee advises that while there is not an obligation for a judicial employee to search out and modify or delete endorsements or statements of political views that predate the judicial employment, the Committee recommends that if such endorsements or statements appear to be current, they be modified to clarify that they predate the judicial employment. To the extent that it is impractical or impossible to modify such previous endorsements or statements, the Committee suggests posting the following statement on the applicable website: "I have taken a position that precludes me from making further public political comments or

endorsements and this site will no longer be updated concerning these issues." For example, on some social media it may be possible to remove one's political affiliation, and replace it with the above statement, when it is impractical or impossible to remove all posts or likes that appear to be current political endorsements or statements. The Committee reminds that while Canon 5B of the Employees' Code permits certain nonpartisan political activity for some judicial employees, the Codes specify that all judges, members of judges' personal staffs, and high-level court officers must refrain from all political activity.

IX. Conclusion

In light of the reality that users of social media can control what they post but often lack control over what others post, judges and judicial employees should regularly screen the social media websites they participate in to ensure nothing is posted that may raise questions about the propriety of the employee's conduct, suggest the presence of a conflict of interest, detract from the dignity of the court, or, depending upon the status of the judicial employee, suggest an improper political affiliation. We also note that the use of social media also raises significant security and privacy concerns for courts and court employees that must be considered by judges and judicial employees to ensure the safety and privacy of the court.

While the purpose of this opinion is to provide guidance with respect to ethical issues arising from the use of social media by judges and judicial employees, the Committee also notes that social media technology is subject to rapid change, which may lead to new or different ethics concerns. Each form of media and each factual situation involved may implicate numerous ethical Canons and may vary significantly depending on the unique factual scenario presented in this rapidly changing area of communication. There is no "one size fits all" approach to the ethical issues that may be presented. Judges and judicial employees who have questions related to the ethical use of social media may request informal advice from a Committee member or a confidential advisory opinion from the Committee.

Notes for Advisory Opinion No. 112

[1] The Code of Conduct for Judicial Employees ("the Employees' Code") defines a member of a judge's personal staff as "a judge's secretary, a judge's law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge's personal staff." The term judicial employee also covers interns, externs, and other court volunteers.

November 2015

85 A.3d 682
Supreme Court of Delaware.

Tiffany PARKER, Defendant Below–Appellant,
v.
STATE of Delaware, Plaintiff Below–Appellee.

No. 38, 2013.
|
Submitted: Nov. 6, 2013.
|
Decided: Feb. 5, 2014.

Synopsis

Background: Defendant was convicted in the Superior Court, New Castle County, of second-degree assault. Defendant appealed.

Holdings: The Supreme Court, Ridgely, J., held that:

[1] evidentiary rule governing authentication of evidence was appropriate standard for determining admissibility of social media network evidence, and

[2] post on defendant's social media network page indicating her involvement in assault was sufficiently authenticated as having been authored by defendant.

Affirmed.

West Headnotes (4)

[1] **Criminal Law**
Reception and Admissibility of Evidence

The Supreme Court reviews a trial judge's evidentiary rulings for abuse of discretion.

1 Cases that cite this headnote

[2] **Criminal Law**
Discretion of Lower Court

An "abuse of discretion" occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice.

1 Cases that cite this headnote

[3] **Criminal Law**
Telecommunications

In determining admissibility of social media network evidence, trial court would make initial determination whether there was sufficient evidence that proffered evidence was what proponent claimed it to be, and if it so found, then it was up to jury to decide whether to accept or reject evidence. Rules of Evid., Rules 104, 901(b).

5 Cases that cite this headnote

[4] **Criminal Law**
Telecommunications

Post on defendant's social media profile page indicating her involvement in assault was sufficiently authenticated as having been authored by defendant; substance of post referenced physical altercation with victim, it was created on same day as altercation and referenced fight, and victim testified that she viewed defendant's post through mutual friend and that she "shared" post and published it to her own profile page. Rules of Evid., Rule 901(b).

4 Cases that cite this headnote

*682 Court Below: Superior Court of the State of Delaware in and for New Castle County, ID No. 01112001354.
Upon appeal from the Superior Court. **AFFIRMED.**

Attorneys and Law Firms

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Andrew J. Vella, Esquire, of the Department of Justice, Wilmington, Delaware, for Appellee.

Before HOLLAND, BERGER, JACOBS, and RIDGELY, Justices, and NOBLE, Vice Chancellor, constituting the Court en banc.

Opinion

RIDGELY, Justice:

Defendant-below/Appellant, Tiffany Parker, appeals from a Superior Court jury conviction of Assault Second Degree. Parker claims that the Superior Court erred in admitting statements posted on her Facebook *683 profile. The Superior Court admitted the evidence under Rule 901 of the Delaware Rules of Evidence. Parker argues that we should adopt the rule set forth in *Griffin v. State*, a Maryland Court of Appeals decision, to authenticate social media evidence. Under the Maryland approach, social media evidence may only be authenticated through the testimony of the creator, documentation of the internet history or hard drive of the purported creator's computer, or information obtained directly from the social networking site. Unless the proponent can demonstrate the authenticity of the social media post to the trial judge using these exacting requirements, the social media evidence will not be admitted and the jury cannot use it in their factual determination. Under this approach, social media evidence is only authenticated and admissible where the proponent can convince the trial judge that the social media post was not falsified or created by another user.

Conversely, the State advocates for the Texas approach, under which a proponent can authenticate social media evidence using any type of evidence so long as he or she can demonstrate to the trial judge that a jury could reasonably find that the proffered evidence is authentic. The Texas approach involves a lower hurdle than the Maryland approach, because it is for the jury—not the trial judge—to resolve issues of fact, especially where the opposing party wishes to challenge the authenticity of the social media evidence.

The Superior Court adopted the Texas approach and found that Parker's social media post was sufficiently authenticated by circumstantial evidence and by testimony explaining how the post was obtained. On appeal, Parker claims that social media evidence requires greater scrutiny than other evidence and should not be admitted unless the trial judge is convinced that the evidence has not been falsified. We disagree. We conclude that the Texas approach better conforms to the requirements of Rule 104 and Rule 901 of the Delaware Rules of Evidence, under which the jury ultimately must decide the authenticity of social media evidence. A trial judge may admit a relevant social media post where the proponent provides evidence sufficient to support a finding by a reasonable juror that the proffered evidence is what the proponent claims it to be. We find no abuse of discretion by the trial court in admitting the social media evidence in accordance with the Delaware Rules of Evidence. Accordingly, we affirm.

Facts and Procedural History

On December 2, 2011, Tiffany Parker and Sheniya Brown were engaged in a physical altercation on Clifford Brown Walk in the City of Wilmington. The disagreement was over Facebook messages regarding a mutual love interest. Felicia Johnson was driving by when she observed the confrontation and later testified that Parker appeared to be "getting the best of the pregnant girl [Brown]." Bystanders eventually separated the two, but the fight resumed when Brown returned with a knife. Bystanders again intervened, and shortly thereafter officers from the Wilmington Police Department separated the women.

Parker was indicted on one count of Assault Second Degree and one count of Terroristic Threatening. Parker argued that her actions were justified because she was acting in self-defense. The State sought to introduce Facebook entries that were allegedly authored by Parker after the altercation to demonstrate her role in the incident and discredit Parker's self-defense argument. The Facebook entries originated from Parker's Facebook account and stated:

> *684 bet tht [sic] bitch didnt [sic] think [I] was going to see her ass ... bet she wont [sic] inbox me no more, # caughtthatbitch
>
> ...
>
> ... [ctfu]. this girl is crazy. she really got these ppl [sic] thinkin [sic] that [I] was on some nut shit ... first of all she hit me first ... if you really want to put it out there since you shared i ... See more
>
> ... [I] told you go head [sic] and you inboxed [sic] me back still being disrespectful ... [I] told you say no more [sic] ... [I] seen [sic] you today ... we said our words you put your hands on me ... [I] hit you back. WE [sic] ... See more [1]

The State's exhibit depicting Parker's Facebook posts also included her picture, the name "Tiffanni Parker," and a

time stamp for each entry, stating that they were posted on December 2, 2011.[2] Brown "shared," or reposted, this Facebook post on her own Facebook page.

The State used testimony from Brown, as well as circumstantial evidence, to authenticate the Facebook entries. Over Parker's objection, the trial court admitted the Facebook post into evidence, finding that the State had sufficiently authenticated it. The court noted that there was ample Delaware case law that relied upon distinguishing characteristics to appropriately authenticate emails and handwritten letters.[3] As a result, Brown's testimony explaining how she viewed and shared Parker's post and the post itself, which contained distinctive circumstances or characteristics, satisfied Rule 901's authentication requirements. The trial court concluded that "[a]ny further inquiry was for the jury to decide."[4]

The jury acquitted Parker of the Terroristic Threatening charge and convicted her of Assault Second Degree. This appeal followed.

Discussion

[1] [2] We review a trial judge's evidentiary rulings for abuse of discretion.[5] "An abuse of discretion occurs when a court has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice ... to produce injustice."[6]

Under the Delaware Rules of Evidence, "[a]ll relevant evidence is admissible, except as otherwise provided," and "[e]vidence which is not relevant is not admissible."[7] All preliminary questions related to the admissibility of evidence are determined under Rule 104 by the trial judge.[8] *685 But where "the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[9] Nonetheless, where evidence is admitted, a party may introduce additional relevant evidence to support or discount its weight or credibility.[10]

By their nature, social media posts and other similar electronic communications are creatures of, and exist on, the Internet. Rule 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[11] Rule 901(b) provides examples of authentication that comply with the rule. In relevant part, authentication of social media evidence can include: (1) testimony from a witness who states that the evidence is what it is claimed to be,[12] (2) distinctive characteristics of the evidence itself, such as "[a]ppearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances," that can authenticate the documentary evidence,[13] or (3) evidence that shows that the documentary evidence is accurately produced through a process or system.[14] These are not the exclusive ways to authenticate social media posts.[15]

Social Media Evidence Defined

Social media has been defined as "forms of electronic communications ... through which users create online communities to share information, ideas, personal messages, and other content (as videos)."[16] Through these sites, users can create a personal profile, which usually includes the user's name, location, and often a picture of the user.[17] On many sites such as Facebook or Twitter, a user will post content —which can include text, pictures, or videos—to that user's profile page delivering it to the author's subscribers.[18] Often these posts will include relevant evidence for a trial, including party admissions, inculpatory or exculpatory photos, or online communication between users. But there is a genuine concern that such evidence could be faked or forged, leading some courts to impose a high bar for the admissibility *686 of such social media evidence.[19] Other courts have applied a more traditional standard, "determining the admissibility of social media evidence based on whether there was sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic."[20] This approach recognizes that the risk of forgery exists with any evidence and the rules provide for the jury to ultimately resolve issues of fact.

The Maryland Approach

The higher standard for social media authentication is best exemplified by the Maryland Court of Appeals' decision in

Griffin v. State. There, the state sought to introduce a post from the MySpace profile of Jessica Barber, the defendant's girlfriend, stating, "snitches get stitches."[21] In order to prove that the post was written by Barber, the state sought to authenticate the evidence using the picture of Barber, coupled with her birth date and location, displayed on her MySpace profile.[22] The state did not ask Barber to authenticate the page on the stand or introduce electronic records definitively showing that Barber had authored the post.

The Maryland Court of Appeals held that the state failed to properly authenticate Barber's post and thus did not adequately link both the profile and the "snitches get stitches" posting to Barber.[23] As the Court explained, the trial court "failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the 'snitches get stitches' posting."[24] Thus, to properly authenticate similar social media posts, the Court held that the admitting party should either (1) ask the purported creator if she created the profile and the post, (2) search the internet history and hard drive of the purported creator's computer "to determine whether that computer was used to originate the social networking profile and posting in question," or (3) obtain information directly from the social networking site to establish the appropriate creator and link the posting in question to the person who initiated it.[25] Several courts have followed the reasoning of *Griffin* out of the concern that social media evidence could be a fake, a digital alteration of an alleged creator's profile, or a posting by another using the alleged creator's profile.[26]

The Texas Approach

The alternative line of cases is best represented by a Court of Criminal Appeals of Texas case, *Tienda v. State.*[27] In *Tienda,* the state introduced into evidence the names and account information associated with three MySpace profiles that tended to indicate the defendant's knowledge of or *687 responsibility for a murder.[28] Several of the posts complained about the author's electronic monitor, which the defendant wore prior to trial.[29] On appeal, the defendant argued that the state did not properly authenticate the MySpace profile or the individual posts to attribute them to the defendant. The Court explained that "the best or most appropriate method for authenticating electronic evidence will often depend upon the nature of the evidence and the circumstances of the particular case."[30] This could include "direct testimony from a witness with personal knowledge, ... comparison with other authenticated evidence, or ... circumstantial evidence."[31] And rather than imposing a requirement that the proponent prove that the social media evidence was not fraudulent, the Texas Court explained that the standard for determining admissibility is whether "a jury could reasonably find [the] proffered evidence authentic."[32]

Ultimately, the Texas Court found that the state had sufficiently authenticated the defendant's MySpace posts and pictures. The Court explained that the combination of facts—including photos, contextual references to the defendant's life, and the posts about his ankle monitor—was circumstantial evidence "sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the [defendant]."[33] Further, the Court explained that it was the province of the jury to assess and weigh the evidence presented by the state to determine whether it was the defendant, rather than some unidentified conspirators or fraudsters, who created and maintained the MySpace pages.[34] Courts in Arizona and New York have followed the rationale of *Tienda v. State.*[35] The premise of the Texas approach is that the jury—and not the trial judge—ultimately resolves any factual issue on the authentication of social media evidence.

