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Panel 6: Ethical Issues Associated with Trial Practice

Klein, Sharon R.; Stio III, Angela A.; Zurich, Brian. *Ethical Issues That Arise from Social Media Use in Courtrooms*. (View in document)

Berman, Mark A.; Grande, Ignatious A.; Hedges, Ronald J.; *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*. (View in document)

*Jury Research and Social Media*. (View in document)

*Advising a Client Regarding Posts on Social Media Sites*. (View in document)

*Oracle America, Inc. v. Google Inc.*. (View in document)

*Rules of Professional Conduct*. (View in document)
Lindsay Baretz  
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Lindsay R. Baretz, Esq. is an experienced landlord-tenant attorney who specializes in subsidized housing programs. She has been working in housing related issues for eight years. She graduated with honors from both New York University’s Gallatin School of Individualized Study and from Seton Hall University School of Law. After graduation, she clerked for the Honorable Camille M. Kenny, J.S.C. in the Union County Superior Court of New Jersey. She has been with the Law Office of Jeffrey R. Kuschner since 2011.

**Honorable Clarence Barry-Austin**  
**Chief Judge, Municipal Court, South Orange, New Jersey**  
Clarence Barry-Austin is a Martindale Hubbell AV-Preeminent Rated Certified Civil Trial Attorney with a practice concentration in personal injury litigation. He provides referral fees to attorneys on plaintiff personal injury matters, as authorized by New Jersey Court Rule 1:39-6. Clarence is an undergraduate of Fordham University and Law graduate of Rutgers-Newark Law School. He practiced civil defense law for Allstate Company Insurance from 1977 to 1984. Then started his own practice where he concentrated in Plaintiff personal injury cases. In 1994, Clarence was appointed to the South Orange Municipal Court.

**Honorable Marvin T. Braker**  
**Court Judge, Municipal Court, East Orange, New Jersey**  
Marvin T. Braker is a Municipal Court Judge for the city of East Orange New Jersey and the Township of Hillside New Jersey. Judge Braker is past president of the Garden State Bar Association and past president of the Essex County Bar Association’s Judicial Appointments Committee. He served as the Corporation Counsel for three (3) New Jersey Municipalities - The city of Orange NJ, The Township of Irvington NJ and The Town of Hillside NJ. Judge Braker is a graduate of Rutgers University in New Brunswick New Jersey and The DePaul University College of Law in Chicago Illinois. At Rutgers, he was a founder of the Eta Epsilon Chapter of Kappa Alpha Psi fraternity incorporated.

**Melanie R. Costantino**  
**Attorney, Law Office of Melanie R. Costantino**  
Ms. Costantino received her Juris Doctorate from Fordham University School of Law, New York, New York in 2007. From 2007-2008, Ms. Costantino clerked for the Honorable Renee Jones Weeks, J.S.C. (ret.), Superior Court of New Jersey, Essex County, Probate and General Equity Parts. While there, she gained further knowledge and experience of guardianship and probate law, as well as actions concerning foreclosures, partitions, specific performance of contracts and other equitable remedies.

Ms. Costantino was an associate attorney for two general practice Bergen County law firms and at a prominent New York law firm, where her practice focused on collection matters for various health care institutions. Ms. Costantino started her own firm in 2015.

Ms. Costantino has received numerous judicial appointments to serve in guardianship and special guardianship matters in Bergen, Essex, Hudson, Passaic, and Union counties.

Ms. Costantino is licensed to practice in both New York and New Jersey, and is admitted to the District of New Jersey and the Eastern District of New York. She is a member of the National Academy of Elder Law Attorneys (“NAELA”), New Jersey Bar Association, (Elder Law and Young Lawyers Sections), as well as a member of the Bergen County Bar Association. Melanie R. Costantino was selected as a Super Lawyers Rising Star in 2017 and 2018.

Ms. Costantino is a resident of Bergen County where she lives with her husband, two children, and Lucy, a Boston Terrier rescue dog. In her spare time, Ms. Costantino trains and competes in Powerlifting and Strongman competitions, and in 2018, she was the United States Strongman Nationals Champion in the Masters Heavyweight Division.

