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District of Columbia Bar Association Ethics Opinion 371

Social Media II: Use of Social Media in Providing Legal Services

Introduction

Information posted on social media and use of social media in the substantive practice of law raise multiple issues under the Rules of Professional Conduct in all practice areas. This Opinion provides the Committee's guidance about advice and conduct by lawyers related to social media in the provision of legal services, including whether certain advice and conduct are required, permitted, or prohibited by the Rules. The Opinion also identifies issues for lawyers to spot as they provide legal services. Opinion 370 (Social Media I) addresses lawyers' use of social media in marketing and personal use.

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 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]

Applicable Rules of Professional Conduct

- Rule 1.1 (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 3.1 (Meritorious Claims and Contentions)
- Rule 3.3 (Candor to Tribunal)
- Rule 3.4 (Fairness to Opposing Party and Counsel)
- Rule 3.5 (Impartiality and Decorum of the Tribunal)
- Rule 3.6 (Trial Publicity)
- Rule 3.8 (Special Responsibilities of a Prosecutor)
- Rule 4.1 (Truthfulness in Statements to Others)
- Rule 4.2 (Communication Between Lawyer and Person Represented by Counsel)
- Rule 4.3 (Dealing with Unrepresented Person)

- Rule 4.4 (Respect for Rights of Third Persons)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.4 (Misconduct)

I. Understanding Social Media

Because the practice of law involves use or potential use of social media in many ways, competent representation under Rule 1.1[3] requires a lawyer to understand how social media work and how they can be used to represent a client zealously and diligently[4] under Rule 1.3.[5] Recognizing the pervasive use of social media in modern society, lawyers must at least consider whether and how social media may benefit or harm client matters in a variety of circumstances. We do not advise that every legal representation requires a lawyer to use social media. What is required is the ability to exercise informed professional judgment reasonably necessary to carry out the representation. Such understanding can be acquired and exercised with the assistance of other lawyers and staff.[6]

We agree with ABA Comment [8] to Model Rule 1.1 that to be competent "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Although the District's Comments to Rule 1.1 do not specifically reference technology, competent representation always requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to carry out the representation. Because of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct.

Similarly, the requirement of D.C. Rule 1.3(b)(1) to "seek the lawful objectives of a client through reasonably available means" may require that a lawyer utilize social media if it would assist zealous and diligent representation. In using social media for representation, however, a lawyer must at all times stay within the "bounds of the law,"[7] including for example the general prohibition on misrepresentation by pretexting and the duty of truthfulness discussed in this and other Opinions.[8]

II. Communication with Clients

The duty to maintain client confidences under Rule 1.6,[9] the duty to provide competent representation under Rule 1.1, and the duty to communicate with clients under Rule 1.4[10] are all implicated by lawyer-client social media communication. Because social media communication often is public or semi-public, confidentiality of lawyer-client communication is an important concern.

Protecting the confidentiality of lawyer-client communication under Rule 1.6 requires a lawyer to understand in particular how non-clients can access client social media communication and postings.[11] For example, social media sites usually have a range of privacy settings, and clients may give others access to content posted behind private settings. In addition, site privacy settings can unexpectedly change with new terms and conditions imposed by the site host. Rules 1.1, 1.4 and 1.6 may require[12] that a lawyer advise clients about how non-client access to posted

information about legal matters risks inappropriate disclosure of the information, waiver of the attorney-client privilege, and loss of litigation work-product protection.[13] *See, e.g., Lenz v. Universal Music Corp.*, in which the plaintiff "made comments in emails and electronic 'chats' with friends, [and] postings on her blog," which comments disclosed her discussions with counsel.[14] The Court held that the emails and chats waived the attorney-client privilege regarding the matters discussed.

A lawyer should consider reaching agreement with clients about how their attorney-client communication will occur, including whether or not social media should ever be used for such communication because of the confidentiality risks. Agreements about these subjects could be included in engagement letters.

III. Social Media as Sources of Information about Cases or Matters

Social media have become sources of relevant information in litigation and other adversarial proceedings, as well as in a broad array of transactional and advisory practices, including regulatory work.

