https://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-370.cfm

District of Columbia Bar Association Ethics Opinion 370

Social Media I: Marketing and Personal Use

Introduction

Social media and social networking websites are online communities that allow users to share information, messages, and other content, including photographs and videos. The Committee defines social media as follows:

> Social media include any electronic platform through which people may communicate or interact in a public, semi-private or private way. Through blogs, public and private chat rooms, listservs, other online locations, social networks and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo and Lawyers.com, users of social media can share information, messages, e-mail, instant messages, photographs, video, voice or videoconferencing content.[1] This definition includes social networks, public and private chat rooms, listservs, and other online locations where attorneys communicate with the public, other attorneys, or clients. Varying degrees of privacy may exist in these online communities as users may have the ability to limit who may see their posted content and who may post content to their pages.[2]

Increasingly, attorneys are using social media for business and personal reasons. The Committee wants to raise awareness of the benefits and pitfalls of the use of social media within the practice of law and to emphasize that the District of Columbia Rules of Professional Conduct (the "Rules") apply to attorneys in the District of Columbia (the "District") who use, or may use, social media for business or personal reasons.[3] This Opinion applies to all attorneys who use social media, regardless of practice area or employer and applies regardless of whether the attorney engages in advertising or client communications via social media. The Committee notes that any social media presence, even a personal page, could be considered advertising or marketing, and lawyers are cautioned to consider the Rules applicable to attorney advertising, even if not explicitly discussed below. Lawyers reviewing this Opinion may also wish to review Opinion 371 (Social Media II), which addresses use of social media by lawyers in providing legal services.

Social networking websites provide an online community for people to share daily activities, their interests in various topics, or to increase their circle of personal or business acquaintances. There are sites with primarily business purposes, some that are primarily for personal use and some that offer a variety of different uses. According to the 2014 ABA Legal Technology Survey, among attorneys and law firms, in addition to blogs, LinkedIn, Facebook and Twitter are among the more widely used social networks.[4] On these sites, members create online "profiles," which may include biographical data, pictures and other information that they wish to post. These services permit members to locate and invite other members of the network into their

personal networks (to "connect" or "friend" them) or to invite the friends or contacts of others to connect with them.

Members of these online social networking communities communicate in a number of ways, publicly or privately. Members of these online social networking communities may have the ability, in many instances, to control who may see their posted content, or who may post content to their pages. Varying degrees of privacy exist. These privacy settings allow users to restrict or limit access of information to certain groups, such as "friends," "connections" or the "public."

Social media sites, postings or activities that mention, promote or highlight a lawyer or a law firm are subject to and must comply with the Rules.[5] Attorneys who choose to use social media must adhere to the Rules in the same way that they would if using more traditional forms of communication.

The Rules, as well as previous Opinions of this Committee, apply to a number of different social media or social networking activities that an attorney or law firm may be engaged in, including:

1. Connecting and communicating with clients, former clients or other lawyers on social networking sites;
2. Writing about an attorney's own cases on social media sites, blogs or other internet-publishing based websites;
3. Commenting on or responding to online reviews or comments;
4. Self-identification by attorneys of their own "specialties," "skills" and "expertise" on social media sites;
5. Reviewing third-party endorsements received by attorneys on their personal or law firm pages; and,
6. Making endorsements of other attorneys on social networking sites.

The Committee concludes that, generally, each of the activities identified above are permissible under the Rules; but not without caution, as discussed in greater detail below. Consistent with our mandate, we consider only the applicability of the D.C. Rules of Professional Conduct. Given that social media does not stop at state boundaries, we remind members of the District of Columbia Bar that their social media presence may be subject to regulation in other jurisdictions, either because the District applies another state's rules through its choice-of-law rule,[6] or because other states assert jurisdiction over attorney conduct without regard to whether the attorney is admitted in other states.[7]

Lawyers must be aware of the ethical rules regarding social media in the principal jurisdiction where they practice, consistent with Rule 8.5. However, adherence to the ethical rules in the jurisdiction of one's principal practice may not insulate an attorney from discipline. There is considerable variation in choice of law rules across jurisdictions. We specifically wish to caution lawyers that the disciplinary rules of other jurisdictions, including our neighboring jurisdictions of Maryland and Virginia, allow for the imposition of discipline upon attorneys who are not admitted in that jurisdiction, if the lawyer provides or offers to provide any legal services in the jurisdiction. ABA Model Rule 8.5(b)(2) provides a limited safe harbor to this provision, by stating that "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the

rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." We note, however, that not every state has adopted this safe harbor. This Committee undertook a detailed evaluation of choice of law rules in non-judicial proceedings in Opinion 311.[8]

We explicitly note that this Opinion is limited to the use of social media as a communications device. This Opinion does not address issues related to the ethical use of social media in litigation or other proceedings, or with regard to issues related to advising clients on the use of social media. Those issues are addressed in Opinion 371 (Social Media II).