**Helen M. Dukhan**  
**Attorney, HD Family Law- Law Office of Helen M. Dukhan**  
Helen M. Dukhan, Esq., LL.M., has been focused solely on family, divorce, and matrimonial law for
15 years. Helen attended New York Law School. During her time there, she personally assisted a successful divorce and family law attorney with all meaningful stages of each case. Immediately after passing the bar exam, Helen achieved a legal master’s degree in family and matrimonial law from Hofstra School of Law, the only program of its kind in the eastern United States, and one of only three programs in the country. While earning her legal master’s, Helen worked directly with the then Attorney-in-Charge of the Brooklyn Neighborhood Office of the Legal Aid Society, co-Supervisor of the Domestic Violence Project, and Supervising Attorney of the Citywide Family Law Unit at that time, assisting with research, case management, adoption proceedings, and Hague Convention and child abduction cases. Immediately thereafter, Helen joined a boutique general practice firm, where she quickly excelled and became supervising attorney of the matrimonial and family law department representing both high net worth individuals and mid-to-low income households. During her time at the firm, Helen showed her passion for the community by doing extensive pro-bono work with a local lawyer’s project. After only two years at the firm, she opened her own successful Divorce and Family Boutique Award Winning Law Office, which she has now owned for 10 years. Since opening her own practice, Helen took and passed the New Jersey Bar Exam, and has expanded her family law and divorce practice to serve individuals in most central and northern counties of New Jersey. In fact, she has opened up another office in Bergen County, New Jersey which she now considers her main office. Helen has spoken at Montclair University, has guided matrimonial seminars at Hofstra Law School, and is founder of a non-profit called Sunset 2 Sunrise, which empowers recently divorced women by providing them with a makeover and photo shoot, and free images to use on social media and a portrait for their home. Lastly, she is first generation American, speaks Russian fluently and is very connected and active in the Russian community. If asked though, what defines her most, is being the mother to two young and extremely energetic boys.

Rhonda J. Eiger
Partner, Goldzweig Green & Eiger
Rhonda J. Eiger concentrates her practice on residential real estate, municipal court, and wills, trusts and estates at Goldzweig, Green, Eiger & Biedzynski, LLC. Mrs. Eiger is a member of the Monmouth County Bar Association and the New Jersey State Bar Association. Ms. Eiger is the immediate Past President of the Marlboro Jewish Center. She received her B.A. from Brandeis University and her J.D. from The American University Washington College of Law. Mrs. Eiger served as a judicial clerk to the Honorable Samuel P. Supnick. She also serves as a mock trial judge, a New Jersey Bar Association Ethics Committee Fee Arbitration Chair, and NJ Bar Association faculty for ICLE, Fordham Law School, CLE and the New York City Bar Association.

Norberto A. Garcia
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Norberto A. Garcia is a trial attorney with offices in New York and New Jersey. He is a Partner at Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins. He is the past president of the Hudson County Bar Association where he has been a trustee since 2000. He is on the executive board of the New Jersey State Bar Foundation where he currently serves as Vice President. He serves on a number of committees for the New Jersey State Bar Association including the Civil Trial Bar Section and the Diversity Committee (co-chairperson). Mr. Garcia has been certified by the New Jersey Supreme Court as a civil trial attorney since 2001. He has been active in the Hudson County Inns of Court program since 1996 and is currently a Master in the program. He served as president of the North Hudson Lawyers Club in 2003. He has been co-chairperson of the Hudson County Civil Practice Committee since 2003. He served on the Office of Attorney Ethics of the Supreme Court, District VI, Fee Arbitration Committee from 2004 through 2009, becoming its chairperson in 2009. From 2005 through 2008 he served on the Supreme Court Committee on Minority Affairs. He has been a member of the American Board of Trial Advocates since 2004. He has a B.A. *cum laude* in history from Seton Hall University and graduated from the University of Pennsylvania Law School. He has been admitted to the bars of New Jersey, New York and Pennsylvania. Mr. Garcia resides in Kinnelon, New Jersey with his wife and two sons.
Joseph C. Mahon
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Joseph C. Mahon is a partner in Frankfurt Kurnit Estate Planning & Administration Group, advising high net worth clients, executives and business owners on family wealth planning, administration and succession. Mr. Mahon regularly assists clients in structuring, documenting and implementing plans and transactions to transfer, maximize and protect wealth.