A. Client Social Media

Rules 1.1 and 1.3 require a lawyer to consider the potential risks and benefits that client social media could have on litigation, regulatory, and transactional matters undertaken by the lawyer, and Rule 1.4 requires a lawyer to discuss such risks and benefits with clients.[15]

1. Review by Client's Lawyer

Competent and zealous representation under Rules 1.1 and 1.3 may require lawyer review of client social media postings relevant to client matters.[16] In litigation, client social media postings could be inconsistent with claims, defenses, pleadings, filings, or litigation/regulatory positions. For example, if a client initiated an action claiming serious injuries, the client's social media profile could disclose activity inconsistent with the injuries alleged.[17] A lawyer must address any such known inconsistencies before submitting court or agency filings to ensure that claims and positions are meritorious under Rule 3.1, which requires a non-frivolous basis in law and fact,[18] and that misrepresentations are not made to courts or agencies[19] in violation of Rules 3.3 and 8.4.[20]

Client social media also can present risks and benefits for transactions and regulatory compliance. For example, review of client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements could be important because inconsistency could create rights or remedies for counterparties. Similarly, competent and zealous representation under Rules 1.1 and 1.3 in regulatory matters may require ensuring that representations to agencies are consistent with social media postings and that advice to clients takes such postings into account.

2. Review by Adversaries

In litigation and adversarial regulatory matters, social media postings without privacy settings are subject to investigation. Lawyers can and do look at the public social media postings of their opponents, witnesses, and other relevant parties, and as discussed below, may even have an ethical obligation to do so. Postings with privacy settings on client social media are subject to formal discovery and subpoenas.[21] To provide competent advice, a lawyer should understand that privacy settings do not create any expectation of confidentiality to establish privilege or work-product protection against discovery and subpoenas.[22]

3. Document Preservation

Because social media postings are subject to discovery and subpoenas, a lawyer may need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection.[23] A lawyer also may need to determine whether under applicable law, which varies from jurisdiction to jurisdiction, clients may modify their social media presence once litigation or regulatory proceedings are anticipated. For example, are clients permitted to change privacy settings or to remove information altogether from social media postings? Such analysis may need to include consideration of obstruction statutes, spoliation law,[24] and procedural rules applicable to criminal and regulatory investigations and cases; procedural rules and spoliation law in civil cases; and the duty under Rule 3.4(a) not to "[o]bstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so. . . ."[25] Before any lawyer-counseled or lawyer-assisted removal or change in content of client social media, at a minimum, an accurate copy of such social media should be made and preserved, consistent with Rule 3.4(a).[26]

Transactional and regulatory representation also can include advice about adjusting client social media. In the absence of unlawful activity or anticipation of litigation or adversary proceedings, that advice may not be constrained by spoliation or obstruction of justice considerations. In order to comply with Rule 1.1, however, a lawyer should not advise a client to make fraudulent or unlawful adjustments; nor should a lawyer participate in such activity or in misrepresentations or material omissions in violation of Rules 1.2(e),[27] 4.1,[28] or 8.4(c).

4. Substantive Regulatory Risks

In regulatory practice, competent and zealous representation also may require advice about whether social media postings or use violate statutory or rule-based limits on public statements or marketing. The Securities and Exchange Commission, Federal Trade Commission, Consumer Product Safety Commission, Food and Drug Administration, and other federal, state, and local agencies have promulgated such limits or guidelines. For example, in April 2013 the SEC Division of Enforcement applied Regulation FD and the Commission's 2008 Guidance to the use of social media.[29] Communications about initial public offerings pose regulatory risk, and those risks apply fully to issuer social media.[30] Inadequately disclosed interactive internet downloads may constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.[31] Other agencies have published guidelines, such as a Guidance on social media issued by the Federal Financial Institutions Examination Council.[32]

B. Social Media of Adverse Parties, Counsel, and Experts

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of potentially relevant social media postings of adverse parties and their counsel, other agents, and experts.[33] In litigation, discovery requests should expressly include social media as sources, and discovery responses should not overlook them. Transactional practice may require review of social media both informally by investigation and formally by including social media in due diligence requests. In conducting such investigations, a lawyer should take into consideration that some social media networks automatically provide information to registered users or members about persons who access their information.[34] This is sometimes referred to as a digital footprint.