Applicable Rules

The Rules that are potentially implicated by social media include:

Rule 1.1 (Competence)
Rule 1.6 (Confidentiality of Information)
Rule 1.7 (Conflict of Interest: General)
Rule 1.18 (Duties to Prospective Client)
Rule 3.3 (Candor to Tribunal)
Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants)
Rule 7.1 (Communications Concerning a Lawyer's Services)
Rule 8.4 (Misconduct)
Rule 8.5 (Disciplinary Authority; Choice of Law)

Discussion

I. Social Media in General

The guiding principle for lawyers with regard to the use of any social network site is that they must be conversant in how the site works. Lawyers must understand the functionality of the social networking site, including its privacy policies. Lawyers must understand the manner in which postings on social media sites are made and whether such postings are public or private. Indeed, comment [6] to Rule 1.1 (Competence) provides:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

As discussed in more detail herein, lawyers must be cognizant of the benefits and risks of the use of social media and their postings on social media sites. Social networking sites, and social media in general, make it easier to blur the distinctions between communications that are business and those that are personal. Communications via social media are inherently less formal than more traditional or established forms of communication. Lawyers and law firm employees must be reminded of the need to maintain confidentiality with regard to clients and client matters in all communications. It is recommended that all law firms have a policy in place regarding

employees' use of social networks. Lawyers in law firms have an ethical duty to supervise subordinate lawyers and non-lawyer staff to ensure that their conduct complies with the applicable Rules, including the duty of confidentiality. *See* Rules 5.1 and 5.3.

Content contained on a lawyer's social media pages must be truthful and not misleading. Statements on social media could expose an attorney to charges of dishonesty under Rule 8.4 or lack of candor under Rule 3.3, if the social media statements conflict with statements made to courts, clients or other third parties, including employers. Similarly, statements on social media could expose a lawyer to civil liability for defamation, libel or other torts.

II. Permissible Uses of Social Media

A. Attorneys may connect with and communicate with clients, former clients or other lawyers on social networking sites, but not without caution.

There are no provisions of the Rules that preclude a lawyer from participating in social media or other online activities. However, if an attorney connects with, or otherwise communicates with clients on social networking sites, then the attorney must continue to adhere to the Rules and maintain an appropriate relationship with clients. Lawyers must also be aware that, if they are connected to clients or former clients on social media, then content made by others and then placed on the attorney's page and content made by the attorney may be viewed by these clients and former clients. Attorneys should be mindful of their obligations under Rule 1.6 to maintain client confidences and secrets.

Some social networking sites, like Facebook, offer users the option to restrict what some people may see on a user's page. These options also allow a user to determine who may post content publicly on the lawyer's page. It is advisable for lawyers to periodically review these settings and adjust them as needed to manage the content appearing publicly on the lawyer's social media pages. Attorneys should be aware of changes to the policies of the sites that they utilize, as privacy policies are frequently changed and networks may globally apply changes, pursuant to the updated policies.

i. Avoiding the formation of an inadvertent attorney-client relationship

As we opined in Opinion 316, it is permissible for lawyers to participate in online chat rooms and similar arrangements through which attorneys could engage in real time, or nearly real time communications with internet users. However, that permission was caveated with the caution to avoid the provision of specific legal advice in order to prevent the formation of an attorney-client relationship. In Opinion 302, we provided "best practices" guidance on internet communications, with the intent of avoiding the inadvertent formation of an attorney-client relationship. One of the suggested "best practices" included the use of a prominent disclaimer. *Id*. However, we have reiterated "that even the use of a disclaimer may not prevent the formation of an attorney-client relationship if the parties' subsequent conduct is inconsistent with the disclaimer." D.C. Ethics Op. 316.