For more than 25 years, Mr. Mahon has advised clients on a range of issues, including: Estate Planning, Estate, Gift and Income Tax Planning, Generation Skipping Transfer Tax Planning, State Death Taxes, Family Office Services, Family Governance, Liquidity Events, Business Succession, Insurance, Lifetime Gifts, including Valuation Discounts, Grantor Trusts, Dynasty Trusts, Family Limited Partnerships, Intra-Family Loans, Grantor Retained Annuity Trusts, Private Annuities, Qualified Personal Residence Trusts, Crummey Trusts, Trust Terminations, Trustee Succession, Trust Protector, Pre-Nuptial Agreements, Powers of Attorney, and Health Care Proxies. Mr. Mahon also regularly advises clients on trust and estate litigation and dispute resolution, including contested guardianships, and on tax and other issues unique to Non-U.S. persons and assets.

Mr. Mahon is a frequent writer on Trusts and Estates matters. His articles have appeared in Trusts & Estates magazine, Estate Planning magazine, New Jersey Lawyer, Unique Homes, and other publications. His leading 2011 article on the impact of income taxes on estate planning pursuant to recent tax changes -- "The 'TEA' Factor: How Much Appreciation Must Occur for a Gift to Provide Estate Tax Savings Greater Than Income Tax Costs?"— was published by Trusts & Estates magazine in August 2011. Mr. Mahon has lectured frequently on estate planning for leading organizations including New York City Bar Association, New York State Bar, New Jersey Institute for Continuing Legal Education, New Jersey Society of Certified Public Accountants, and Princeton Bar Association.

Mr. Mahon served as a member of the New York City Bar's Committee on Trusts & Estates (1987-1989), and the New York State Bar Association's Committee on Legislation -- Trusts & Estates Section (1990-1996). He has also served on several charitable boards and is currently a member of the Board of Trustees of the Hudson Valley Shakespeare Festival, in Cold Spring, New York.

Michael C. Zogby
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Michael C. Zogby is a trial lawyer whose clients trust him to handle a variety of complex, aggregate litigation, including products liability, medical device, life sciences, class action, consumer disputes, intellectual property, trade secrets, toxic tort, and multidistrict proceedings. Mike also has significant experience counseling clients and coordinating cross-border discovery, privacy, information governance, cybersecurity, and data collections involving Asian and European companies.

Mike co-chairs the firm’s 60-attorney nationally ranked Products Liability and Mass Tort Group, as well as the firm wide Pharma and Life Sciences Group.

He serves as a faculty member at the National Trial Advocacy College at the University of Virginia School of Law, an intensive hands-on trial advocacy training program for practicing attorneys and law students.

Mike is an elected trustee of the Trial Attorneys of New Jersey, a nonprofit organization whose mission is to preserve and improve the civil and criminal justice system in New Jersey, providing its plaintiff and defense attorneys with a wide range of services, including legal education, leadership and advocacy on issues that affect the quality of life of lawyers, judges and litigants at the trial bar.

Mike is a member of the Product Liability Advisory Council (PLAC), an organization comprised of more than 100 leading product manufacturers and 350 of the most elite product liability defense counsel operating in the U.S. and abroad. PLAC focuses on achieving balance and fairness in the application of existing law within the civil litigation system and its many facets, leveraging litigation—and trials—to shape the common law.

Mike is also a member of the International Association of Defense Counsel (IADC). The IADC is an invitation-only, peer-reviewed organization founded in 1920 and comprised of leading corporate defense trial lawyers and in-house
counsel from across the United States and more than 35 countries.

Mike was elected to membership in the Trial Attorneys of America. This national organization of trial counsel, founded in 1969, is limited to 200 attorneys who devote a substantial portion of their practice to the defense of product liability litigation and to corporate counsel who work primarily in that area.