The Jury Should Make the Ultimate Finding on Social Media Evidence

[3] We conclude that social media evidence should be subject to the same authentication requirements under the Delaware Rules of Evidence Rule 901(b) as any other evidence. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[36] Although we are mindful of the concern that social media evidence could be falsified, the existing Rules of Evidence provide an appropriate framework for determining admissibility. Where a proponent seeks to introduce social media evidence, he or she may use any form of verification available under Rule 901—including witness testimony, corroborative circumstances, distinctive characteristics, *688 or descriptions and explanations of the technical process or system that generated the evidence in

question—to authenticate a social media post. Thus, the trial judge as the gatekeeper of evidence may admit the social media post when there is evidence "sufficient to support a finding" by a reasonable juror that the proffered evidence is what its proponent claims it to be.[37] This is a preliminary question for the trial judge to decide under Rule 104. If the Judge answers that question in the affirmative, the jury will then decide whether to accept or reject the evidence.[38]

No Abuse of Discretion in Admitting Parker's Facebook Post

[4] Applying this rule to the proceeding below, the trial court did not abuse its discretion when it admitted Parker's Facebook posts. The trial court specifically rejected the Maryland approach and adopted the Texas rule.[39] At trial, the court explained that Delaware follows the "distinguishing characteristics" rationale, noting that Delaware courts have authenticated handwritten letters from inside prison based on the nicknames of the parties involved and references to the crimes.[40] The trial court further noted that the Court of Chancery has authenticated an email through distinctive characteristics using only the sender's email address.[41] As a result, the trial court concluded that the State had adequately authenticated Parker's social media post using witness testimony and circumstantial evidence.[42]

Having applied the same rule of law that we validate today, we agree with the trial court that the post was sufficiently authenticated in accordance with Rules 104 and 901. First, the substance of the Facebook post referenced the altercation that occurred between Parker and Brown. Although the post does not mention Brown by name, it was created on the same day after the altercation and referenced a fight with another woman. Second, Brown's testimony provided further authenticating evidence. Brown testified that she viewed Parker's post through a mutual friend. Thereafter, Brown "shared" the post and published it on her own Facebook page. Collectively, this evidence was sufficient for the trial court to find that a reasonable juror could determine that the proffered evidence was authentic.[43] The trial court did not abuse its discretion in admitting Parker's Facebook post.

Conclusion

The judgment of the Superior Court is AFFIRMED.

All Citations

85 A.3d 682

Footnotes

1 State's Exhibit 5, *State v. Parker,* No. 01112001354 (Del.Super.Ct.2012).

2 *Id.*

3 *State v. Parker,* No. 1112001354, mem. op. at 4 (Del.Super.Ct. Oct. 9, 2012).

4 *Id.* at 5.

5 *Manna v. State,* 945 A.2d 1149, 1153 (Del.2008) (citing *Pope v. State,* 632 A.2d 73, 78–79 (Del.1993)).

6 *Culp v. State,* 766 A.2d 486, 489 (Del.2001) (alteration in original) (omissions in original) (internal quotation marks omitted) (quoting *Lilly v. State,* 649 A.2d 1055, 1059 (Del.1994)).

7 D.R.E. 402.

8 Rule 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of paragraph (b) of this rule. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

D.R.E. 104(a).

9 D.R.E. 104(b).

10 Rule 104(e) provides: "This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." D.R.E. 104(e).

11 D.R.E. 901(a).

12 D.R.E. 901(b)(1).

13 D.R.E. 901(b)(4).

14 D.R.E. 901(b)(9).

15 *See* D.R.E. 901(b) (providing that the "examples of authentication or identification" listed in Rule 901(b) are "[b]y way of illustration only, and not by way of limitation").

16 Honorable Paul W. Grimm et al., *Authentication of Social Media Evidence,* 36 Am. J. Trial Advoc. 433, 434 (2013) (quoting *Definition of Social Media,* Merriam–Webster, http://www.merriam-webster. com/dictionary/social% 20media (last visited Feb. 5, 2014)).

17 *See* danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship,* 13 J. Computer–Mediated Comm. 210, 213 (2007). Relatedly, many users also create fake user profiles. *See* Katharina Krombholz et al., *Fake Identities in Social Media: A Case Study on the Sustainability of the Facebook Business Model,* 4 J. Service Sci. Res. 175, 177 (2012) (noting that five to six percent of registered Facebook accounts are fake accounts).

18 *See* Grimm et al., *supra,* at 435.

19 *E.g., Griffin v. State,* 419 Md. 343, 19 A.3d 415, 423 (2011); *see also* Grimm et al., *supra,* at 441–54 (collecting cases).

20 Grimm et al., *supra,* at 441.

21 *Griffin,* 19 A.3d at 418, 423.

22 *Id.* at 418–19, 424.

23 *Id.* at 423.

24 *Id.* at 423 (quoting *Griffin v. State,* 192 Md.App. 518, 995 A.2d 791, 806 (2010), *rev'd,* 419 Md. 343, 19 A.3d 415 (2011)).

25 *Id.* 427–28.

26 *E.g., St. Clair v. Johnny's Oyster & Shrimp, Inc.,* 76 F.Supp.2d 773, 774 (S.D.Tex.1999); *People v. Beckley,* 185 Cal.App.4th 509, 110 Cal.Rptr.3d 362, 367 (2010); *State v. Eleck,* 130 Conn.App. 632, 23 A.3d 818, 825 (2011); *Commonwealth v. Williams,* 456 Mass. 857, 926 N.E.2d 1162, 1172–73 (2010).

27 358 S.W.3d 633 (Tex.Crim.App.2012).

28 *Tienda,* 358 S.W.3d at 635.

29 *Id.* at 636.

30 *Id.* at 639.

31 *Id.* at 638.

32 *Id.*

33 *Id.* at 645.

34 *Id.* at 646.

35 *E.g., State v. Assi,* 2012 WL 3580488, at *3 (Ariz.Ct.App. Aug. 21, 2012); *People v. Valdez,* 201 Cal.App.4th 1429, 135 Cal.Rptr.3d 628, 633 (2011); *People v. Clevenstine,* 68 A.D.3d 1448, 891 N.Y.S.2d 511, 514 (2009). Notably, this approach has been praised by Judge Paul Grimm, District Court Judge for the District of Maryland, and his colleagues in their recent article, *Authentication of Social Media Evidence. See generally* Grimm et al., *supra.*

36 D.R.E. 901(a).

37 Grimm et al., *supra,* at 457 (citing *Lorraine v. Markel Am. Ins. Co.,* 241 F.R.D. 534, 542 (D.Md.2007)).

38 D.R.E. 901(a); *see also* Grimm et al., *supra,* at 455–56.

39 *Parker,* mem. op. at 4–5.

40 *Id.* (citing *Smith v. State,* 902 A.2d 1119, 1125 (Del.2006)).

41 *Id.* mem. op. at 5 (citing *Paron Capital Mgmt., LLC v. Crombie,* 2012 WL 214777, at *2 (Del.Ch. Jan. 24, 2012)).

42 D.R.E. 901(b)(4).

43 Although not explicitly considered by the trial court, we note that the proffered evidence was a print out of the Facebook page that displayed a photo of Parker and listed "Tiffanni Parker" as the content's creator. While a photo and a profile name alone may not always be sufficient evidence to satisfy the requirements of Rule 901, they are certainly factors that the trial court may consider.

End of Document

New Jersey
Advisory Committee on the Code of Judicial Conduct

February 15, 2016

Advisory Opinion Concerning Social Media

Introduction

(1) Because of the prevalence of the use of social media in current social and business activity, the Advisory Committee on the Code of Judicial Conduct[1] has been asked to express guidelines for judges[2] in their use of social media. As discussed in this advisory opinion, the Code of Judicial Conduct applies to a judge's use of social media in the same manner as it would apply to other activities of the judge. Because of the nature of social media, however, its use by judges may raise ethical issues that may not be as apparent as the traditional issues that judges commonly address. The

[1]The Code of Judicial Conduct Committee and its staff counsel, Jennifer L. Scott, assisted the Advisory Committee on the Code of Judicial Conduct with this endeavor. Members of the Code of Judicial Conduct Committee were Robert O. Beck, John P. Burton, Hon. Joel Cano, Frank N. Chavez, Hon. Sandra Engel, Harvey Fruman, Michael H. Keedy, Hon. Jim Summers, Hon. James J. Wechsler, and Hon. Briana H. Zamora.

[2]This advisory opinion also applies to judicial candidates when applicable under the Code.

Committee therefore advises that judges be circumspect in their use of social media and be continually vigilant of their compliance with the requirements of the Code.

{2} The following is a list and location of the topics discussed:

Preamble to the Code of Judicial Conduct

{3} The preamble to the Code of Judicial Conduct stresses the significance of an independent, impartial, and fair judiciary to the public's confidence in our legal system. Rule 21-001(A) NMRA. It notes that judges "should maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives." Rule 21-001(B). It provides that

"[j]udges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise extreme caution in its use so as not to violate the Code." Rule 21-001(C).

Other Relevant Provisions of the Code of Judicial Conduct

{4} The Code does not specifically discuss social media other than in its preamble. Nevertheless, the Code otherwise addresses conduct pertaining to social media use in the context of its broader rules. In particular, the rules concerning independence, integrity, and impartiality; abuse of prestige of office; the impression of being in a position to influence a judge; ex parte communications; statements affecting a pending or impending case; disqualification; promoting public confidence in the judiciary; and extrajudicial activities, have bearing on a judge's use of social media. Simply put, a judge may not communicate on a social media site in a manner that the judge could not otherwise communicate. But, further clarification and guidance, along with examples, may prove helpful to judges when making decisions regarding social media use.

Definition of Social Media

{5} Social media has been defined in numerous ways, depending on its use and context. For the purposes of this advisory opinion, social media refers to "the wide array of Internet-based tools and platforms that increase and enhance the sharing of

information," the "common goal [being] to maximize user accessibility and self-publication through a variety of different formats." *See Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States, Administrative Office of the United States Courts, April 2010, at 9, *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct.

{6} Examples of social media include, but are not limited to, sites for "social and professional networking" (such as Facebook, LinkedIn, and Yelp), sites for photo and video sharing (such as Instagram and YouTube), sites for blogs, sites for micro-blogs (such as Twitter), sites for wikis (such as Wikipedia), online discussion groups and threads, and other web-based applications of this nature.[3] *Id.* at 9-12.

Traditional Communication versus Social Media Communication

{7} Social media formats raise issues different from traditional means of communication because of their ready access and interactive nature. These formats are designed in many respects to foster mass communication and engage large groups of users in open discussions or information sharing. Thus, communications that may seem to be limited in scope to the named participants are available to others, or may be re-transmitted, often without specific knowledge of at least one of the original

[3]*See* Norman H. Meyer, Jr., *Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators*, Int'l. J. for Ct. Admin., Vol. 6, No. 1, June 2014, at 3; *available at* http://www.iacajournal.org.

participants. For example, Twitter is a popular free social networking service that enables users to send and read short 140-character messages called "tweets" and permits registered users to read and re-transmit tweets.[4] Although unregistered Twitter users cannot re-transmit tweets, they still have access to Twitter.com and may read registered users' tweets.[5] Similarly, Facebook is another free popular social networking website that allows registered users to create profiles, upload photos and videos, and send public or private messages to friends, family, and colleagues. Unlike Twitter, only registered users may access facebook.com to view registered users' profile pages, uploaded photos and videos, and public messages posted on registered users' profiles. But, if a registered Facebook user fails to implement adequate privacy controls concerning his or her Facebook profile, other registered users may access and re-transmit the content without notifying the registered user.[6] For these reasons, while advisory opinions in other states have allowed judges to participate in Internet social media exchanges, they advise judges to do so cautiously.

> While judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will

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[4]*See* New User FAQs, *available at* https://support.twitter.com/articles/13920; FAQs about Retweets (RT), *available at* https://support.twitter.com/articles/77606.

[5]*See* FAQs about Retweets (RT), *available at* https://support.twitter.com/articles/77606.

[6]*See* Basic Privacy Settings & Tools, *available at* https://www.facebook.com/help/325807937506242; How to Post & Share, *available at* https://www.facebook.com/help/333140160100643.

> be scrutinized [for] various reasons by others . . . . [J]udges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.