1. Media of Represented Persons

Rule 4.2[35] generally forbids communicating with represented persons without the consent of their counsel. The Rule applies to some aspects of social media investigation. A lawyer's review of a represented person's public social media postings does not violate the Rule because no communication occurs. On the other hand, requesting access to information protected by privacy settings, such as making a "friend" request to a represented person, does constitute a communication that is covered by the Rule.[36]

2. Media of Unrepresented Persons

Rule 4.3[37] governs lawyer contacts with unrepresented persons, including when they are adverse parties. This Rule also applies to social media investigation. As with Rule 4.2, review of public postings of an unrepresented person does not implicate the Rule because it does not constitute a communication. On the other hand, requesting access to information protected by privacy settings would trigger the requirements of Rule 4.3(b). Rules 4.1 and 8.4(c) also apply to such social media communication. To comply with these three Rules, in social media communication with unrepresented persons, lawyers should identify themselves, state that they are lawyers, and identify whom they represent and the matter.[38]

3. Pretexting

Rules 4.1 and 8.4 generally preclude pretexting or other misrepresentation during review of social media by a lawyer or his or her agents, including requesting access to information protected by privacy settings.[39] Unannounced review of publicly available sites usually does not involve pretexting or misrepresentation.[40]

4. Document Preservation

Competent and zealous representation under Rules 1.1 and 1.3 may require imposing on adversaries reasonable litigation holds that cover social media and pursuing spoliation remedies of adversaries who have not preserved relevant social media as required by law.[41]

5. Inadvertent Disclosure

If an investigation of social media reveals inadvertent disclosure of privileged or work product protected information, a lawyer should consider whether Rule 4.4[42] or other law, rules, or orders apply.[43] This is consistent with the responsibility of a lawyer to refrain from seeking information that is protected by the attorney-client privilege of another party.[44]

6. Trial Evidence and Service of Process

At the time of social media investigation or later, competent and zealous representation under Rules 1.1 and 1.3 may require consideration of how social media information will be authenticated and presented as evidence at trials or hearings.[45]

In some jurisdictions, social media also may be used to effect alternative service on opposing parties.[46]

C. Social Media of Fact Witnesses and Other Sources of Facts

All of the above considerations about investigation and use of social media of adverse parties apply to non-party sources of facts, including witnesses.

D. Social Media of Jurors

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of jurors or potential jurors to discover bias or other relevant information for jury selection.[47]

Accessing public social media sites of jurors or potential jurors is not prohibited by Rule 3.5 as long as there is no communication by the lawyer with the juror in violation of Rule 3.5(b),[48] and as long as such access does not violate other applicable Rules of Professional Conduct.[49] As noted above, some social media networks automatically provide information to registered users or members about persons who access their information. In the Committee's view, such notification does not constitute a communication between the lawyer and the juror or prospective juror.

Ex parte communication with jurors or potential jurors is prohibited by Rule 3.5(b).[50] Because requesting access to a juror's or potential juror's private media sites involves communication with the juror, such requests would violate the Rule.[51] In addition, if a court or judge forbids access to the social media of jurors and potential jurors, then a violation of a court rule or order could raise questions under Rule 3.4(c).[52]

Review of juror or potential juror social media could reveal misconduct by the juror or others. Whether and how such misconduct must or should be disclosed to a court is beyond the scope of the Rules of Professional Conduct, except to the extent that the review has revealed information clearly establishing that a fraud has been perpetrated upon the tribunal[53] under Rule 3.3(d).[54]

E. Social Media of Judges, Arbitrators, and Regulators

Social media of judges, arbitrators, regulators, and agencies could contain information relevant to cases and other matters in which a lawyer provides representation.

To the extent not prevented by court, agency, or professional responsibility rules, competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of decision-makers. For example, to formulate regulatory advice, a lawyer may need to review public social media of agencies and their decision-makers, while avoiding inappropriate *ex parte* communication, pretexting not authorized by law, and influence prohibited by law.

As with social media of jurors, lawyer review of public social media of judges, arbitrators, regulators, and other neutrals does not constitute communication and therefore is not an *ex parte* contact in violation of Rule 3.5, even if it occurs during the pendency of a case or matter.

The ABA and several ethics opinions have opined that judges can participate in social media, and a lawyer can be a "friend" of judges on social media sites, as long as the contacts comply with the Code of Judicial Conduct; do not undermine the judges' independence, integrity, or impartiality; and do not create an appearance of impropriety.[55] D.C. Rule 3.5(a)[56] prohibits seeking to influence a judge or other official by means prohibited by law.