Mike was appointed to the Law360 Life Sciences Editorial Advisory Board and the Law360 Product Liability Advisory Board. He co-chairs the Pharmaceutical and Medical Device Subcommittee of the ABA's Mass Torts Litigation Committee, and he has served as a Master in the William J. Brennan, Jr.-Arthur Vanderbilt Inn of Court, as ethics investigator for the District V Attorney Ethics Committee, and on the New Jersey State Bar Equity Jurisprudence, Class Actions, and Antitrust Special Steering Committees.


Steven J. Zwieg
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Steven Zweig has been practicing law for 26 years, as a Securities Exchange Commission enforcement attorney, as corporate counsel, and—for the last nine years—as a landlord-tenant attorney in New Jersey, handling public housing, private landlord, and commercial tenancy matters for both landlords and tenants. He also has hands-on business and negotiating experience, having been a vice president of operations, executive vice president, and president/founder of various publishing companies. In addition to practicing law, he also writes about the law for several legal websites and is the Managing Editor for a legal journal.
With the rampant expansion of social media and online technologies over the past decade, it is no surprise that Facebook, MySpace, Twitter, Instagram, YouTube and blogs have made their way into the courtroom, pervaded the jury box, and even pierced the veil of judges' chambers. This expansion of social media technologies has raised many questions about the use of the information that can be obtained and the ways attorneys go about obtaining that information. This article addresses some of the ethical issues that can arise when an attorney turns to social media platforms or online technology during a trial.

Social media research has been described as the wild West by some legal commentators, and for this reason bar associations throughout the country have started establishing parameters for ethical online social media research at trial. About a year ago, during the summer of 2012, the New York State Bar Association Committee on Professional Ethics issued Formal Opinion No. 2012-2, titled “Jury Research and Social Media.” To date, the opinion appears to be the most comprehensive analysis of the subject.

Formal Opinion 2012-2 addresses the ethical restrictions that apply to an attorney's use of social media websites to research potential or sitting jurors. The starting point for this analysis was the New York Rules of Professional Conduct (RPCs) and in particular, RPC 3.5, which addresses the maintenance and partiality of tribunals and jurors. Among other things, RPC 3.5 states that “a lawyer shall not ... (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.”

This rule is similar to New Jersey RPC 3.5, titled “Impartiality and Decorum of the Tribunal.” Under New Jersey RPC 3.5(c) a lawyer shall not communicate ex parte with a juror or prospective juror except as permitted by law.

Social Media Research of Jurors During the Jury Selection Process

In light of the language in New Jersey's and New York's versions of RPC 3.5, one of the ethical issues that arises most often involves the use of social media research during the jury selection process. Formal Opinion 2012-2 analyzed this issue and found that “[i]f a juror were to (i) receive a ‘friend’ request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification.”

Formal Opinion 2012-2 found that the same attempts to research a juror might constitute a prohibited communication even if inadvertent or unintended, because NY RPC 3.5 does not contain a mens rea requirement. The same appears to be true with
NJ RPC 3.5, which does not contain a mens rea requirement, and by its express terms prohibits all ex parte communications with jurors, even if inadvertent.

Thus, if an attorney does not know the functionality of a social media platform, he or she should proceed with caution in conducting research, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of the rules of professional conduct. Fortunately, most search engines for social media platforms do not permit registered members to learn who accessed their information. LinkedIn, however, allows its registered members to learn of individuals who viewed their profiles, and attorneys should understand the functionality of the LinkedIn search engine and other similar search engines to minimize the risk of unintended communications with prospective jurors.

Although some attorneys may question if Internet research on jurors is even permissible during voir dire, the New Jersey Appellate Division found the practice acceptable. In Carino v. Muenzen, a medical malpractice action, the plaintiff's counsel was using Google to conduct research on potential jurors in the venire. When this was brought to the attention of the trial judge, the court prohibited the research because: 1) the plaintiff's counsel did not provide advance notice to the court and opposing counsel, and 2) the judge wanted to create an “even playing field,” since the defendant's counsel was not conducting the same research.