Cynthia Gray, *Judges and social networks*, Judicial Conduct Reporter, Vol. 34, No. 3, Fall 2012, at 5, *available at* http://www.ncsc.org (quoting Tennessee Advisory Opinion 12-1, at 3-4). *See also* Kentucky Advisory Opinion JE-119 (2010), New York Advisory Opinion 08-176, and Maryland Advisory Opinion Request 2012-7 (urging judges to exercise caution in the use of social media). Additionally, the American Bar Association has recently issued an opinion noting the benefits of this technology, concluding that judges may participate in the use of social media if judges take proper care not to violate the Model Code of Judicial Conduct. *See* ABA Comm. on Ethics & Professional Responsibility, Formal Op. 462 (2013). We endorse the same approach.

Ex parte Communications and Comments about Pending Cases

{8} A typical problem that has led to the discipline of judges in other states has stemmed from communications concerning pending cases. *See Letter of Suspension and Removal from Office re Judge Michael A. Maggio*, Arkansas Judicial Discipline and Disability Commission, Case No. 14-136, as adopted by the Arkansas Supreme Court in *Judicial Discipline and Disability Comm'n v. Maggio*, 2014 Ark. 366, 440 S.W.3d 333 (recommending removal of judge from bench for various acts of

misconduct, including the posting of inappropriate comments on a public website regarding a closed adoption matter and pending divorce and public intoxication cases, as well as "gender, race, and sexuality related statements"); *In re Bass*, Public Reprimand (Georgia Judicial Qualifications Commission March 18, 2013) (suspending judge for, among other violations, engaging "in a private Facebook chat with a woman who contacted [the judge] on behalf of her brother about a DUI matter" that ultimately came before the judge); *In the Matter of Allred*, Reprimand and Censure (Alabama Court of the Judiciary March 22, 2013) (reprimanding and censuring judge for making comments on his Facebook page about contempt proceedings against a particular lawyer and for sending an email to all state judges about the proceedings); *In the Matter of Senior Judge Edward W. Bearse*, Public Reprimand (Minnesota Board on Judicial Standards Nov. 20, 2015) (reprimanding a senior judge, a position similar to a judge pro tempore in New Mexico, for posting comments on pending cases on his Facebook page because, among other reasons, the comments undermined the judge's appearance of lack of impartiality and, in two cases, the posts impaired the fairness of the cases); *In the Matter of Fowler*, Public Admonishment (West Virginia Judicial Investigation Commission March 14, 2014) (admonishing judge for "sexually suggestive" Facebook posts and other improper communications with a woman appearing before him in pending proceedings); Public Reprimand of Terry (North Carolina Judicial Standards Commission April 1, 2009)

(reprimanding judge for "friending" a party's lawyer in a custody proceeding before the judge and communicating about the proceeding with the lawyer through Facebook posts). *But see In re Hon. Michelle Slaughter*[7] (Special Court of Review of Texas Sept. 30, 2015) (dismissing admonishment of Texas State Commission on Judicial Conduct for posting of comments on a Facebook page about a high-profile case during trial that, although "amount[ing] to an error in judgment," did not violate the Texas Code in the absence of evidence that the "extrajudicial statements would suggest to a reasonable person the judge's probable decision on any particular case or that would cause reasonable doubt on the judge's capacity to act impartially as a judge" as required by the canons pertaining to comments on pending cases and impartiality).

{9} Rule 21-209(A) NMRA states that a "judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . . ." Rule 21-210(A) NMRA prohibits a judge from making "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." Social media

[7]The Committee believes that the outcome of this case is inconsistent with judicial disciplinary commission activity pertaining to social media use in other states.

sites, like Twitter and Facebook, fall squarely within these prohibitions, and they provide an easy means to communicate with not only a single individual but with many others often beyond the scope of the original intent. A Tweet or Facebook post intended for a limited audience may likely be read and re-transmitted by unintended and/or unimagined parties.

{10} The interactive nature of social networking sites presents an additional issue under Rule 21-209. Social networking sites generally enable others with access to the social media webpage to post content (statements, photos, videos, or website links) that are then available for anyone with access to the site to view. If content concerning a pending case is posted on a judge's social media webpage or on a site that a judge accesses, the judge may then receive an ex parte communication that may be prohibited by Rule 21-209. A judge has the obligation under Rules 21-209(A) and 21-210(A) to avoid such communications.[8]

[8] Twitter and Facebook currently provide security and privacy features that may resolve this issue. At this time, Twitter allows users the ability to limit who can see a user's tweets. *See* About Public and Protected Tweets, *available at* https://support.twitter.com/articles/14016. The default setting for Twitter user pages is public (*i.e.* a user's tweets are visible to anyone, regardless whether they have a Twitter account). A user may change this default feature and protect one's tweets (*i.e.* tweets may only be visible to a user's approved Twitter followers), by doing the following: (1) go to the user's security and privacy settings, (2) scroll down to the 'Tweet privacy' section and check the box next to 'Protect my Tweets', and (3) click the blue 'save' button at the bottom of the page, which will prompt the user to enter his or her password to confirm the change. *See* Protecting and unprotecting your Tweets, *available at* https://support.twitter.com/articles/20169886.

Facebook offers slightly more privacy features. Judges using Facebook should

{11} If a judge is unable to avoid such an ex parte communication that relates to the substance of a pending case, the judge has the obligation to disclose the communication to the parties and provide them the opportunity to respond. *See* Rule 21-209(B) ("If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.").

{12} An additional aspect of the ex parte communications prohibition of Rule 21-209 concerns a judge's investigation of facts in a pending case. Rule 21-209(C) provides that a judge "shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." The ease of obtaining factual information from Internet sites has led to discipline of judges in other states. *See e.g.*, Public Reprimand of Terry (North

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become aware of the privacy settings Facebook offers. They may currently do so by the following: (1) click the blue bottom arrow in the upper-right corner of any Facebook page; (2) select 'Settings' from the dropdown menu; (3) select 'Privacy' on the left; and (4) click a setting (*e.g.* 'Who can see your future posts?'; 'Who can send you friend requests?'; or 'Limit the audience for posts you've shared with friends of friends or Public?'). *See* Basic Privacy Settings & Tools, *available at* https://www.facebook.com/help/325807937506242. Familiarity with these safety and privacy features may help judges avoid many ex parte communications.

Carolina Judicial Standards Commission April 1, 2009) (reprimanding judge in part for obtaining information about a party from a "Google" site).

{13} Because social media sites provide the ability to communicate broadly, some judges have used these sites to disseminate information to the public concerning the judiciary. When this type of information relates to a pending or impending case, however, a judge is prohibited from making a statement "that might reasonably be expected to affect the outcome or impair the fairness" of the case. Rule 21-210(A).

New Mexico Judicial Standards Commission's Position on Ex parte Communications and Comments about Pending Cases

{14} The New Mexico Judicial Standards Commission issued an informal caution to a judge after the judge allegedly made public and ex parte comments on a social networking site about a pending case that included a comment about the jury's verdict. *See* New Mexico Judicial Standards Commission Annual Report, 2013, p. 41.

Use of Social Media Blogs by Judges

{15} Rules 21-209(A) and 21-210(A) also pertain to a judge's maintaining of a blog. A judge may seek to inform the public about court procedures, even in connection with a pending case. Rule 21-210(D). *See also* Rule 21-102 NMRA, Comment 6 (allowing a judge, acting in a manner consistent with the Code, to "initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice"). In providing such

information, however, it would be inappropriate for the judge to express an opinion that may have bearing on the judge's impartiality or fairness or that may be related to the merits of any pending or impending case. Because of the public nature of most blogs, it is even more critical for judges to remain cognizant of Rules 21-209(A) and 21-210(A). To the extent that a judge may be expressing opinions concerning non-legal matters, the judge must act in conformity with the dignity of judicial office and avoid activity that will lead to frequent disqualification. *See* Rule 21-102 (stating that a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . ."); *see also* Rule 21-301(B) NMRA (prohibiting a judge from engaging in extrajudicial activities "that will lead to frequent disqualification of the judge"). *See* Washington Ethics Advisory Committee Opinion 09-05 (stating that a judge may blog about "the law, the legal system and the administration of justice" within the parameters of the Code of Judicial Conduct).

Impression that a Person is in a Position to Influence the Judge

{16} Rule 21-204(C) NMRA states that a judge "shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." Social media sites, such as Facebook, permit a user to access the information posted by other users and thereby interconnect their posted information. On Facebook, a user may "friend" another user in order to make this interconnection.

Users may also "like" postings of others in order to express approval or support of a posting by another user.

Advisory Opinions from other States – Judges "Friending" Attorneys

{17} The question has arisen in advisory opinions of other states whether judges may be Facebook "friends" with attorneys who appear, or may appear before them in court. The advisory opinions have reached opposite results.

{18} The strict view, as expressed by advisory committees in Florida Advisory Opinions 2009-20 and 2010-6, Massachusetts Advisory Opinion 2011-6, and Oklahoma Advisory Opinion 2011-3, focuses on the impression that can be conveyed when judges and lawyers are "friends" even if the word is not used in its traditional way. *See* Gray, *supra* at 5. The Oklahoma advisory opinion stresses that the "public trust in the impartiality and fairness of the judicial system is so important that it is imperative to err on the side of caution . . . ." OK Jud. Ethics Op. 2011-3, ¶ 9.

{19} Advisory opinions of other states take a less restrictive position. *See* Gray, *supra* at 5-6. *See* Arizona Advisory Opinion 14-01; California Advisory Opinion 66 (2010); Kentucky Advisory Opinion JE-119 (2010); Maryland Advisory Opinion 12-1; New York Advisory Opinion 08-176; Ohio Advisory Opinion 2010-07; Utah Informal Advisory Opinion 12-1.

{20} Generally, the less restrictive position recognizes the different, non-traditional meaning of "friend" on a social media site, as well as the fact that even a judge's

professional or social friends may not be in a position to influence a judge. *See* Gray, *supra* at 5-6. The advisory opinions adopting this view consider the question to depend on the particular facts and circumstances. *Id.* By way of example, the California committee set forth four relevant factors: (1) "[t]he nature of the social networking site," (2) "[t]he number of "friends" on the page," (3) "[t]he judge's practice in determining whom to include," and (4) "[h]ow regularly the attorney appears before the judge." CA Judges Assoc. Jud. Ethics Comm. Op. 66, at 8.

{21} This Committee agrees with the less restrictive approach. Given the ubiquitous use of social networking, the mere fact that a judge and an attorney who may appear before the judge are linked in some manner on a social networking site does not in itself give the impression that the attorney has the ability to influence the judge. Other facts are necessary in order to reasonably reach such a conclusion. The factors discussed in the California advisory opinion, as well as others, may be helpful in determining whether there is a reasonable impression, or whether the judge has permitted the impression, that the attorney is in a position to influence the judge.

{22} Professional networking sites, such as LinkedIn, also require a similar analysis. Use of these types of sites carry the same risk of creating an impression that someone is in a special position to influence the judge. As with Facebook, some states have specifically addressed this type of site in ethics opinions. Florida, for example, sees no distinction between LinkedIn and Facebook and has taken a strict approach

prohibiting judges from adding those lawyers who may appear before them as "connections" on the site. *See* FL Sup. Ct. Jud. Ethics Advisory Comm. Op. 2012-12. Utah, on the other hand, takes a more permissive approach and appears to allow judges to maintain a LinkedIn profile and possibly include lawyers who may appear before the judge as "connections" depending on the specific circumstances. *See* Utah Informal Advisory Opinion 2012-1. But, although Utah implicitly appears to permit a judge to "connect" with a lawyer who may appear before the judge, the judge may not "recommend" or endorse the lawyer on LinkedIn if the lawyer regularly appears before the judge. *Id.* Florida's opinion does not address the difference between "connecting" with a lawyer versus "recommending" or "endorsing" a lawyer.

{23} Again, we take a similar approach as that of Utah and recognize the value of professional networking sites, but urge judges to exercise the same caution as that exercised in the use of all social networking sites. And, although a site may be deemed "professional," we caution judges that this label does not automatically make the site permissible or advisable.

Abuse of the Prestige of Judicial Office

{24} Rule 21-103 NMRA provides that a judge "shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." Professional and social networking sites, such as LinkedIn, Facebook, Twitter, and Yelp, raise concerns about the potential abuse of the prestige

of judicial power. With LinkedIn, for example, if a judge "recommends" or "endorses" someone, this act may be considered akin to a letter of recommendation, expressing favor toward that individual over others, and requesting that someone act upon that favor. With Facebook, a judge may be inadvertently advancing the views of attorneys and parties by "liking" or commenting on other users' posts. Similarly, with Twitter, a judge may also be inadvertently affecting the views of attorneys and parties by re-tweeting tweets made by users. With Yelp[9], a judge may be inadvertently advancing the economic interests of a restaurant upon giving his or her review. Judges must be mindful of these activities and not make any statements or comments that would violate Rule 21-103 or any other provision of the Code.

"Friending" and "Liking"

[25] As previously discussed, the use of the word "friend" on social media is different from the traditional meaning of the word. The same is true for the word "like." In the social media context, "friending" and "liking" are methods of exchanging, both by sending and receiving, information. For example, on Facebook, a person may "friend" a user to obtain access to the user's "news feed" and "profile," which includes the ability to "like" and comment on a user's posts. A person may "like" a user's page to access the page's information and allow it on his or her own

[9]Yelp is a website connecting users with businesses, allowing for the sharing of opinions and reviews. *See* http://www.yelp.com/factsheet.