When no case or proceeding involving a lawyer is pending, Rule 3.5 does not forbid the lawyer from becoming a "friend" of judges, arbitrators, regulators, or other neutrals. Nor does it forbid public or private social media communication with such persons, as long as Rule 3.5(a) is not violated.[57] When a case or matter is pending before a decision-maker, the prohibition of *ex parte* communication in Rule 3.5(b) applies to all communication, including by social media.[58] In such a circumstance a lawyer should consider whether to remove, at least temporarily, the decision-maker as a "friend" or other connection on social media.

F. Lawyer Social Media

Many lawyers and law firms have social media accounts to facilitate review of the internet presence of clients and others as discussed above. In addition, lawyers also use social media sites to comment on legal issues, cases, and matters. Although such social media postings, including about litigation, are not necessarily prohibited, the Rules impose some constraints. *See* Opinion 370, which addresses lawyers' use of social media for their own marketing and other purposes.

As with all communications by a lawyer, Rule 1.6 prohibits disclosure in social media postings of client confidences or secrets unless expressly or impliedly authorized by the client or unless another specific exception is provided by the Rules. When a client consents to social media posting related to a matter, the lawyer should be careful not to disclose, without specific client consent, attorney-client privileged information. Purposeful disclosure of privileged information could result in a subject matter waiver, and even inadvertent disclosure could result in waiver of particular communications.[59] Such care also should be taken regarding identification, financial, health, and other sensitive personal information. In addition, social media postings should not violate protective orders or confidentiality agreements.

Regarding trials and other adversary proceedings, Rule 3.6[60] prohibits statements by a lawyer, on social media or otherwise, that the lawyer knows or reasonably should know will create a serious and imminent threat of material prejudice to a proceeding. As noted above, Rule 3.5 forbids communications seeking to influence a judge, juror, prospective juror or other official by means prohibited by law or to disrupt any proceeding or tribunal. Rule 3.8(f)[61] prohibits statements by prosecutors that heighten condemnation of the accused and do not serve a legitimate law enforcement purpose.[62] All of these Rules apply to social media postings by a lawyer.

IV. Supervision of Lawyers and Staff

Under Rules 5.1[63] and 5.3,[64] a lawyer should take reasonable measures to ensure that any social media investigation or posting by subordinate lawyers and staff—including personal posting—conforms to the Rules of Professional Conduct, including protection of confidential client information.

Conclusion

Social media, like other technology applicable to the practice of law, will continue to change. The principles explained in this Opinion should be applied to such change to ensure continuing compliance with the Rules of Professional Conduct.

[1] "Content" means any communication, 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] Rule 1.1(a) states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

[4] *See, e.g.*, N.Y. State Bar Ass'n Social Media Comm., *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section* (2015) ("NYSBA Guidelines"); American Bar Ass'n

Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014) ("ABA Op. 466"); N.C. State Bar, Formal Ethics Op. 2014-5 (revised 2015) ("N.C. Op. 2014-5"); Pa. Bar Ass'n, Formal Op. 2014-300 ("Pa. Op. 2014-300"). *See generally* D.C. Bar Legal Ethics Op. 281 (1998) (noting in an early internet-related opinion about confidentiality risks from e-mail communication that it was important to understand how e-mails actually traveled over the internet).

[5] Rule 1.3(a) states:

> A lawyer shall represent a client zealously and diligently within the bounds of the law.

[6] *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2014).

[7] *See supra* note 5.

[8] *See generally* D.C. Legal Ethics Op. 323 (2004) and other Opinions addressing application of D.C. Rule 8.4(c).

[9] Rule 1.6(a) and (b) states in part:

> (a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:
>
> > (1) [R]eveal a confidence or secret of the lawyer's client;. . . .
>
> (b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "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.

[10] Rule 1.4(a) and (b) states:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[11] *See supra* note 4.

[12] In this Opinion the terms "may require" and "may need to" mean that whether the referenced Rules would establish a requirement in any given matter will depend on circumstances such as the scope of a lawyer's representation and the nature of the matter. At the same time, the term reflects the Committee's view that the referenced issue should be given

serious consideration and could constitute a requirement. The term "should" has the meaning established in the first paragraph of the Scope page of the Rules. *See* Comment 3 to Rule 1.4.

[13] *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300.

[14] *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783 JF (PVT), 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010).

[15] *See generally* NYSBA Guidelines; N.Y. Cty. Lawyers' Ass'n, Ethics Op. 745 (2013) ("NYCLA Op. 745").