These same principles are applicable to the use of social media. Disclaimers are advisable on social media sites, especially if the lawyer is posting legal content or if the lawyer may be engaged in sending or receiving messages from "friends," whether those friends are other attorneys, family or unknown visitors to the lawyer's social media page, when those messages relate, or may relate, to legal issues.[9]

Rule 1.18 imposes a duty of confidentiality with regard to a prospective client, who is defined in Rule 1.18(a) as "a person who discusses … the possibility of forming a client-lawyer relationship with respect to a matter." However, comment [2] to Rule 1.18 notes that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of [the Rule]." The guidance of Rule 1.18 is of particular importance in social networking, where lawyers may self-identify themselves as attorneys and where, most likely, those "connected" to the lawyer will be aware that the user is an attorney; however, without more, the mere knowledge that a friend is an attorney does not give rise to a reasonable expectation that interactions with that attorney would create a prospective or actual client relationship, or its attendant duty of confidentiality.

ii. Avoiding the creation of conflicts of interest

Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or the lawyer's firm. Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict. Rule 1.7(b)(4) states that an attorney shall not represent a client with respect to a matter if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property or personal interests," unless the conflict is resolved in accordance with Rule 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts.

Moreover, online communications and interactions with people who are unknown to the lawyer may unintentionally cause the development of relationships with persons or parties who may have interests that are adverse to those of existing clients.

iii. Protecting client confidences and secrets

Protecting client information is of the utmost importance when using social media. Most attorneys are aware of the importance of protecting attorney-client communications, attorney work-product or other privileged information. The obligation to protect this information extends beyond the termination of the attorney-client relationship.

Rule 1.6 distinguishes between information that is "confidential" and that which is a "secret," and requires attorneys to protect both kinds of information. In the District of Columbia,

> "Confidence" refers to information protected by the attorney-client privilege under applicable law. "Secret" refers to other information gained in the

> professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Rule 1.6(b). Comment [8] to Rule 1.6 makes clear that the Rule potentially applies to all information gained in the course of the professional relationship, and exists without regard to the nature or source of the information, or the fact that others share the knowledge.

No less critical are considerations of the level of confidentiality available on the social media sites themselves. If an attorney uses social media to communicate with potential or actual clients or co-counsel, then careful attention must be paid to issues of privacy and confidentiality. It is critically important that lawyers review the policies of the social media sites that they frequent, particularly policies related to data collection. Privacy settings on social media are not the equivalent of a guarantee of confidentiality.

Particular consideration must be given to the issue of maintaining and protecting the confidentiality of communications on social networking sites.[10] Messaging and electronic mail services provided by social networking sites may lack safeguards sufficient for communicating with clients or prospective clients. Moreover, the messaging and electronic mail services provided by these sites should not be assumed to be confidential or private. Therefore, when appropriate, clients or potential clients should be advised by lawyers of the existence of more secure means of communicating confidential, privileged, sensitive or otherwise protected information. Messages with clients that are sent or received via social networks must be treated with the same degree of reasonable care as messages sent or received via electronic mail or other traditional means of communication. Social media sites may not permanently retain messages or other communications; therefore care should be taken to preserve these communications outside of the social media site, in order to ensure that the communications are maintained as part of the client file. It is advisable that communications regarding on-going representations or pending legal matters be made through secured office e-mail, and not through social media sites.

Certain social media sites collect information about the people and groups that the user is connected to and the interactions with that group or person. The information collected is gathered from both the lawyer and the person communicating with the lawyer and can include content, information and frequency of contact.[11] These sites also collect information about uses of their partner products and/or websites, allowing the social media service to collect and integrate information about its users, which can be used for targeted advertising and/or research purposes.[12] Thus, depending on the intended use of the social media site, it is advisable for a lawyer to give careful consideration to which social media sites, if any, may be more appropriate for business-related uses or for communications with potential or actual clients.

When inviting others to view a lawyer's social media site, or profile, a lawyer must be mindful of the ethical restrictions relating to solicitations and other communications. Most social networking sites require an e-mail address from the user as part of the registration process. Then, once the social networking site is accessed by a lawyer, the site may access the entire address book (or contacts list) of the user. Aside from any data collection purposes, this access allows the social media site to suggest potential connections with people the lawyer may know who are

already members of the social network, to send requests or other invitations to have these contacts connect with the lawyer on that social network, or to invite non-members of the social network to join it and connect with the lawyer.