"news feed." Merely "friending" a person on Facebook or "liking" a particular page, does not necessarily mean the two are friends in the traditional sense or that anyone actually likes, in the traditional way, the user's posts. In this manner, "friending," "liking," or subscribing to a particular page or posting may not be seen as an endorsement. Of course, judges are cautioned that in some circumstances those activities could be construed as such.

{26} Judges should look to the nature of the social media sites they are using to determine the meaning of the terms used on each particular site and ensure that their participation on the site is in compliance with the Code. A judge should monitor the judge's social media activity in the same manner as the judge monitors the judge's other activities and behaviors. Indeed, a judge should engage in the same deliberative analysis process with regard to potential violations of the Code when deciding whether to engage in social media use as the judge would engage with regard to the judge's other activities and behaviors.

Ownership of Social Media Activity, including the Use of Aliases, Pseudonyms, or Surrogates

{27} If a judge decides to participate in social media use, the judge must take ownership of his or her use. Typically, a social media user will adopt a user name for the social media site. There is no requirement that a user provide the user's correct identity. Thus, a judge using social media may do so without disclosing the judge's true name by using an alias or a pseudonym. When doing so, however, the judge's

actions are nonetheless subject to the requirements of the Code. The judge must not act in a manner that undermines the dignity of judicial office or would conflict with the Code, even if the judge's identity may not be readily apparent. That is to say, the judge may not hide behind an alias or pseudonym. *See Judicial Discipline and Disability Comm'n v. Maggio*, 2014 Ark. 366, 440 S.W.3d 333 (removing judge from bench for improper comments and misconduct on a public website under a pseudonym). In addition, a judge must not ask others, such as family members, friends, or staff, to post or share information for them that they otherwise would not be allowed to post.

Supervisory Responsibility for Court Staff

{28} Rule 21-212(A) NMRA instructs a judge to "require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations" under the Code of Judicial Conduct. As a result of Rule 21-212(A), a judge's supervisory duties include ensuring that court staff do not participate in social networking that would undermine the judge's responsibilities. Examples of such activity include engaging in social media exchanges that either involve ex parte communications or statements concerning pending or impending cases.

Promoting Confidence in the Judiciary

{29} Rule 21-102 provides that a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." As a result, a judge who uses social media must be mindful of the dignity of judicial office and the impact the judge's personal activities may have on the public's view of the judiciary. When assuming the position of judge, an individual accepts restrictions upon his or her behavior in order to comply with the ethical requirements of the office. *See* Rule 21-102, Comment 2 (stating that a judge "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code and should do so freely and willingly"). In a judge's use of social media, it would therefore be improper for the judge to include or allow material (such as pictures, videos, or linked material) that could call into question the dignity of the judge and the judicial office. *See Letter of Suspension and Removal from Office re Judge Michael A. Maggio*, Arkansas Judicial Discipline and Disability Commission, Case No. 14-136, as adopted by the Arkansas Supreme Court in *Judicial Discipline and Disability Comm'n v. Maggio*, 2014 Ark. 366, 440 S.W.3d 333 (recommending removal of judge from bench for various acts of misconduct that undermined public confidence in the judiciary, including the posting of inappropriate "gender, race, and sexuality related statements"

on a public website). In general, a judge may identify himself or herself as a judge when using social media unless doing so would impair the judge's obligations under any provision of the Code of Judicial Conduct.

Extrajudicial Activity

{30} Judges are encouraged to participate in community activities, provided that their involvement does not undermine the judge's independence, integrity, or impartiality; does not create an appearance of impropriety; and does not improperly lend the prestige of judicial office. *See* Rule 21-001(A),(B); Rule 21-103; Rule 21-301. To the extent that a judge's extrajudicial activities involve social networking, the restraints of the Code of Judicial Conduct apply.

{31} Extrajudicial activities frequently involve a judge's serving as an officer, director, or member of a charitable, educational, or non-profit organization. *See* Rule 21-307(A) NMRA (allowing a judge to participate in activities sponsored by certain charitable, educational, and non-profit organizations). Such organizations, or individuals associated with them, may participate on social networking sites in connection with the purposes or operations of the organizations. Judges associated with such organizations must scrutinize this social media usage to avoid situations in which the judge's independence, integrity, and impartiality or the judge's official position may be compromised. By way of example, an organization in which a judge is a director, may be using social media to raise funds. Although the judge may be

identified as a director of the organization, it would be improper for it to appear that the judge was soliciting funds for the organization. *See* Rule 21-307(A)(2) (limiting the manner in which a judge may solicit funds for a charitable, educational, or non-profit organization); Rule 21-307, Comment 4 (stating that it is permissible for a judge's name to appear on an organization's letterhead for solicitation of funds as long as the judge is not personally soliciting funds, but that the judge's title may not appear on the letterhead for any purpose). *See* Private Reprimand of a Justice of the Peace (Texas State Commission on Judicial Conduct April 23, 2013) (reprimanding judge for soliciting funds for a non-profit corporation by allowing the non-profit to send out a letter that included the judge's name and position encouraging supporters to buy raffle tickets, contacting a state senator to secure grant funding, and soliciting public participation through the use of Facebook and the non-profit's website); Private Warning and Order of Additional Education of a Municipal Court Judge (Texas State Commission on Judicial Conduct Aug. 23, 2012) (issuing a private warning to judge for organizing a charitable fundraiser under circumstances in which judge was aware his name and position were being used to promote, sell tickets, and solicit funds for the organization, and his involvement was apparent from numerous Facebook posts). In addition, an organization's social networking site could draw postings that could bear upon subject matter or pending or impending cases that could infringe upon the judge's impartiality.

Disqualification after a Judge's Use of Social Media

{32} Rule 21-211 NMRA requires a judge's disqualification "in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Depending upon the specific circumstances, a judge's social media participation could lead to a judge's disqualification. *See Domville v. State*, 103 So.3d 184 (Fla. Dist. Ct. App. Sept. 5, 2012) (affirming grant of criminal defendant's motion to disqualify judge who was a Facebook "friend" with prosecutor in case); *Chace v. Loisel*, 170 So.3d 802 (Fla. Dist. Ct. App. Jan. 24, 2014) (holding that judge's initiating ex parte communications with a party by sending a Facebook "friend" request that the party did not accept, were sufficient grounds for disqualification by creating a well-founded fear in the party's mind that the party would not receive a fair trial). *But see In re Hon. Michelle Slaughter* (Special Court of Review of Texas Sept. 30, 2015) (dismissing admonishment of judge who was disqualified from high-profile criminal case after Facebook postings).

{33} There are circumstances, however, in which Facebook "friendships" have not resulted in a judge's disqualification. *See State v. Forguson*, 2014 WL 631246 (Tenn. Crim. App. Feb. 18, 2014) (holding that there was not a sufficient showing of proof that trial judge could not be impartial as "thirteenth juror" when trial judge was Facebook "friend" of confidential informant and the record did not show the length of the Facebook relationship or the extent or nature of the interactions); *State v.*

Madden, 2014 WL 931031 (Tenn. Crim. App. March 11, 2014) (holding that criminal defendant failed to establish bias of trial court judge although judge had numerous community ties and a Facebook connection with one of the State's witnesses). *Youkers v. State* is an example of the steps a judge should take to avoid disqualification when faced with ex parte communications on a social media site (400 S.W.3d 200 (Tex. Ct. App. May 15, 2013)). In that case, the trial judge was a Facebook "friend" with the father of a criminal defendant's girlfriend. According to the judge, the extent of the relationship between the judge and the father was the fact that they ran for office at the same time, nothing more. The father sent the judge a Facebook message requesting leniency for the defendant. The following describes the actions taken by the judge in response to the father's message:

> The judge responded online formally advising the father the communication was in violation of rules precluding ex parte communications, stating the judge ceased reading the message once he realized the message was improper, and cautioning that any further communications from the father about the case or any other pending legal matter would result in the father being removed as one of the judge's Facebook "friends." The judge's online response also advised that the judge was placing a copy of the communications in the court's file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required.

Id. at 204. The Texas Court of Appeals concluded that there was no evidence that the judge and the father had a relationship that would "influence the judge and lead to bias or partiality" and that the judge had fully complied with the procedures for

handling ex parte communications as recommended by the Texas Committee on Judicial Ethics. *Id.* at 206-207.

Political Campaigns and Activities

{34} The Code of Judicial Conduct permits judges to engage in certain campaign and political activity, particularly when a judge is a candidate for judicial office. Non-judge judicial candidates are also subject to the rules of the Code with respect to campaigns for judicial office. *See* Rule 21-003(O) NMRA (defining a "judicial candidate" to include "any person" seeking selection for or election to judicial office).

{35} Rule 21-400 NMRA precludes a judge from engaging in political or campaign activity "that is inconsistent with the independence, integrity, or impartiality of the judiciary." Rule 21-402(A)(1)(a) NMRA requires a judicial candidate to "act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary."

{36} An election campaign will frequently include a website or social media page regarding the campaign and the candidate that also includes a fundraising effort. Such sites are typically interactive and enable the public to access the sites and post comments. They also enable the public to make campaign contributions. Because of the interactive nature of such sites, there is potential for non-parties to post comments on pending cases. Such postings may lead to the appearance that the judge is participating in ex parte communications or statements concerning pending or

impending cases contrary to Rules 21-209(A) and 21-210(A). A judge must guard against such an appearance. If an incident of this nature does occur, the judge must take appropriate remedial action as required under the Code.

{37} A judge accepting or expending funds in excess of $1000 in a political campaign must form a campaign committee for the campaign. Rule 21-402(A)(1)(e) NMRA; Rule 21-404(A) NMRA. A campaign social media site maintained by a campaign committee may present a buffer for the judge as opposed to a site maintained by the judge. Nevertheless, a judicial candidate retains responsibility to "review and approve the content of all non-financial campaign statements and materials produced by the candidate or his or her campaign committee." Rule 21-402(A)(1)(c). A committee maintaining a social media site must vigilantly scrutinize the site to avoid any appearance that the judge is receiving ex parte communications and/or participating in improper communications.[10]

{38} The question remains as to the degree in which a campaign committee that maintains a social media site may act to fully insulate the judge. Specifically, the question is whether a committee must inform the judge of an improper communication that has been made on the site. If the judge has no knowledge of a communication and the communication can be removed without comment, the

[10]A judge may also delegate responsibility to a third person other than a campaign committee to maintain a social media site, in which event, the judge would continue to have full responsibility for all aspects of the site.

committee can arguably remove the communication in its maintaining of the site. On the other hand, if the communication necessitates a response, Rule 21-402(A)(1)(c) requires a judge to approve the content of statements from the judge's campaign committee, which would include those made on a social media site. The judge, in turn, may be required to notify the parties of such a communication from a third-party as an inadvertent ex parte communication under Rule 21-209(B).

(39) The content of a social media site maintained by a campaign committee, and any social media communications on behalf of a campaign committee or the judge, must maintain the dignity demanded of judicial office. Furthermore, communications may not involve any activity not permitted by the judge. *See* Rule 21-402(A)(1)(d) (requiring a judicial candidate to "take reasonable measures to ensure that other persons do not undertake" actions on behalf of the candidate that the candidate or a campaign committee may not take under the Code). By way of example, a site may not endorse or solicit funds for another candidate for public office because a judge may not take such action under Rule 21-401(C)(2)(a), (4). Similarly, a judge, or anyone acting on behalf of the judge, may not use a social media site to express public support for another candidate for public office, even if the judge is also currently a candidate. *See* Rule 21-401(C)(2)(a) (prohibiting a judge from publicly endorsing a candidate for public office); Rule 21-402(A)(2)(b), (c), and (C) (prohibiting a candidate from engaging in behaviors or activities that are prohibited

by judges under Rule 21-401(C)(2) and prohibiting a candidate from soliciting funds for another candidate or a political organization, or making a contribution to another candidate subject to certain exceptions). *But see* Rule 21-402(C) (providing that "judicial candidates may, however, run for election as part of a slate of judicial candidates and may participate in joint fundraising events with other judicial candidates"). Some social media sites provide the opportunity for users to indicate their approval or support for the site of another. A judge's communication of approval or support for another candidate's social media site has the effect of publicly communicating the judge's support for the candidate, an action generally impermissible under the Code.