[16] *See, e.g.*, Pa. Op. 2014-300.

[17] *See, e.g., McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *1, *13 (Pa. Ct. Com. Pl., Jefferson Cty. Sept. 9, 2010) (plaintiff alleged substantial injures, including "possible permanent impairment," yet public Facebook postings showed him taking several trips, indicating he had exaggerated his injuries).

[18] Rule 3.1 states in part:

> A lawyer shall not 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, which includes a good-faith argument for an extension, modification, or reversal of existing law.

[19] *See, e.g.*, NYCLA Op. 745; *see* also NYSBA Guidelines.

[20] Rule 3.3(a)(1) states:

> (a) A lawyer shall not knowingly:
>
> > (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.

Rule 8.4(c) states:

> It is professional misconduct for a lawyer to:
>
> > (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[21] *See, e.g., Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 3:12-cv-00127-PK, 2012 WL 3763545, at *1 (D. Or. Aug. 29, 2012) ("I see no principled reason to articulate different

standards for the discoverability of communications through email, text message, or social media platforms."); *Loporcaro v. City of New York*, 950 N.Y.S.2d 723 (Sup. Ct., Richmond Cty. 2012) (unpublished table decision), 2012 WL 1231021, at *7 ("Clearly, our present discovery statutes do not allow that the contents of such [social media] accounts should be treated differently from the rules applied to any other discovery material. . . .").

[22] *See, e.g., Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) ("[M]aterial posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy."); *see also Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012); *Davenport v. State Farm Mut. Auto. Ins.*, No. 3:11-cv-632, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012) (stating that generally social media content "is neither privileged nor protected by any right of privacy"); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (App. Div. 2011).

[23] *See, e.g.*, Pa. Op. 2014-300.

[24] *See, e.g., Gatto v. United Air Lines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285, at *3, 2013 U.S. Dist. LEXIS 41909, at *10 (D.N.J. Mar. 25, 2013); *Torres v. Lexington Ins.*, 237 F.R.D. 533 (D.P.R. 2006); *Lester v. Allied Concrete Co.*, 83 Va. Cir. 308 (2011), *aff'd in part, rev'd in part?*, 285 Va. 295 (2013).

[25] D.C. Rule 3.4. *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300;N.C. Op. 2014-5; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2014-5.

[26] *See, e.g.*, Pa. Op. 2014-300. Because adjusting privacy settings does not alter the content of social media postings, Rule 3.4(a) does not require content preservation before such adjustment. *Id*.

[27] Rule 1.2(e) states:

> (e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

[28] Rule 4.1 states:

In the course of representing a client, a lawyer shall not knowingly:

> (a) Make a false statement of material fact or law to a third person; or
>
> (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[29] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings Exchange Act, Release No. 69279, 105 SEC Docket 4327 (Apr. 2, 2013) (interpreting Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58288 (Aug. 7, 2008)).

[30] *See id.* at 5 ("[I]ssuer communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels [and] the principles outlined in the 2008 Guidance . . . apply with equal force to corporate disclosures made through social media channels.").

[31] Complaint and Decision and Order, *In Re. Sears Holdings Mgmt. Corp.*, FTC No. C-4264 (Aug. 31, 2009).

[32] Social Media: Consumer Compliance Risk Management Guidance, 78 Fed. Reg. 76,297 (Dec. 17, 2013).

[33] *See id.*; *see* also NYCLA Op. 745.

[34] *See, e.g.*, NYSBA Guidelines; Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("N.Y.C. Op. 2012-2"); *see also* N.Y. Cty. Lawyers' Ass'n Comm. On Prof'l Ethics, Formal Ethics Op. 743 (2011) ("NYCLA Op. 743").

[35] Rule 4.2(a) states:

> (a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

[36] *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010); *see also* Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015) ("Colo. Op. 127"); Ore. State Bar, Formal Op. 2013-189 ("Ore. Op. 2013-189"); San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2 ("SDCBA Op. 2011-2").

[37] Rule 4.3(a)(2) and (b) states:

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not. . . .:
>
> > (2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.

> (b) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[38] *See, e.g.*, Mass Bar Ass'n, Ethics Op. 2014-5; N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05; *see generally* D.C. Bar Legal Ethics Op. 321 (2003). *But* see SDCBA Op. 2011-; N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 2010-02; Colo. Op. 127; Ore. Op. 2013-189; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Pa. Op. 2014-300.