On appeal, the plaintiff's counsel argued that the trial court abused its discretion during jury selection by precluding him from accessing the Internet to obtain information on prospective jurors. The Appellate Division noted that no authority exists for the trial court's determination that counsel is required to notify an adversary and the court in advance of accessing the Internet during jury selection or any other part of a trial. The Appellate Division also criticized the trial court's effort to create an “even playing field,” noting that Internet access was open to both counsel. It thus concluded that the trial court acted unreasonably in preventing use of the Internet by the plaintiff's counsel, but nevertheless affirmed the judgment because the plaintiff's counsel had not demonstrated any prejudice resulting from the failure to use Internet research on potential jurors.

Assuming access to the Internet is available, Carino v. Muenzen provides support for the principle that online research of potential jurors is permissible in New Jersey courts.

A federal court in the Eastern District of New York recently issued a similar ruling in U.S. v. Watts. There, the defendant's counsel in a criminal matter filed a motion to permit a jury consulting firm to perform Internet research on potential jurors. The initial application to the court requested the name of jurors in the jury pool in advance of when the venire appeared, so research could be performed in advance. This portion of the application was denied. The court, however, allowed the parties to conduct Internet research on potential jurors during the venire, on the following three conditions: 1) the parties could not make unauthorized or improper direct contact with prospective or current jurors, including using social networking platforms that would leave a record with the account holder of having been searched; 2) the parties were barred from informing jurors that Internet searches were being conducted regarding them; and 3) if any party had reason to believe a juror may have neglected to disclose information bearing on his or her fitness to serve as a juror, that party was required to inform the court and opposing counsel immediately. On this last restriction, the court noted that an “attorney's duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client.”

Not all courts, however, agree that Internet research on jurors is permissible or even beneficial. Recently, a judge in Montgomery County, Maryland, denied a request to allow a defense attorney in a child sex abuse case to use the Internet to research potential jurors during the jury selection process. The judge believed Internet research on potential jurors was totally inappropriate and could have a chilling effect on jury service if individuals knew they were going to be “Googled” as soon as they walked into the courthouse.
Social Media Research of Jurors During Trial

A second issue that arises with social media research is whether attorneys can continue to research and monitor the actions of sitting jurors during a trial. In this regard, the same ethical restrictions that apply to communications with potential jurors also apply to sitting jurors. These restrictions include the prohibition on an attorney communicating directly and indirectly with a sitting juror. Despite these restrictions, attorneys are well served to engage in unobtrusive monitoring of jurors during trial to ensure an unbiased, independent jury. Indeed, in a recent survey by the Federal Judicial Center, 79 percent of judges who responded said they had no way of knowing whether jurors had violated a social media ban. As such, social media monitoring is often left in the hands of counsel and, in some higher profile cases, the media. This was the case in the corruption trial of former Baltimore Mayor Sheila Dixon. There, a newspaper reported that certain members of the jury were communicating with each other about the case via Facebook. This report served as one of the bases for the mayor to seek a new trial. Before the court could rule on the application, however, a plea was entered. Nevertheless, the juror conduct and media attention underscore the need to monitor sitting jurors.

Another instance of jurors' use of social media and the need for monitoring occurred in Sluss v. Commonwealth of Kentucky. In Sluss, the defendant was convicted of murder and several other criminal counts arising from a motor vehicle death following a highly publicized trial. After the trial, it came to light that two of the jurors were Facebook friends with the victim's mother. The defendant appealed the conviction and argued, among other things, that the trial court erred in denying his motion for a new trial based on juror misconduct. The defendant contended that the jurors being Facebook friends with the victim's mother was evidence of misconduct.

On appeal, the Kentucky Supreme Court addressed the issue of who on Facebook is actually a friend, as opposed to a mere negligible connection who blindly accepts a friend request and has no real relationship. While opining that a juror who is a Facebook friend with a family member of a victim, standing alone, is probably not enough evidence to presume juror bias sufficient for a new trial, the Court remanded the matter for further inquiry to address “the extent of the interaction and the scope of the relationship” between the two jurors and the victim's mother, and whether juror misconduct occurred. In so concluding, the Court stated that “it is the closeness of the relationship and the information that a juror knows that frames whether that juror could reasonably be viewed as biased.”