{40} A judicial campaign social media site will commonly include a fundraising component. Fundraising for a judicial campaign has strict restrictions. "Candidates shall not personally solicit or personally accept contributions for their own campaigns. Nor shall candidates solicit personally, or through campaign committees, contributions for the campaigns of other candidates or offices." Rule 21-404(A) NMRA. A judicial candidate may not personally receive any contributions and must refrain from seeking to discover who has contributed to the candidate's campaign. Rule 21-404(A); Rule 21-402(A)(2)(a). A campaign committee "may solicit and accept reasonable campaign contributions" on behalf of a judicial candidate subject to certain restrictions. Rule 21-404(A). In particular, a campaign committee may not

knowingly solicit a contribution from a litigant with a case pending before the judicial candidate. Rule 21-402(E). A committee may not disclose identifying information concerning contributions to the judicial candidate. *Id.*

(41) As a result of these restrictions, a judicial candidate who maintains a social media site may not engage in fundraising on the site. Any financial contributions must be donated directly to the candidate's campaign committee. A campaign committee may use a social media site to raise funds, but it must seek to avoid soliciting contributions from litigants in pending cases and must scrutinize contributions to avoid accepting such contributions. The judicial candidate must ensure that his or her campaign committee is complying with these restrictions. Rule 21-404(A). The committee, however, must avoid sharing fundraising results with the judicial candidate, and the candidate must avoid accessing fundraising information on the site.

Conclusion

(42) With the popularity of social media, judges may wish to use it for personal, campaign, or professional purposes. But, judges should be mindful that many provisions of the Code of Judicial Conduct could be compromised. Because of the potential pitfalls and its evolving nature, judges should be cautious in using social media and constantly monitor their use for compliance with the Code.

James J. Wechsler, Chair

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RED FLAGS IN WORKERS COMPENSATION CLAIMS THAT CAUSE INVESTIGATION

1. There are no witnesses to the injury or the only witnesses are the claimant's "close" co-workers.
2. The claimant and witness statements offer conflicting information.
3. The report of the injury is not timely.
4. The accident report, statements and other documents contain numerous cross-outs, white out, erasures or are incomplete.
5. The claimant cannot recall specific details about the accident.
6. The injured worker is a new employee.
7. The claimant has a poor attendance record at work.
8. The claimant has a history of discipline issues.
9. The accident occurs immediately before or after a vacation.
10. The accident occurs immediately prior to an employee's retirement.
11. The employee is injured prior to a strike, company layoff, termination or the employer closing or relocating the business.
12. The employee is injured after giving notice.
13. The employee is injured after receiving a disciplinary action, demotion, being passed over for promotion or being placed on probation.
14. The claimant has problems with workplace relationships.
15. The claimant has a history of reporting subjective claims or has more than one claim at a time.
16. The claimant's job history reflects a series of jobs held for relatively short periods of time.
17. The claimant's alleged injury relates to a pre-existing health problem.
18. The claimant is involved in hobbies, sports home improvement or auto repair activities.
19. The claimant has a part-time job that is labor intensive, i.e. building outdoor decks, installing tile, etc.
20. The injury occurs on a Friday but is not reported until the following Monday, or the injury happens early Monday morning or at the beginning of a weekly shift.
21. The incident report and the medical evaluation offer conflicting information.
22. The claimant refuses or delays treatment to diagnose the injury.
23. The claimant is difficult to reach- won't come to the telephone, is sleeping and can't be disturbed or is never home.
24. The claimant misses physical therapy, occupational therapy or other medical appointments.
25. The claimant provides a telephone number but doesn't live at the address associated with it.
26. The claimant provides his friends, parents or other family members address or a hotel or post office box.

27. The claimant's family doesn't know anything about the claim or they are extremely helpful to the point of the information sounding rehearsed.
28. The claimant is involved in domestic litigation.
29. The claimant is having financial difficulties.
30. Tips or anonymous information from co-workers, relatives or neighbors suggest that the claimant's injuries are exaggerated or not legitimate.
31. The claimant's lifestyle is incompatible with his known income.
32. The claimant's family members are on workers' comp or have a history of claims or lawsuits.
33. The claimant's injuries are subjective (soft-tissue injuries, phantom pain, emotional injuries, etc.).
34. The claimant changes physicians frequently.
35. The claimant is healthy, tanned or sunburned.
36. The claimant and other workers from the same employer use the same attorney, doctor, chiropractor or clinic.
37. The claimant is familiar with the claims handling protocol and workers comp in general.

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Discovery and Preservation of Social Media Evidence

By Margaret (Molly) DiBianca

The ubiquitous nature of social media has made it an unrivaled source of evidence. Particularly in the areas of criminal, personal-injury, employment, and family law, social media evidence has played a key role in countless cases. But the use of social media is not limited to these practice areas. Businesses of every size can be affected by social media – both in the duty to preserve social media content and in the desire to access relevant social media evidence in litigation.

The Duty to Preserve Social Media Evidence

Data residing on social media platforms is subject to the same duty to preserve as other types of electronically stored information (ESI). The duty to preserve is triggered when a party reasonably foresees that evidence may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve. Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it.

As an initial matter, social media content should be included in litigation-hold notices instructing the preservation of all relevant evidence. Once the litigation-hold notice has been issued, parties have available to them a number of ways to preserve social media data, depending on the particular platform or application at issue.

Methods of Preservation

Facebook offers the ability to "Download Your Info." With just one click of the mouse, users can download a zip file containing timeline information, posts, messages, and photos. Information that is not available by merely logging into an account also is included, such as the ads on which the user has clicked, IP addresses that are logged when the user accesses his or her Facebook account, as well as other potentially relevant information.

Twitter offers a similar, although somewhat limited, option. Twitter users can download all Tweets posted to an account by requesting a copy of the user's Twitter "archive." Twitter does not, however, offer users a self-serve method of obtaining other, non-public information, such as IP logs. To obtain this additional information, users must request it directly from Twitter by sending an e-mail to privacy@twitter.com with the subject line, "Request for Own Account Information." Twitter will respond to the e-mail with further instructions.

Although these self-help methods can be an excellent start, they do not address all possible data. Therefore, it may be prudent to employ the assistance of a third-party vendor in order to ensure complete preservation. CloudPreservation and X1 Social Discovery are two examples of commercially available tools that are specifically designed for archiving and collecting social media content.

Consequences of Failing to Preserve

Regardless of the method employed, preservation of social media evidence is critically important and the consequences of failing to preserve can be significant. In the worst case, both counsel and client may be subject to sanctions for a failure to preserve relevant evidence. In the first reported decision involving sanctions in the social media context, *Lester v. Allied Concrete Co.*, No. CL08-150 (Va. Cir. Ct. Sept. 01, 2011), *aff'd*, No. 120074 (Va. Ct. App. Jan. 10, 2013), the court sanctioned both the plaintiff and his counsel based, in large part, on its determination that they had engaged in spoliation of social media evidence. In that case, the lawyer told his paralegal to make sure the plaintiff "cleaned up" his

Facebook page. The paralegal helped the plaintiff to deactivate his page and delete 16 pictures from his account. Although the pictures were later recovered by forensic experts, the court found that sanctions were warranted based on the misconduct.

In contrast to *Lester*, a federal court in New Jersey imposed a significantly less severe remedy for the removal of Facebook posts. In *Katiroll Company, Inc. v. Kati Roll and Platters, Inc.*, No. 10-3620 (GEB) (D.N.J. Aug. 3, 2011), the court determined that the defendant committed technical spoliation when he changed his Facebook profile picture, where the picture at issue was alleged to show infringing trade dress. Because the defendant had "control" over his Facebook page, he had the duty to preserve the photos.

Because the photos were relevant to the litigation, their removal was "somewhat prejudicial" to the plaintiff. Instead of harsh monetary or evidentiary sanctions though, the court ordered a more practical-driven resolution. Specifically, the court ordered the defendant to coordinate with the plaintiff's counsel to change the picture back to the allegedly infringing picture for a brief time during which the plaintiff could print whatever posts it believed to be relevant.

Critical to the court's decision not to award sanctions was its finding that the plaintiff had not explicitly requested that the defendant preserve his Facebook account as evidence. The court concluded, instead, that it would not have been immediately clear to the defendant that changing his Facebook profile picture would constitute the destruction of evidence. Thus, any spoliation was unintentional. This decision supports the idea that counsel should consider issuing a litigation-hold notice to opposing parties, as well as to one's own client.

Even inadvertent negligence for which sanctions are not warranted, can result in the loss of potentially relevant social media evidence. For example, in *In re Pfizer Inc. Securities Litigation*, 288 F.R.D. 297 (S.D.N.Y. Jan. 8, 2013), the plaintiff-shareholders sought sanctions against Pfizer for failing to preserve data from "e-rooms." The "e-rooms" were internal collaboration applications maintained by the company for use by employees in sharing documents and calendars, archiving e-mails, and communicating via discussion boards and instant messaging. Although the company had preserved (and produced) a tremendous amount of ESI, it had failed to preserve the data associated with the relevant e-rooms.

The court took issue with the scope of Pfizer's litigation-hold measures because they did not include e-rooms. Although documents and information included in the e-rooms were likely also maintained elsewhere and had likely been preserved and produced, the deletion of the e-rooms had resulted in the loss of discoverable information concerning the manner in which the employees internally organized information.

The court found that this information was relevant because it would allow the plaintiffs to draw connections and understand the narrative of events in a way "not necessarily afforded by custodial production." Thus, the court concluded, the company breached its duty to preserve because the scope of its litigation hold did not include the e-rooms. Sanctions, however, were not warranted because the conduct was merely negligent and the plaintiffs had not shown that any lost data was, indeed, relevant to their claims.

Preservation in a "BYOD" World

One question that remains unanswered relates to the obligation of a company to preserve the potentially relevant social media content of its employees. In *Cotton v. Costco Wholesale Corp.*, No. 12-2731 (D. Kan. July 24, 2013), the court denied the employee-plaintiff's motion to compel text messages sent or received by employees on their personal cell phones, finding that the employee had failed to show that the employer had any legal right to obtain the text messages. In other words, the phones and the data they contained were not in the "possession, custody, or control" of the employer. This recent discussion is one of the first of its kind and observers will have to wait to see whether the approach is adopted by other courts in cases to come.

The Discoverability of Social Media

Preservation of social media evidence, of course, is only one part of the process. Parties will want to obtain relevant social media evidence as part of their informal and formal discovery efforts. Although some courts continue to struggle with disputes involving such efforts, discovery of social media merely requires the application of basic discovery principles in a somewhat novel context.

No Reasonable Expectation of Privacy

The user's right to privacy is commonly an issue in discovery disputes involving social media. Litigants continue to believe that messages sent and posts made on their Facebook pages are "private" and should not be subject to discovery during litigation. In support of this, litigants claim that their Facebook pages are not publicly available but, instead, are available only to a limited number of designated Facebook "friends."

Courts consistently reject this argument, however. Instead, courts generally find that "private" is not necessarily the same as "not public." By sharing the content with others – even if only a limited number of specially selected friends – the litigant has no reasonable expectation of privacy with respect to the shared content. Thus, the very purpose of social media – to share content with others – precludes the finding of an objectively reasonable expectation that content will remain "private." Consequently, discoverability of social media is governed by the standard analysis and is not subject to any "social media" or "privacy" privilege.

Relevancy as the Threshold Analysis

Relevancy, therefore, becomes the focus of the discoverability analysis. Courts are wary about granting discovery of social media content where the requesting party has not identified some specific evidence tending to show that relevant information exists. However, a requesting party is only able to satisfy this burden if at least some part of producing party's social media con-

tent is publicly available. Thus, when a litigant's social-networking account is not publicly available, the likelihood of its discovery diminishes significantly. As more and more users understand the importance of privacy settings, the burden on the requesting party becomes more and more difficult to satisfy.

Methods of Access to Social Media Evidence

Assuming a litigant is able to meet its burden to establish the relevancy of social-networking content, the question becomes a practical one – how to obtain the sought-after information? Currently, this question has no good answer. There have been a variety of methods requested by litigants and ordered by the courts, with mixed degrees of success.

Direct Access to Social Media Accounts

One of the most intrusive methods of discovery is to permit the requesting party access to the entire account. If analogized to traditional discovery, this would be the equivalent of granting access to a litigant's entire office merely because a relevant file is stored there. Not surprisingly, this method of "production" has not been popular with parties or with courts.

Nevertheless, there now are several decisions in which a court has ordered a party to produce his or her login and password information to the other side in response to a discovery request. One of these decisions, *Largent v. Reed*, No. 2009-1823 (Pa. C.C.P. Nov. 8, 2011), illustrates some of the procedural challenges that can result.

In *Largent*, the court ordered the plaintiff to turn over her Facebook login information to defense counsel within 14 days of the date of the order. Defense counsel then would have 21 days to "inspect [the plaintiff's] profile." After that period, the plaintiff could change her password to prevent any further access to her account by defense counsel. Although the order specifically identified the defendant's lawyer as the only party who would be given the login information, it did not specify whether the defendant was permitted to view the account's contents once the attorney had logged in.

Another case involving the exchange of login information resulted in more serious and permanent harm. In *Gatto v. United Airlines, Inc.*, No. 10-1090-ES-SCM (D.N.J. Mar. 25, 2013), the plaintiff voluntarily provided his Facebook password to the defendants' counsel during a settlement conference facilitated by the court. When the defendants' attorney later logged into the account and printed portions of the plaintiff's profile page as previously agreed, Facebook sent an automated message to the plaintiff, alerting him that his account had been accessed from an unauthorized ISP address.

The plaintiff attempted to deactivate the account but deleted it instead. As a result, all of the data associated with the account was automatically and permanently deleted 14 days later. The court found that the plaintiff had failed to preserve relevant evidence and granted the defendants' request for an adverse-inference instruction as a sanction.