[39] *See, e.g.*, SDCBA Op. 2011-2; *see also* Colo. Op. 127; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Ore. Op. 2013-189; N.Y.C. Op. 2010-02. *See generally* D.C. Bar Legal Ethics Op. 323 (2004) (misrepresentation by government lawyers); Hope C. Todd, *Speaking of Ethics: Lies, Damn Lies: Pretexting and D.C. Rule 8.4(c)*, WASHINGTON LAWYER (Jan. 2015).

[40] The Committee does not express a view about whether pretexting can arise from site publication of terms and conditions for public access.

[41] *See, e.g.*, Margaret DiBianca, *Discovery and Preservation of Social Media Evidence*, BUS. L. TODAY (Am. Bar Ass'n Jan. 2014) (noting "social media content should be included in litigation-hold notices").

[42] Rule 4.4(b) states:

> (b) A lawyer who receives a writing relating to the representation of a client and knows, before [reading] the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

[43] *See* D.C. Bar Legal Ethics Op. 256 (1995).

[44] *See* D.C. Bar Legal Ethics Op. 287 (1998) ("[A] lawyer may not solicit information . . . that is reasonably known or which reasonably should be known to the lawyer to be protected from disclosure by statute or by an established evidentiary privilege.").

[45] See generally, *e.g., Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534 (D. Md. 2007) (Grimm, M.J.) (addressing evidence rules applicable to social media and other internet evidence).

[46] *See, e.g., Baidoo v. Blood-Dzraku*, 5 N.Y.S. 3d 709, (Sup. Ct., N.Y. Cty., 2015) and cases cited therein from the Southern District of New York, the Eastern District of Virginia and the Supreme Court of Richmond County, New York allowing alternative service by Facebook; and from the Southern District of New York, the Eastern District of Missouri, and the Supreme Court of Oklahoma not allowing such service. *See generally Christopher M. Finke, Internet Service Provided: The Movement Towards Service of Process Via Social Media*, U. BALT. L. REV.: ISSUES TO WATCH (Nov. 12, 2015), ubaltlawreview.org/2015/11/12/the-movement-towards-service-of-process-via-social-media.

[47] For example, some courts encourage pretrial investigation of jurors to uncover juror conduct before trials begin. *See, e.g., Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam).

[48] *See, e.g.*, NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; NYCLA Op. 743; Ore. Op. 2013-189.

[49] *Accord, e.g.*, ABA Op. 466;Pa. Op. 2014-300. *But see* NYSBA Guidelines;NYCLA Op. 743; N.Y.C. Op. 2010-2.

[50] Rule 3.5(b) states:

> A lawyer shall not:
>
> > (b) Communicate *ex parte* with [a judge or juror] during the proceeding unless authorized to do so by law or court order.

[51] *See, e.g.*, NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; Ore. Op. 2013-189; NYCLA Op. 743.

[52] Rule 3.4(c) states:

> A lawyer shall not:
>
> > (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

[53] *See, e.g.*, ABA Op. 466; NYCLA Op. 743.

[54] Rule 3.3(d) states:

> (d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon [a] tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

[55] American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) ("ABA Op. 462"); *accord* N.C. State Bar, Formal Ethics Opinion 2014-8 ("N.C. Op. 2014-8") (as long as no communication occurs during the pendency of a lawyer's case before the judge); Pa. Op. 2014-300 (as long as the purpose is not to influence the judge and no *ex parte* communication occurs).

[56] Rule 3.5(a) states:

> A lawyer shall not:

> (a) Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law.

[57] *See id.*; Pa. Op. 2014-300.

[58] *See, e.g.*, NYSBA Guidelines; ABA Op. 462;N.C. Op. 2014-8; *see also Youkers v. State*, 400 S.W.3d 200, 206 (Tex. App. 2013) ("[W]hile the internet and social media websites create new venues for communications, our analysis should not change because an ex parte communication occurs online or offline.").

[59] *See, e.g.*, NYSBA Guidelines; D.C. Op. 256.

[60] Rule 3.6 states:

> A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.

[61] Rule 3.8(f) states:

> The prosecutor in a criminal case shall not:
>
> (f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused.

[62] *See, e.g., United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015).

[63] Rule 5.1(b) states:

> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

[64] Rules 5.3(b) states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

> (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

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