Another example of a juror's misuse of social media was discussed in U.S. v. Fumo, which involved the highly publicized prosecution of Pennsylvania State Senator Vincent Fumo. The portion of the appeal relevant to social media involved a juror posting various comments on Facebook. After it was reported by the media that a juror had been posting on Facebook about the trial, the juror deleted the comments from his Facebook page. The most discussed post involved the juror's comment that “This is it ... no looking back now!” As a result, the court reviewed the Facebook posts and held an in camera review in which it asked the juror about his activity and general media consumption. The juror claimed he had accidently seen the news report regarding his Facebook posts when a program he had been watching on television ended and the news began, but otherwise indicated he took his responsibilities and obligations as a juror seriously. Based on this review, the trial court concluded that most of the Facebook posts involved what the court deemed “ramblings” that were “so vague as to be virtually meaningless.” It thus concluded that the juror's Facebook posts were not substantially prejudicial.

On appeal, the Third Circuit affirmed, finding the trial court did not abuse its discretion in denying the defendants' motion for a new trial. It largely agreed that the juror's Facebook posts were “nothing more than harmless ramblings having no prejudicial effect,” and there was no evidence his extra-jury misconduct had any prejudicial effects on the defendants.
Nonetheless, the implications of jurors' improper use of social media during a trial are high. As noted by the Third Circuit in *Fumo*., “a juror who comments about a case on social media may engender responses that include extraneous information about the case or attempts by third-parties to exercise persuasion or influence.” When attorneys are aware of a juror's use of social media in a manner they believe is improper, they have an obligation to report the misconduct to the court and their adversary. And, once reported, a court has a number of remedies at its disposal.

In New Jersey, these remedies could include imprisonment and/or civil fine. These remedies were discussed in the recent decision issued by Assignment Judge Peter Doyne in *In re Daniel Kaminsky*. Kaminsky involved contempt proceedings against a juror for conducting Internet research during deliberations, in direct violation of the court's explicit instructions not to conduct such research. The situation came to light after two of the charged juror's fellow jury members reported they thought the research tainted the deliberations, which ultimately resulted in a hung jury. In a well-reasoned opinion outlining the implications of the ease of Internet research on modern juries, Judge Doyne held the juror in contempt and fined him $500. In so holding, Judge Doyne stated, “a clear message apparently need[s] be sent [that] the offense of contemtuously violating a court’s instruction concerning internet use is serious, with consequential ramifications.”

Similarly, in *Juror Number One v. Sup. Ct. of Sacramento*, a California court, upon receiving a report that a juror posted items on his Facebook account concerning a criminal trial while it was in progress, ordered the juror to execute a consent form authorizing Facebook to release for in camera review all items he posted during the trial. The juror filed a petition for writ of prohibition that challenged the order on the basis that it was in violation of the Stored Communications Act, his Fourth and Fifth Amendment rights and his rights to privacy. The court made short work of the arguments and found a juror had no expectation of privacy in his or her Facebook posts and, in any event, privacy rights do not trump the litigants' rights to a fair trial free from juror misconduct.

Courts in Florida and Texas also have sent a clear message to jurors who engage in the improper use of social media during a trial. One Florida juror was held in contempt and sentenced to three days in jail when it came to light that he ‘friended’ a defendant in a personal injury case. Similarly, a Texas man was sentenced to two days of community service for friending a plaintiff.

**Social Media Research to Impeach a Witness During Trial**

A third issue that arises from social media research at trial involves whether counsel can use this technology to obtain information to impeach a witness. In analyzing this issue, it is important for an attorney to understand that social media platforms are no different than direct or indirect communication with any individual. Accordingly, attorneys should re-familiarize themselves with *NJ RPC 4.1, 4.2, 8.4(c) and 8.4(d)* before conducting a social media search for impeachment evidence. These Rules of Professional Conduct provisions prevent, among other things, attorneys from doing the following:

1. making materially false statements of fact or law to a third person, *NJ RPC 4.1*;

2. communicating with a person the lawyer knows or should know is represented by counsel, *NJ RPC 4.2*;

3. engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, *NJ RPC 8.4(c)*; and

4. engaging in conduct that is prejudicial to the administration of justice, *NJ RPC 8.4(d)*.