Not all courts have endorsed the idea of direct access to a party's social media account. One court went so far as to hold that a blanket request for login information is *per se* unreasonable. In *Trail v. Lesko*, No. GD-10-017249 (Pa. C.C.P. July 3, 2012), both sides sought to obtain Facebook posts and pictures from the other. Neither complied and both parties filed motions seeking to compel the other to turn over its Facebook password and username.

The court explained that a party is not entitled to free-reign access to the non-public social-networking posts of an opposing party merely because he asks the court for it. "To enable a party to roam around in an adversary's Facebook account would result in the party to gain access to a great deal of information that has nothing to do with the litigation and [] cause embarrassment if viewed by persons who are not 'Friends.'"

One court went even further. In *Chauvin v. State Farm Mutual Automobile Insurance Company*, No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (S.D. Mich. Oct. 20, 2011), the court affirmed an award of sanctions against the defendant due to its motion to compel production of the plaintiff's Facebook password. The court upheld the decision of the magistrate judge, who had concluded that the content the defendant sought to discover was available "through less intrusive, less annoying and less speculative means," even if relevant. Furthermore, there was no indication that granting access to the account would be reasonably calculated to lead to discovery of admissible information. Thus, the motion to compel warranted an award of sanctions.

In Camera Review

In an effort to guard against overly broad disclosure of a party's social media information, some courts have conducted an *in camera* review prior to production. For example, in *Offenback v. Bowman*, a No. 1:10-cv-1789, 2011 U.S. Dist. LEXIS 66432 (M.D. Pa. June 22, 2011), the magistrate judge conducted an *in camera* review of the plaintiff's Facebook account and ordered the production of a "small segment" of the account as relevant to the plaintiff's physical condition.

In *Douglas v. Riverwalk Grill, LLC*, No. 11-15230, 2012 U.S. Dist. LEXIS 120538 (E.D. Mich. Aug. 24, 2012), the court ordered the plaintiff to provide the contents for *in camera* review. After conducting its review of "literally thousands of entries," the court noted that "majority of the issues bear absolutely no relevance" to the case. In particular, the court found that the only entries that could be considered discoverable were those written by the plaintiff, which could be in the form of "comments" he made on another's post or updates to his own "status." The court identified the specific entries it had determined were discoverable.

Many courts, understandably, have been less than enthusiastic about the idea of doing the parties' burdensome discovery work. For example, in *Tomkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387 (E.D. Mich. 2012), the court declined the parties' suggestion that it conduct an *in camera* review, explaining that "such review is ordinarily utilized only when necessary to

resolve disputes concerning privilege; it is rarely used to determine relevance."

At least one court has agreed to "friend" a litigant for the purpose of conducting an *in camera* review of the litigant's Facebook page. In *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-00764, 2011 U.S. Dist. LEXIS 143892 (M.D. Tenn. June 3, 2010), the magistrate judge offered to expedite the parties' discovery dispute by creating a Facebook account and then "friending" two individuals "for the sole purpose of reviewing photographs and related comments *in camera*." The judge then would "properly review and disseminate any relevant information to the parties . . . [and would] then close Facebook account."

Attorneys' Eyes Only

In *Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375 (D. Nev. June 20, 2012), the defendant obtained information from the plaintiff's publicly available social-networking profiles that was relevant to the case, but asserted that the plaintiff had since changed her account settings to prevent the defendant from further access and had failed to produce (or had produced in overly-redacted form) information from these profiles in response to the defendant's formal discovery requests.

The defendant sought to have the court conduct an *in camera* review of the profiles in their entirety to determine whether the plaintiff's discovery responses were complete. Instead, the court ordered the plaintiff to provide the requested information to the defendant's counsel for an attorney's-eyes-only review for the limited purpose of identifying whether information had been improperly withheld from production. The defendant's counsel was instructed that it could not use the information for any other purpose without a further ruling by the court.

Third-Party Subpoenas

While the discoverability analysis is a product of the common law, there is at least one statute relevant to the discussion. The Stored Communications Act (SCA) limits the ability of Internet-service providers to voluntarily disclose information about their customers and subscribers. Although providers may disclose electronic communications with the consent of the subscriber, the SCA does not contain an exception for disclosure pursuant to civil discovery subpoena. The application of the SCA to discovery of communications stored on social-networking sites has produced mixed results.

Providers, including Facebook, take the position that the SCA prohibits them from disclosing social media contents, even by subpoena. From Facebook's website:

> Federal law prohibits Facebook from disclosing "user content (such as messages, Wall (timeline) posts, photos, etc.), in response to a civil subpoena. Specifically, the Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits Facebook from disclosing the contents of an account to any non-governmental entity pursuant to a subpoena or court order.

One of the earliest cases to address the issue, *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010), concluded that the SCA prohibited a social-networking site from producing a user's account contents in response to a civil discovery subpoena. In that case, the defendants served subpoenas on several third parties, including Facebook and MySpace, seeking communications between the plaintiff and another individual. The plaintiff moved to quash the subpoenas.

The court held that plaintiff had standing to bring the motion, explaining that "an individual has a personal right in information in his or her profile and inbox on a social-networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and bank records." Moreover, the court determined that the providers were electronic communication service (ECS) providers under the SCA and were thus prohibited from disclosing information contained in "electronic storage."

The SCA does not override a party's obligation to produce relevant ESI, though. To the contrary, a party must produce information that is within its possession, custody, or control. Thus, a court can compel a party to execute an authorization for the release of social media content. With an executed authorization, a properly issued subpoena, and, in most cases, a reasonably small payment for associated costs, litigants can obtain all information related to a user's social media account.

Lessons Learned

Although the world of social media and other new technology continues to present novel questions, the answers are often derived by applying a "pre-Facebook" analysis. For example, businesses understand that they have an obligation to preserve potentially relevant evidence. Social media evidence is no different and should be preserved in the same way as paper documents and emails.

Similarly, parties in litigation are entitled to discovery of all relevant, non-privileged information. Thus, social media content is subject to discovery, despite the privacy settings imposed by the account user. Nevertheless, only relevant information must be produced and it is the responsibility of counsel to make the relevancy determination.

Parties and counsel are well advised to adjust their thinking so that social media becomes just another type of ESI. And, like emails and other forms of electronic data, social media must be preserved and is subject to discovery if relevant to the dispute.

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SOCIAL MEDIA WARNING

In this modern world, many of us communicate using the internet, email or other forms of digital communication. Now that you are pursuing a legal claim for monetary damages, it is critical that you understand that any communications you have with anybody (other than your attorney), may be subject to disclosure at some point in the process. **Any information you post to an internet website, write in an email or instant message, or otherwise transmit electronically may someday be requested by the other side as evidence in your case.** If you maintain an internet website or a space on internet portals such as Facebook, Twitter, Skype etc., there is nothing that prevents the other side from accessing those sites and obtaining all of the information you have placed there.

For these reasons, it is critical that from now until the time that your case is finally resolved, you refrain from communicating about your case, or disclosing any of the facts relating to your case on any internet website, email or other digital format. The only exception is that you may, of course, communicate with us using email if you so choose. Unlike other digital communications, anything you send us (so long as it is sent to us only and copied to no one else) is covered by the attorney/client privilege, and is therefore confidential.

You must be very careful about any other information you communicate through the internet or email, even if it is not specifically about the facts of your case. Even information relating to your personal interests, lifestyle choices, associations or other types of information will be accessible to the other side and available for them to use against you in the case. This does not mean that you should stop using the internet or email, or worry about shopping or providing basic information on commercial websites. What it does mean is that you should be very careful about what information, including **videotape, photographs, etc., you post on any online forum, blog or social networking website.** Moreover, you should be careful about what sort of information you place in e-mail. You do not want there to be embarrassing or profane materials that the other side can attempt to use to impeach your character.

In short, what we suggest is that you use common sense and an abundance of caution between now and when your case is finally resolved.

By signing below, you acknowledge that you have been advised by your attorney of the foregoing information.

_____ _____

Signature Date

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Managing Your Clients' Social-Media Evidence

By Margaret (Molly) DiBianca

You represent the plaintiff in a personal-injury suit. Your client seeks damages for injuries sustained as a result of a multiple-vehicle accident. During your client's deposition, she is asked by the lawyer for one of the defendants about her social-media use. The client testifies that she has a Twitter and Facebook account and that she posts to both on a regular basis.

The defense lawyer asks whether your client has ever posted about her accident on any of her social-media accounts. "No, never," your client responds. "And how about your injuries? Have you ever posted about your injuries on Twitter or Facebook?" the lawyer inquires. "Well, maybe," your client says.

You feel mildly nauseous as the defense lawyer pulls out an exhibit and slides it across the table. Your client grimaces as she reads the paper. You pick up the page and see a screenshot of a Twitter feed. Next to the tweet is your client's tiny picture. The tweet was posted from your client's Twitter account.

The tweet says, "Follow-up appointments are the stupidest thing ever! My wreck was forever ago! I'm FINE!!!" The defense lawyer launches into a series of questions about the tweet and about other comments your client may have posted to her social-media accounts. Your client admits that she posted the tweet, that she may have posted others like it, and that she has not made any efforts to collect or otherwise preserve online content relating to the accident or her injuries.

At the conclusion of the deposition, the defense lawyer puts a request on the record, seeking all other relevant social-media content. You dismiss that defendant the following day. And then you thank your lucky stars that nothing worse came

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out of your failure to preserve your client's social-media content.

Current Issues

Content posted onto online social-media sites, such as Facebook and Twitter, is subject to the same duty to preserve as other types of electronically stored information, such as email and electronic documents. The duty to preserve is triggered when a party reasonably foresees that evidence may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve.

Social Media as Potential Evidence

Parties in litigation are entitled to discovery of all relevant, non-privileged information. Thus, social-media content is subject to discovery, despite the privacy settings imposed by the user. Nevertheless, the user's right to privacy is commonly an issue in discovery disputes involving social media. Litigants continue to contend that their Facebook content is "private" and should not be subject to discovery during litigation. They argue that privacy protections are available because their Facebook pages are not publicly available but are available only to a limited number of designated Facebook "friends."

Content posted onto online social-media sites, such as Facebook and Twitter, is subject to the same duty to preserve as other types of electronically stored information, such as email and electronic documents.

This argument is rejected consistently by courts. Instead, courts have found that "private" is not necessarily the same as "not public." By sharing content with others, even in limited numbers, the user has lost his or her right to keep such information "private." The logic is compelling—social media gets its name from the social nature of the medium. If users truly desired to keep the information private, they would not have posted it to a social-media account. Consequently, discoverability of social media is governed by the typical relevancy analysis applied to any other type of evidence and is not subject to any "social media" or "privacy" privilege.

Why Preservation of Social Media Matters

Due to the broad scope of discovery, lawyers must be diligent in ensuring that all potentially relevant evidence stored on their clients' social-media accounts are preserved for litigation. Failure to properly preserve social-media evidence can result in significant consequences, including sanctions. When it comes to the duty to preserve, ignorance of the client or of the lawyer is not a defense. For example, in *Painter v. Atwood*,[1] the defense sought to compel certain comments and pictures posted to the plaintiff's Facebook page.

The logic is compelling—social media gets its name from the social nature of the medium. If users truly desired to keep the information private, they would not have posted it to a social-media account.

When the plaintiff denied that the content existed, the defense produced copies of the pictures and comments, which had been obtained from one of the plaintiff's Facebook friends. The plaintiff admitted that, although the content had once been posted to her account, it had since been deleted, claiming that she "regularly" deleted pictures and posts. The defense moved for sanctions for the plaintiff's failure to preserve relevant evidence.

In response to the motion, the plaintiff's counsel argued that the plaintiff had not understood the duty to preserve because she was a "young girl." The court was not moved. In finding that the plaintiff had spoliated the evidence, the court reasoned that age nor gender were relevant and that, in any event, it was the duty of counsel to instruct her client about the need to preserve.

Although the court determined that spoliation had occurred, it did not order sanctions because the defense had been able to obtain copies of the deleted content. A similar approach was taken in *Katiroll Company, Inc. v. Kati Roll and Platters, Inc.*[2] In that case, the court determined that the defendant had committed technical spoliation when he changed his Facebook profile picture, where the picture at issue was alleged to show infringing trade dress. Because the defendant had "control" of his Facebook page, he had the duty to preserve the photo.

The court found that the photo was relevant to the litigation and, therefore, its removal was "somewhat prejudicial" to the plaintiff. Instead of awarding harsh monetary or evidentiary sanctions, though, the court took a more practical approach. Specifically, the court ordered the defendant to change the picture back to the allegedly infringing picture for a brief period of time, thereby enabling the plaintiff to print copies of whatever she believed to be relevant.

Critical to the court's ruling was its finding that the plaintiff had not explicitly requested that the defendant

preserve his Facebook account as evidence. Unlike the court in *Painter*, here the court concluded that it would not have been immediately clear to the defendant that changing his Facebook profile picture would constitute the destruction of evidence. Thus, the court found, any spoliation was unintentional.