However, in many instances, the people contained in a lawyer's address book or contact list are a blend of personal and professional contacts. Contact lists frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site. The connection services provided by many social networks can be a good marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure. Accordingly, great caution should be exercised whenever a social networking site requests permission to access e-mail contacts or to send e-mail to the people in the lawyer's address book or contact list and care should be taken to avoid inadvertently agreeing to allow a third-party service access to a lawyer's address book or contacts.

B. Attorneys may write about their own cases on social media sites, blogs or other internet-based publications, with the informed consent of their clients.

The scope of the protections provided in Rule 1.6 militates in favor of prudence when it comes to disclosing information regarding clients and cases. While lawyers may ethically write about their cases on social media, lawyers must take care not to disclose confidential or secret client information in social media posts. Rule 1.6(e)(1) states that a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the attorney has obtained the client's informed consent to the use in question. Because Rule 1.6 extends to even information that may be known to other people, the prudent lawyer will obtain client consent before sharing any information regarding a representation or disclosing the identity of a client. Even if the attorney is reasonably sure that the information being disclosed would not be subject to Rule 1.6, it is prudent to obtain explicit informed client consent before making such posts. With or without client consent, attorneys should exercise good judgment and great caution in determining the appropriateness of such posts. Consideration should be given to the identity of the client and the sensitivity of the subject matter, even if the client is not overtly identified. It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client consent in a written form.

Consideration must also be given to ensure that such disclosures on social media are compliant with Rule 7.1. Rule 7.1 governs all communications about a lawyer's services, including advertising. These Rules extend to online writings, whether on social media, a blog or other internet-based publication, regarding a lawyer's own cases. Such communications are subject to the Rules because they have the capacity to mislead by creating the unjustified expectation that similar results can be obtained for others. Care must be taken to avoid material misrepresentations of law or fact, or the omission of facts necessary to make the statement considered as a whole not materially misleading. Accordingly, social media posts regarding a

lawyer's own cases should contain a prominent disclaimer making clear that past results are not a guarantee that similar results can be obtained for others.

Law firms that have blogs or social media sites or that allow their lawyers to maintain their own legal blogs or social media pages should take appropriate steps to ensure that such content is compliant with the Rules, consistent with the duties set forth in Rule 5.1. Non-attorney employees who create content for their own or their employers' social media sites should be educated regarding the protection of client information and, if appropriate, be supervised by their employing law firm or lawyer, as required by Rule 5.3.[13]

As noted above, all social media postings for law firms or lawyers, including blogs, should contain disclaimers and privacy statements sufficient to convey to prospective clients and visitors that the social media posts are not intended to convey legal advice and do not create an attorney-client relationship.

C. Attorneys may, with caution, respond to comments or online reviews from clients.

The ability for clients to place reviews and opinions of the services provided by their counsel on the internet can present challenges for attorneys. An attorney must monitor his or her own social networking websites, verify the accuracy of information posted by others on the site, and correct or remove inaccurate information displayed on their social media page(s). As set forth in comment [1] to Rule 7.1, client reviews that may be contained on social media posts or webpages must be reviewed for compliance with Rule 7.1(a) to ensure that they do not create the "unjustified expectation that similar results can be obtained for others."[14]

Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion. Rule 1.6(e) states that:

> A lawyer may use or reveal client confidences or secrets:
>
> (3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, ***or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client [emphasis added].***

Thus, the lawyer's ability to reveal confidences under Rule 1.6(e)(3) is limited to only "specific" allegations by the client concerning the lawyer's representation of the client. Comment [25] to Rule 1.6 specifically excludes general criticisms of an attorney from the kinds of allegations to which an attorney may respond using information otherwise protected by Rule 1.6. However, even when the lawyer is operating within the scope of the Rule 1.6(e)(3) exception, the comments to Rule 1.6 caution that disclosures should be no greater than the lawyer reasonably believes are necessary. There is no exception in Rule 1.6 that allows an attorney to disclose client confidences or secrets in response to specific or general allegations regarding an attorney's

conduct contained in an online review from a third party, such as opposing counsel or a non-client.[15]