In *Painter* and *Katiroll*, the courts held that no sanctions were necessary because the defense had been able to obtain copies of the deleted content. But not all courts have adopted this no-harm-no-foul approach. For example, in *Gatto v. United Airlines, Inc.*,[3] the plaintiff attempted to deactivate his Facebook account but deleted it instead. As a result, all of the data associated with the account was automatically and permanently deleted 14 days later. The court found that the plaintiff had failed to preserve relevant evidence and ordered an adverse-inference instruction as sanctions.

In *Lester v. Allied Concrete Company*,[4] the court sanctioned both the plaintiff and his counsel based, in large part, on its determination that they had engaged in spoliation of social-media evidence. In that case, upon learning that his client had posted less-than-flattering photos to his Facebook page, the lawyer instructed his paralegal to tell the client to "clean up" his Facebook page. The paralegal assisted the plaintiff in deleting 16 pictures from his account and then deactivating his account.

Although all but one of the photos were later recovered by forensic experts, the court found that sanctions were warranted. The plaintiff's lawyer was ordered to pay $542,000 in attorney fees and was referred to the state bar's disciplinary counsel, which resulted in an agreed-on five-year suspension of the attorney's law license.[5]

The duty to preserve applies only to evidence that is in the party's "possession, custody, or control."

Future Issues

It seems inevitable that parties and their counsel will continue to face the general challenge of complying with the duty to preserve social-media evidence for some time to come. But there are some specific issues that counsel can expect to face in the more immediate future.

One such issue deals with the question of "control." The duty to preserve applies only to evidence that is in the party's "possession, custody, or control." Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it. In the context of online evidence, including social-media content, the concept of control is less obvious than in the context of traditional paper documents or other tangible items.

In the context of online evidence, there is a question of whether an entity "controls" (and, therefore, has a duty to preserve) potentially relevant social-media content of its employees. Although there is not yet a published opinion addressing this question, other recent cases give an indication of how the law may be applied.

For example, in *Cotton v. Costco Wholesale Corp.*,[6] the plaintiffs, who were former employees, sought to compel their former employer to produce text messages sent or received by former coworkers. There was no question about the relevancy of the text messages at issue, but there was a question about "control" because the messages were sent *via* the coworkers' personal cell phones. In denying the plaintiffs' motion to compel, the court held that there was no basis to find that the employer had any legal right to obtain the text messages. In other words, the court found that the phones and the data they contained were not in the "possession, custody, or control" of the employer.

A different approach was used in *P.R. Telephone Co., Inc. v. San Juan Cable, LLC*.[7] In this case, the court held that the employer *did* have a duty to preserve relevant email from the personal email accounts of three of the company's former officers. The only facts given by the court as the basis for its decision was that the company "presumably knew" that its officers had used their personal email accounts to conduct company business. The court found that the company had failed to preserve the emails sent through the officers' personal accounts.

It would seem that the duty to preserve social-media evidence should not be nearly as difficult when the evidence is within the client's possession, custody, or control. But many lawyers continue to struggle with the logistics of how to preserve a client's social-media content. There are several "entry-level" methods to preserve social-media evidence, which require minimal technological knowledge.

Facebook is an excellent example. To obtain all of the content and related metadata from a Facebook account, the user must sign an authorization form, which must be submitted to Facebook, along with a check for $150. Facebook will then provide all of the data contained in and about the account. This is the most comprehensive method and lawyers should consider having clients execute the authorization form at the outset of the engagement.

But there also is a more immediate way to preserve Facebook content. After logging into his or her Facebook account, the user (client) clicks a button called, "Download Your Information." With just one click, the

client will download a zip file containing timeline information, posts, messages, and photos. Information that is not available by merely logging into the account also is included in the zip file, such as the ads on which the user has clicked, IP addresses that are logged when the user accesses his or her account, and other potentially relevant information. This method offers the lawyer and client the ability to preserve content immediately and without any cost.

Twitter offers a similar, although somewhat limited, option. Twitter users can download all tweets posted to an account by requesting a copy of the user's Twitter "archive." Twitter does not offer users a self-serve method of obtaining other, non-public information, such as IP logs. To obtain this additional information, users must request it directly from Twitter by sending an email to *privacy@twitter.com* with the subject line, "Request for Own Account Information." Twitter will respond to the email with further instructions.

This method does have its limitations, though. For example, it does not provide for content that is posted *after* the user has downloaded his information. But, fear not, new apps are in the works to provide for such collection.

Cloud Preservation and X1 Social Discovery are two examples of commercially available tools that are designed specifically for archiving and collecting social-media content.

One such app is called Tweet Keeper. Once installed on a user's smartphone or tablet, the app can be used to download the most recent 3,200 tweets posted from the account. Once downloaded, the tweets can be filtered, searched, and exported into various formats for use in other applications, such as Microsoft Excel. But perhaps the most unique feature of this particular app is its ability to continue to download new tweets as they are posted to the account, thus resolving the problem of preserving content posted during litigation, after the initial preservation has occurred.

Although these self-help preservation methods can be an excellent start and certainly are better than taking no steps to preserve, they do not address all possible data associated with a user's social-media accounts. There may be some instances when it is advisable to employ the assistance of a third-party vendor in order to ensure complete preservation. Cloud Preservation and X1 Social Discovery are two examples of commercially available tools that are designed specifically for archiving and collecting social-media content. The downside to such tools, of course, is that they come with a price tag significantly larger than Tweet Keeper's $1.99 price or even the $150 Facebook method.

Conclusion

The unavoidable reality is that social media is here to stay. Consequently, lawyers are well-advised to embrace the reality and endeavor to learn the minimal skills necessary to comply with their ethical duties. The good news is that this can be accomplished without the investment of much time or money. Here are three key things every litigator should remember about social-media evidence:

1. **Be aware of its existence.** Do not pretend that social-media evidence does not exist. Ask your clients about their social-media usage immediately upon engagement and then throughout the litigation.

2. **Preserve immediately.** Once you know that your client uses social media, take immediate steps to preserve any and all potentially relevant content.

3. **Preserve more, not less.** What may be relevant in any particular case can be an incredibly complex question. The safer practice, by far, is to preserve more than you need, rather than less.

The duty to preserve is a serious one and is no less serious in the context of social media. Although social media may be an unfamiliar source of evidence, it is a critical one. Thus, lawyers should acknowledge the reality and work toward development of a level of familiarity that satisfies the ethical duty of competence.

Notes

1. Painter v. Atwood, No. 2:12-cv-01215-JCM-RJJ (D.Nev. Mar. 18, 2014).
2. Katiroll Co., Inc. v. Kati Roll and Platters, Inc., No. 10-3620 (GEB) (D.N.J. Aug. 3, 2011).
3. Gatto v. United Airlines, Inc., No. 10-1090-ES-SCM (D.N.J. Mar. 25, 2013).
4. Lester v. Allied Concrete Co., No. CL08-150 (Va. Cir. Ct. Sept. 1, 2011), *aff'd*, 736 S.E.2d 699, 702 (Va. 2013).
5. In re Matthew B. Murray, Nos. 11-070-088422 (July 17, 2013).
6. Cotton v. Costco Wholesale Corp., No. 12-2731 (D. Kan. July 24, 2013).
7. P.R. Tele. Co., Inc. v. San Juan Cable, LLC, No. 11-2315 (GAG/BJM) (D.P.R. Oct. 7, 2013).

Michael O'Rourke

"Social networking" has been around forever. It's the simple act of expanding the number of people you know by meeting your friends' friends, their friends' friends and so on. In fact, many of us today use Twitter and Facebook to promote our existing and upcoming businesses. And people looking to connect with other business-associated contacts usually move to sites like LinkedIn, but one need to understand that social media is beyond Twitter, Facebook, LinkedIn and Blogs. After observing and running an analysis on hundreds of Social Networking sites I have listed down 40 most popular social networks across countries.

1. Facebook: To access Facebook.com, you must create an account on the site which is free. Facebook's terms of use state that members must be at least 13 years old with valid email ID's. After updating you're details, your Facebook profile is generated. Using Facebook.com you can:

o Browse and join networks, which are organized into four categories: regions, colleges, workplaces and high schools.
o Pull contacts from a Web-based e-mail account, into Facebook.com.
o Find friends in several ways, including search engine to look for a specific person and lot more.
o Facebook has recently crossed 500 million users and is the most popular Social Networking site of the world.

2. MySpace: On MySpace, your social network starts growing from the first day. When you join MySpace, the first step is to create a profile. You then, invite friends to join there and search for your friends on already profiled on MySpace these friends become your initial Friend Space. Once the friendship is confirmed all the people in your friends' Friend Space become part of your network. In that sense, everyone on MySpace is in your Extended Network. As part of terms of MySpace, the user must be at least 14 years old to register.

3. Twitter: Twitter is a very simple service that is rapidly becoming one of the most talked-about social networking service providers. When you have a Twitter account, you can use the service to post and receive messages to a network of contacts, as opposed to send bulk email messages. You can build your network of contacts, and invite others to receive your Tweets, and can follow other members' posts. Twitter makes it easy to opt into or out of networks. Additionally, you can choose to stop following a specific person's feed.

4. LinkedIn: LinkedIn is an online social network for business professionals, which is designed specifically for professional networking, to help them find a job, discover sales leads, connect with potential business partners. Unlike most of the other social networks, LinkedIn does not focus on making friends or sharing media like photos, videos and music. To start using LinkedIn you need to register and create a profile page. To register to LinkedIn, you need to provide personal information. You can update the profile with your education and job details and a summary. Additionally, you can also give and receive recommendations from co-workers and bosses. There are more than 75 million professionals registered on LinkedIn.

5. Bebo: In the United Kingdom, Bebo is the second best social network. Bebo allows users to create social networking profiles for free. It offers many of the same features as other social networking sites. You can register a free account with Bebo and upload photos, videos and information. The site lets you connect with old friends and make new ones using a unique user interface. The site boasts users from more than a dozen countries, including the United States, Australia, Canada, Poland, France and Germany.

6. Friendster: Friendster was one of the first Web sites to bring it into mass culture. It was designed as a place to connect with friends, family, colleagues and new friends over the Internet. However, it went beyond just a one-way communication. Using Friendster, you can connect with friends and family, meet new people through the connections you already have, find people with similar interests, backgrounds or geographical locations, join groups by activity, school or interest, interact through message posts, games, blogs and application sharing, and share your details with the Internet community.

7. Hi5: Hi5 shares many similarities with many social network sites; however, it introduces some twists that make it worthwhile for people who love trying out new and interesting online communities. However, it is not one of the popular sites in the United States. This was a strategic move from the founder, therefore, Hi5 claims around 60 million members from more than 200 countries other than the US. One of the site's biggest transformations is the addition of many entertainment options, including games.

8. Habbo: The Habbo online community is inhabited by pixelated, cartoon-character alter egos. You can meet others in public rooms (nightclubs, restaurants, shops) and create private rooms for selected friends. Habbo employees heavily moderate the site, catering to its solid teen user base. Most of the users of Habbo are between the age group of 13 – 18 years. Although, a major part of the users are from the U.S., Habbo social networks is very popular in places like the United Kingdom, Japan, Sweden, Spain, Italy, Finland and more.

9. NING: Ning is the leading online platform for the world's organizers, activists and influencers to create social experiences that inspire action. It helps you create a safe and secure place online for like-minded people. Ning takes the idea of groups to a whole new level. The ability to create your own community makes Ning a great home away from home for organizations and groups looking to fill the social void.

10. Classmates: Classmates.com is different from most social networks, in the sense that most of its features are available to premium member. The price for premium members depends on the length of the agreement – shorter term results in a higher cost per month. Classmates.com is primarily used to reconnect with old classmates. The site features a search engine that lets you view other people who went to the same school you attended. Creating a basic Classmates.com profile is free and easy. However, most of the advanced features in Classmates.com are only available to paid users.

11. Tagged: Tagged is a blend of social networking features that MySpace and Facebook users will find very familiar. Tagged was designed to help users meet lots of new people with similar interests in a short amount of time. You can access and register directly or be invited by a friend to join Tagged. This is a free social network that allows you to view your friends' newly uploaded Tagged photo album. Tagged encourages its users to meet strangers based on shared interests, with the idea of growing your network to meet as many people as possible.

12. myYearbook: myYearbook, the best place to meet new people and one of the 25 most-trafficked sites in the United States. myYearbook has Flash-based games, and the games incorporate Lunch Money (the myYearbook virtual currency). It includes a virtual economy through which people can purchase of gifts which members send to each other. Lunch Money is also donated by members to their favourite charity. In 2010, myYearbook donated money to the Haiti Relief Fund to help victims of the earthquake in Haiti.

13. Meetup: Meetup is an online social networking portal that facilitates offline group meetings in various localities around the world. It makes it easy for anyone to organize a local group or find one of the thousands already meeting up face-to-face. More than 2,000 groups get together in local communities each day, each one with the goal of improving themselves or their communities.