Other jurisdictions have taken a more restrictive view of responding to comments or reviews on lawyer-rating websites. For example, the New York State Bar Association Committee on Professional Ethics, in its Opinion 1032 (2014), held that "[a] lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a [lawyer-rating website]." The New York analysis turned on the language contained in New York's Rule 1.6, which requires "accusations," rather than allegations, in order to trigger the "self-defense" exception of N.Y. Rule 1.6. Attorneys licensed in the District of Columbia who are admitted to practice in multiple jurisdictions are cautioned that they may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct. Under the District's choice of law rule, Rule 8.5(b)(2)(ii),

> the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

See notes 6 and 7, *infra*.[16]

We recognize that there are limitations on the control that any individual can assert over his or her presence on the internet. That is why we recognize that an attorney's ethical obligations to review and regulate content on social media extends only to those social media sites or webpages for which the attorney maintains control of the content, such as the ability to delete posted content, block users from posting, or block users from viewing. However, notwithstanding the scope of the attorney's affirmative obligations, it is highly advisable for attorneys to be aware of content regarding them on the internet.

D. An attorney or law firm may identify "specialties," "skills" and "expertise" on social media, provided that the representations are not false or misleading.

Many social media sites, like LinkedIn, allow attorneys to identify skills and areas of practice. The District of Columbia does not prohibit statements regarding specialization or expertise. Accordingly, District of Columbia attorneys are ethically permitted to identify their skills, expertise and areas of practice, subject to Rule 7.1(a).[17]

As we previously opined in Opinion 249, "Rule 7.1(a) permits truthful claims of lawyer specialization so long as they can be substantiated." Rule 7.1(a) states that an attorney is prohibited from making a "false or misleading communication about the lawyer or the lawyer's services." The relevant comment [1] to this Rule states that "[i]t is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters." Accordingly, we conclude that social media profiles or pages that include statements by the attorney setting forth an attorney's skills, areas of specialization or expertise are subject to Rule 7.1(a) and, therefore, cannot be false or misleading.

E. Attorneys must review their social media presence for accuracy.

Consistent with the goals of networking, marketing and making connections, some social networking sites permit members of the site to recommend fellow members or to endorse a fellow member's skills. Users may also request that others endorse the lawyer for specified skills that the lawyer has indicated he or she possesses. LinkedIn and other sites also allow clients or others to submit written reviews or recommendations of the lawyer. Other legal-specific social networking sites focus exclusively on endorsements or recommendations. It is our view that a lawyer is ethically permitted, with caution, to recommend other attorneys, and to accept endorsements, written reviews and recommendations, subject to the Rules.

As noted above, it is our opinion that lawyers in the District of Columbia have a duty to monitor their social network sites. If a lawyer controls or maintains the content contained on a social media page, then the lawyer has an affirmative obligation to review the content on that page. A lawyer must remove endorsements, recommendations or other content that are false or misleading. Lawyers are advised that it is appropriate to reject or refuse endorsements from people who lack the knowledge necessary for making the recommendation. It would be misleading for an attorney to display recommendations or endorsements of skills that are received from people who do not have a factual basis to evaluate the lawyer's skills. Lawyers must reject or refuse endorsements that indicate that the lawyer possesses skills or expertise that the lawyer does not possess. It would be misleading for an attorney to display a recommendation that contained incorrect information. The operative questions asked by the lawyer when reviewing endorsements or recommendations received on their social media pages should be whether the person making the endorsement knows the lawyer and whether the person can fairly comment on the lawyer's skills.

We recommend that lawyers who are using social media sites that allow for the review of posts, recommendations or endorsements prior to publication avail themselves of the settings that allow review and approval of such information before it is publicized on the lawyer's social media page. Some sites, like LinkedIn, provide settings that allow the user to review and approve endorsements that are received before the endorsements are posted publicly. Users may also choose to keep endorsements hidden so that they are not seen by others.[18] Other social networking sites, like Facebook, allow users to adjust their privacy settings to require user approval before certain content, such as photos, can be displayed on a user's home page. Some social media sites allow users to adjust their privacy settings to require approval before a user can be "tagged," a practice that allows content on another person's page to be displayed on the user's page.

It is suggested that lawyers, particularly those who do not frequently monitor their social media pages, those who may not know everyone in their networks well, or those who wish to have an added layer of protection, utilize these heightened privacy settings. Aside from the potential ethical issues discussed herein, there are many good reasons for a lawyer to want to maintain a higher level of control over what content others may place on a lawyer's social media page(s).