14. MyLife: MyLife (formerly Reunion.com) is a social network service. MyLife can search over 60 social-networking sites and other information resources on the Web. MyLife searches the web to deliver accurate and timely results. Even in cases when you don't immediately find who you're looking for, MyLife continues searching and provides updates and alerts. MyLife suggests friends and contacts you may know based on your profile information and existing contacts. It also intimates you when someone else is looking for you. MyLife gives you a global view into the most popular sites your friends are part of, including LinkedIn, Facebook and MySpace as well as 50 other sites.

15. Flixster: Flixster is a social networking site for movie fans. Users can create their own profiles, invite friends, rate movies and actors, and post movie reviews as well. From the site, people can also get information about movies, read user-generated movie reviews and ratings, converse with other users, get movie show times, view popular celebrity photos, read the latest movie news, and view video clips from popular movies and TV shows. Flixster.com also operates

leading movie applications on Facebook, MySpace, iPhone, Android, and BlackBerry.

16. myHeritage: MyHeritage is a family-oriented social network service and genealogy website. It allows members to create their own family websites, share pictures and videos, organize family events, create family trees, and search for ancestors. There are more than 15 million family trees and 91 million photos on the site, and the site is accessible in over 35 languages.

17. Multiply: Multiply is a vibrant social shopping destination, but faster and more convenient, where sellers and buyers interact. A user's network is made up of their direct contacts, as well as others who are closely connected to them through their first-degree relationships. Users are also encouraged to specify the nature of their relationship with one another, making it possible to share content based on relationship. Many shoppers in the Philippines, Indonesia, Malaysia, Singapore, Thailand and Vietnam have made the Multiply Marketplace a favourite shopping destination.

18. Orkut: Orkut is a free social networking website where you can create a profile, connect with friends, maintain an online scrapbook and use site features and applications to share your interests and meet others. The prerequisite for logging on to Orkut is that the user must be over 18 years old. Currently, Orkut is the most popular in Brazil. The number of orkut users in India is almost equivalent to those in its original home in the United States.

19. Badoo: Badoo is a multi-lingual social networking website. It is gaining popularity in emerging markets like Russia and Brazil. The site allows users to create profiles, send each other messages, and rate each other's profile pictures at no cost. However, features that are designed to make user profile more visible to other users are provided at a cost. Badoo includes geographic proximity feature that identifies users' locations based on analysis of their network connection. This lets users know if there are people near their current location who may wish to meet.

20. Gaia Online: Gaia Online is a mix of social networking and massive multiplayer online role-playing games. It is a leading online hangout for teens and young adults, and offers a wide range of features from discussion forums and virtual towns to fully customizable profiles and avatars. It provides a fun, social environment that inspires creativity and helps people make meaningful connections around shared interests such as gaming, arts and anime.

21. BlackPlanet: Initially, BlackPlanet was designed as a way for African-American professionals to network. Since then, it's grown and evolved as a site operating under the principles of Web 2.0. Members can read other members' blogs, watch music videos, chat with one another, look for new careers and discuss news. Though BlackPlanet is not restricted to any community, this site is more popular amongst African-American. This site helped Obama to connect to nearly 200,000 potential supporters.

22. SkyRock: SkyRock.com is a social networking site that offers its members free web space where they can create a blog, add a profile, and exchange messages with other registered members. The site also offers a specific space for members who create blogs showcasing their original musical compositions. SkyRock is very popular in France and French speaking markets including Switzerland and Belgium. The site is also available in English, German, Dutch and Spanish. It's very popular in the European Union.

23. PerfSpot: PerfSpot provides a web portal for people of any age, gender, or background to share their interests and favourite things on the web. PerfSpot currently publishes its site in 37 different languages, with comprehensive moderator team based in the U.S. and the Philippines that screens through up to a million pictures on a daily basis.

24. Zorpia: Zorpia.com is a social network that has a large international community. Zorpia's features include profile customization, networking features and an incredibly detailed search. Zorpia has an impressive music section featuring popular artists like Ashlee Simpson, Vanessa Hudgens, Alanis Morissette and more. You can purchase a Royal Membership for extra networking options such as an ad–free profile, extra profile design features and unlimited messaging.

25. Netlog: Netlog (formerly known as Facebox and Bingbox) is a Belgian social networking website specifically targeted

at the European youth demographic. On Netlog, you can create your own web page with a blog, pictures, videos, events and much more to share with your friends. Netlog is pageview market leader in Belgium, Italy, Austria, Switzerland, Romania and Turkey. In the Netherlands, Germany, France and Portugal, Netlog covers the second place. Pan European, Netlog is the market leader. Netlog is localized in over 25 languages, to enable users from around the world to access the network.

26. Tuenti: Tuenti is an invitation-only private social networking website. It has been referred to as the "Spanish Facebook", by many social network watchers. It is one of the largest social networking sites in Spain. It allows you to set up a profile, upload photos, link videos and connect and chat with friends. Many other utilities, such as the ability to create events, are also offered. From 2009, utilizing a simple interface, Tuenti user can change their language to Catalán, Basque, Galician, and English. Tuenti is also available as an iPhone App.

27. Nasza-Klasa.pl: nasza-klasapl is considered one of the largest and most used social networking sites in Poland. It primarily brings together school's students and alumni. The site is in polish therefore restricting its popularity only to Poland and polish speaking people. Nevertheless, it claims to be the most popular networking site in Poland, and therefore, has found its niche in the competitive social networking space. The site where one might say, new meets old, where the intractability is like Facebook, yet traditional with old styled forums.

28. IRC-Galleria: IRC Gallery has been one of the most popular social networking sites for over 10 years, in Finland; with over 5.5 lakh registered users, 90% of which use the site regularly. IRC-Galleria is popular within the age group of 18-22. To be able to create an account with this site, at least one of the uploaded images must be accepted by the administrator. While regular users can upload only up to 60 visible images, you have the option to upgrade to VIP status that enables you to upload 10,000 visible images. Using this site, users can communicate with other users, comments on photos, and join over a 100 communities.

29. StudiVZ: StudiVZ is the biggest social networking site in Germany. It is also popular in German-speaking countries like Switzerland and Austria. This site works as a student directory in particular for college and university students in Europe. The site allows students to maintain a personal page that containing their personal information like name, age, study subjects, interests, courses and group memberships (within StudiVZ).

30. Xing: Xing, (formally known as openBC/Open Business Club) is a professional networking tool. It is popular in countries like Germany, Spain, Portugal, Italy and France. Xing is similar to LinkedIn and claims to have professionals from over 200 countries. Xing has two features Basic and Premium, depending on weather the user wants to use the site for free or at a cost. It is available in different languages including English, German, Spanish, Portuguese, Italian, French, Dutch, Chinese, Finnish, Swedish, Korean, Japanese, Russian, Polish, Turkish and Hungarian; French and German being the most popularly.

31. Renren: Renren (formerly called Xiaonei Network) is one of the largest social networking sites in China, and caters to people of Chinese origin. It is very popular amongst college students. Renren also has a WAP version, which users can access through mobile phones. It features an instant messaging service for its users. Users can use the same username to log in both Renren and Kaixin. Renren appeals more to Chinese college students who use internet cafes, while Kaixin001 targets Chinese white-collar workers who have internet access at work.

32. Kaixin001: Kaixin001 is a popular professional networking tool in China. The target audience for Kaixin's, are typically white-collar middle class who come from a first tier city. This site in China is extremely popular among people who work for multinational companies, ad agencies and other white collar companies. Kaixin001 has gained much more popularity since 2009, because social networking sites, such as Myspace, Facebook, Twitter and Youtube were blocked in China.

33. Hyves.nl: Hyves, pronounced hives (from beehives) is the largest social network in Netherlands, with many Dutch visitors and members. Hyves Payments and Hyves Games, allows you to play games and pay friends through the social network. Hyves provides usual amenities of a social networking site, including profiles, blogs, photos, and so on. 'Hyven' (Hyving) became a common word in Dutch, and is gaining popularity across Europe.

34. Millat Facebook: MillatFacebook is a Muslim-oriented social networking website. Originally launched in Pakistan, it has gained popularity in Arab counties as well. This site came into existence after Facebook was banned in Pakisthan. Millatfacebook offers video chat, bulletins, blogs, polls, shout box, and customization of profile page. Members can change the page CSS and design it on their own will.

35. Ibibo: Ibibo stands for iBuild, iBond. It is an Indian social networking site. It is an umbrella site that offers a variety of applications under its social network. The services offered include games, blogs, photo unlimited storage, mail, messenger, videos, free SMS service, mail, polls and surveys.

36. Sonico: Sonico is a free-access social networking website focused on the Latin American audience. You can do a to rage of things in this site including search and add friends, interact with friends over message, update their own personal profile, manage their privacy, upload photos and videos, organize events, play games with other users. Sonico, more importantly, let's its members more control over their profile by giving them three distinct profiles that the user can organize based on the need: a private profile, a public profile, and a professional profile. This site is popular in Latin America and other Spanish and Portuguese Speaking Regions.

37. Wer-kennt-wen: Wer-kennt-wen, is one of the most popular social networking website in Germany. It is by an invitation-only social networking website, and only for people over 14 years old. The site provides the user to write blogs, chat with friends, and write in their guestbook. It provides users a social community for people, to interact with anybody they want.

38. Cyworld: Cyworld is a South Korean social network service. It has had a big effect on Korea's internet culture. Many renowned Korean socialites and celebrities have accounts where they post upcoming tours and works. Cyword has networks in South Korea, China, and Vietnam and is gaining popularity across Asia and the Pacific Island. Users have access to a profile page, photos, drawings and images uploading, an avatar, neighbourhoods, and clubs.

39. Mixi: Mixi is primarily for Japanese. Mixi offers options to meeting new people, send and receive messages, writing in a diary, read and comment on others' diaries, organize and join communities and invite their friends. The site requires users to own a Japanese cell phone which bars anyone who is not or has not been a resident of Japan.

40. iWiW: iWiW (abbreviation for International Who is Who) is a Hungarian social networking web service. The site is an invite-only website, where a user can provide personal information. Users can search for friends using the search tool. iWiW allows users to log in to external websites using their iWiW credentials. iWiW is also available for iPone and Android.

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www.ColdCaseInvestigation.com www.InvestigativeEducation.com

// Tap Into the Crowd Resource List //

By Mandy Jenkins & Robert Hernandez

UPDATED: FEB. 15, 2014

// Content Search Tools

twXplorer
A smarter way to search Twitter

Enter search terms to see the last 500 tweets, filter/drill down into related terms, hashtags and links. http://twxplorer.knightlab.com/

TOPSY

Search older tweets and photos. http://topsy.com/advanced-search

twazzup

Real-time keyword search, displayed in a visual format. http://twazzup.com

Social Searcher

Searches Twitter, Facebook and Google+, order by popularity. http://social-searcher.com/social-buzz/

All My Tweets

See all of a user's tweets on one page. http://AllMyTweets.net

socialmention

Real-time keyword search across many social networks, plus abillty to save searches to Excel. http://Socialmention.com

WEBSTAGRAM

Search Instagram photos and videos by keyword. http://web.stagram.com/search/

Open Facebook* Status Search
Search Facebook public timeline across Facebook

Search public status updates. http://openstatussearch.com

// Twitter People Searches

Twiangulate

Search for Twitter users by biography, keyword and their connections to others. http://twiangulate.com

Twellow

Search for Twitter users by location and industry/keyword. http://twellow.com

Reverse Image Search

With Google's reverse image search, you can scour the Internet for any instances in which a particular photo has been published. It will find the exact matching photo or any similar photo that has been posted on Facebook, Instagram, blogs or anywhere else on the Internet, for that matter.

TineYe

is also another reverse image search.

Facebook Graph Search

Facebook Graph Search, which is effectively a search engine within Facebook to help find information more easily.

To find someone, you can use a variety of search terms, such as:

- Friends of people named "first.name last.name"
- Photos of people named "first.name last.name"
- People who have visited "place name"

Even if the person you are looking for has blocked himself or herself from public view, you may be able to find him or her through family members.

Spokeo

Spokeo it can search 60 of the top social media sites to determine whether a particular email address or person is linked to a social media profile utilizing an email address. This is especially helpful when the person may be using some type of pseudonym.

Knowem

With Knowem, you can search over 500 popular social networks to see whether that particular screen name has been taken.

Instagram Search

Utilizing Instagram for Chrome, we can search hashtags, GPS tags and user tags in order to develop photos of the Subject, relatives and associates. Instagram also contains Locator Services.

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Department of State: Division of Corporations

Entity Details

THIS IS NOT A STATEMENT OF GOOD STANDING

File Number:	3835815	Incorporation Date / Formation Date:	7/29/2004 (mm/dd/yyyy)
Entity Name:	FACEBOOK, INC.		
Entity Kind:	Corporation	Entity Type:	General
Residency:	Domestic	State:	DELAWARE

REGISTERED AGENT INFORMATION

Name:	CORPORATION SERVICE COMPANY		
Address:	2711 CENTERVILLE RD SUITE 400		
City:	WILMINGTON	County:	New Castle
State:	DE	Postal Code:	19808
Phone:	302-636-5401		

Additional Information is available for a fee. You can retrieve Status for a fee of $10.00 or more detailed information including current franchise tax assessment, current filing history and more for a fee of $20.00.

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