It is permissible under the Rules for a lawyer to make an endorsement or recommendation of another attorney on a social networking site, provided that the endorsement or recommendation

is not false or misleading. Such endorsements and recommendations must be based upon the belief that the recipient of the endorsement does in fact possess said skills or legal acumen. Rule 8.4(c) prohibits an attorney from being dishonest, or engaging in fraud, deceit or misrepresentation. Therefore, a lawyer must only provide an endorsement or recommendation of someone on social media that the endorsing lawyer believes to be justified.

Rule 8.4(a) states that it is misconduct for a lawyer to violate or to attempt to violate ethics rules through the acts of others. Thus, clients and colleagues cannot say things about the lawyer that the lawyer cannot say. The lawyer's obligation to monitor, review and correct content on social media sites for which they maintain control exists regardless of whether the information was posted by the attorney, a client or a third party.

We reiterate that, for websites or social media sites where the attorney does not have editorial control over content or the postings of others, we do not believe that the Rules impose an affirmative duty on a lawyer to monitor the content of the sites; however, under certain circumstances, it may be appropriate for the attorney to request that the poster remove the content, to request that the social networking site remove the content, or for the attorney to post a curative response addressing the inaccurate content.

Conclusion

Social media is a constantly changing area of technology. Social media can be an effective tool for providing information to the public, for networking and for communications. However, using such tools requires that the lawyer maintain and update his or her social media pages or profiles in order to ensure that information is accurate and adequately protected.

Accordingly, this Committee concludes that a lawyer who chooses to maintain a presence on social media, for personal or professional reasons, must take affirmative steps to remain competent regarding the technology being used and to ensure compliance with the applicable Rules of Professional Conduct.

The world of social media is a nascent area that continues to change as new technology is introduced into the marketplace. Best practices and ethical guidelines will, as a result, continue to evolve to keep pace with such developments.

[1] "Content" means any communications, whether for personal or business purposes, disseminated through websites, social media sites, blogs, chat rooms, listservs, instant messaging, or other internet presences, and any attachments or links related thereto.

[2] The Merriam-Webster Dictionary defines "social media" as "forms of electronic communication … through which users create online communities to share information, ideas, personal messages, and other content…." More specifically to the legal profession, the New York State Bar Association Committee on Professional Ethics, in its Formal Opinion No. 2012-2 (May 30, 2012), stated:

> We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives.

[3] We have previously addressed issues related to attorneys' participation in certain kinds of internet and electronic communications, but have not yet addressed the broader uses of social media. In Opinion 316, we concluded that attorneys could take part in online chat rooms and similar arrangements through which they could engage in communications in real time or nearly real time, with internet users seeking legal information. D.C. Legal Ethics Op. 316 (2002). In Opinion 281, we addressed issues related to the use of unencrypted electronic mail. D.C. Legal Ethics Op. 281 (1998). In Opinion 302, we stated that lawyers could use websites to advertise for plaintiffs for class action lawsuits and use websites that offer opportunities to bid competitively on legal projects. D.C. Legal Ethics Op. 302 (2000).

[4] www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html (last visited Oct. 26, 2016).

[5] The Committee further notes that even social media profiles that are used exclusively for personal purposes might be viewed by clients or other third parties, and that information contained on those social media websites may be subject to the Rules of Professional Conduct. The Rules extend to purely private conduct of a lawyer, in areas such as truthfulness and compliance with the law. *See* Rule 8.4.

[6] In accordance with D.C. Rule 8.5(b), the Office of Disciplinary Counsel will apply the rules of another jurisdiction to an attorney's conduct in two circumstances:

> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
>
> (2) For any other conduct, . . .
>
> > (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Note that, in contrast to ABA Model Rule 8.5 (*see infra* note 7), D.C. Rule 8.5 does not provide for jurisdiction over attorneys not admitted to practice in the District and does not apply the rules of another jurisdiction unless the attorney is either practicing before a tribunal in another jurisdiction, or is licensed to practice in another jurisdiction.

[7] In contrast to D.C. Rule 8.5 (discussed *supra* in note 6), ABA Model Rule 8.5(a) states that "[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." Moreover, ABA Model Rule 8.5(b)(2) states that for conduct not in connection with a matter pending before a tribunal, the rules to be applied are "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." Accordingly, Model Rule 8.5(b)(2), unlike D.C. Rule 8.5(b)(2), may result in the application of rules of jurisdictions to which the lawyer is not admitted.

[8] D.C. Legal Ethics Op. 311 (2002). The revisions to Rule 8.5(b)(1) that became effective on February 1, 2007 have modified Opinion 311 to the extent that the Opinion now applies more broadly to conduct in connection with a "matter pending before a tribunal" rather than only in connection with a "proceeding in a court before which a lawyer has been admitted to practice." These revisions, however, do not change this Committee's analysis in Opinion 311 as to "other conduct" under Rule 8.5(b)(2).

[9] As we discussed in Opinion 302, in the District of Columbia, the question of what conduct gives rise to an attorney-client relationship is a matter of substantive law. Neither a retainer nor a formal agreement is required in order to establish an attorney-client relationship in the District of Columbia. *See, e.g. In re Lieber*, 442 A.2d 153 (D.C. 1982) (attorney-client relationship formed where attorney failed to indicate lack of consent to accept a court appointed client after receiving notification of appointment by mail). Further, even casual legal advice can give rise to an attorney-client relationship if the putative client relies upon it. *See, e.g., Togstad v. Vesely, Otto, Miller & Keffe*, 291 N.W.2d 686 (Minn. 1980) (finding an attorney-client relationship where the attorney stated that he did not think a prospective client had a cause of action but would discuss it with his partner, did not call prospective client back, and prospective client relied on attorney's assessment and did not continue to seek legal representation).

[10] *See also* D.C. Legal Ethics Op. 281.

[11] An example is contained in Facebook's data policy. (https://www.facebook.com/about/privacy/) (last visited Oct. 26, 2016).

[12] Miller, C., *The Plus in Google Plus? It's Mostly for Google*, Feb. 14, 2014 http://www.nytimes.com/2014/02/15/technology/the-plus-in-google-plus-its-mostly-for-google.html?_r=0 (last visited Oct. 26, 2016).

[13] *See, e.g.*, Gene Shipp, *Bar Counsel: 20/20: The Future of the Rules of Professional Conduct*, WASHINGTON LAWYER (June 2013), sharing the example that our world is changing so fast that "a high-profile celebrity, who comes to your office on a highly confidential matter and graciously pauses to allow a picture with your receptionist, may be unhappy with your staff's violation of Rule 1.6 when their picture appears on the Internet even before you have had a chance to say hello."

[14] The Committee does not distinguish between client comments that are solicited and those that are unsolicited. Rule 7.1 governs all communications about a lawyer's services.

[15] Although beyond the scope of this Opinion, the Committee notes that the Rule 1.6(e)(3) exception allows an attorney to respond to wrongs alleged by a third party, but only if the third party has formally instituted a civil, criminal or disciplinary action against the lawyer. *See* comments [23] and [24] to Rule 1.6.

[16] Other jurisdictions have sanctioned attorneys for disclosures of client confidences or secrets on social media or other websites. In 2013, the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission held, in the *Matter of Betty Tsamis*, that it was a violation of Rule 1.6(a) for an attorney to respond to an unfavorable review on the legal referral website AVVO with a response that revealed confidential information about the client's case. In *Tsamis*, the attorney first requested that the client remove the posting from the website, which is also a permissible response in the District of Columbia. The client responded that he would remove the post, but only if the attorney returned his files and refunded his fees. Thereafter, AVVO removed the posting from its online client reviews. The client then posted a second negative client review to the same website, which the attorney responded to, disclosing client information. The Hearing Board found that the response exceeded what was necessary to respond to the client's accusations and a reprimand was recommended.

[17] Prudent attorneys should consider the most restrictive rules applicable to them when using self-promotional features on social media. We note that other jurisdictions, like New York, do not permit lawyers to identify themselves as "specialists" unless they have been certified as such by an appropriate organization. They are, however, permitted to detail their skills and experience. *See* N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 748 (Mar. 10, 2015).

[18] Lawyers are advised to review the guidance provided by other jurisdictions in which they are admitted to practice regarding the use of endorsements or the skills and expertise sections in a LinkedIn profile. *See, e.g.*, Maryland State Bar Ass'n, Comm. on Ethics, Ethics Docket No. 2014-05; Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 2012-8 (Nov. 2012); South Carolina Ethics Advisory Comm., Op. 09-10; *see also* note 17.

November 2016