In light of these RPC provisions and other authorities, it is wholly permissible for an attorney to access and review the public social network pages of a witness at trial to search for impeachment material. A lawyer also can engage in truthful friending of an unrepresented party in a manner that does not involve trickery or deception to obtain information.
What an attorney cannot do is mislead a witness or potential witness in order to obtain information about them. Two defense attorneys recently were charged with ethics violations by the Office of Attorney Ethics of the Supreme Court of New Jersey for allegedly causing their paralegal to friend the plaintiff in a personal injury case in order to access information on the plaintiff's Facebook page that was not otherwise available to the public. The attorneys contended they never instructed the paralegal to friend the plaintiff, but simply instructed her to conduct online social media research on him.

In light of this story, if an attorney is going to conduct research on Facebook or another social media platform in order to obtain non-public information, it is important the attorney disclose his or her true identity and the truthful reason for the connection request.

**Social Media Use by Attorneys**

Finally, it goes without saying that attorneys, like everyone else, should be cognizant of their own use of social media. At least one judge in Galveston, Texas, utilized Facebook to catch an attorney who requested a continuance, allegedly because of the death of her father. The attorney, however, had recently posted a string of status updates on Facebook portraying a week of drinking and partying. In a separate incident, the same judge caught another attorney griping about having to handle a motion before her. Thus, just as attorneys are well advised to instruct their clients to maintain private Facebook pages, they too must be cognizant of their social media footprint and their obligation of candor toward a tribunal.

While some readers may seek to avoid the ethical issues discussed in this article entirely, by not using social media at all, this may not be the right answer. At least one court has held that an attorney may be under a limited obligation to use certain new technologies.

In *Johnson v. McCullough*, the Supreme Court of Missouri arguably created a limited duty for lawyers to research members of the *venire*. During *voir dire*, the plaintiff's counsel asked if any of the panelists had been involved in prior litigation. While many panelists responded, one member did not, and she eventually became a sitting juror. After the jury returned the verdict for the defendant, the plaintiff's counsel searched a litigation database and found the non-responsive juror had been a defendant in multiple debt collection cases and a personal injury case. The plaintiff filed a motion for a new trial, alleging jury non-disclosure based on the juror's failure to disclose her involvement in prior litigation. The trial court granted the motion, and the Supreme Court of Missouri affirmed.

The Missouri Supreme Court stated that “[w]ith the relative present day ease of procuring the venire member's prior litigation experiences, via Case.net, “[w]e encourage counsel to make such challenges before submission of a case whenever practicable.” The Court further noted that, “to preserve the issue of a juror's non-disclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial.”

While most courts have not gone as far as the Missouri Supreme Court, a lawyer who fails to acquire at least a basic understanding of these new technologies does so at his or her--or perhaps more importantly, his or her client's--own peril.

**Conclusion**

In sum, social media has become a particularly effective arrow in the quiver of technologically savvy attorneys. While social media use in the litigation context continues to evolve, it is important that attorneys keep in mind the potential ethical implications of its use, for research or otherwise, and to avoid any action by them or their subordinates that could be construed as dishonest or deceitful.
Footnotes

a1 Sharon R. Klein is a partner in the corporate and securities practice group of Pepper Hamilton LLP and the chair of the firm's privacy, security and data protection practice. Angelo A. Stio III is a partner in the firm's litigation and dispute resolution department and counsels corporate, financial services and educational institution clients on data privacy issues. Brian Zurich is an associate in the firm's litigation and dispute resolution department and a former law clerk for U.S. Magistrate Judge Earl S. Hines of the U.S. District Court for the Eastern District of Texas.

2 Id. at *6.
4 Id. at *9-10.
5 Id.
7 Id. at *103-104.
8 Id. at *104 (quoting United States v. Daugerdas, 867 F. Supp. 2d 445, 484 (S.D.N.Y. 2012)). While some attorneys may be skeptical of social media research on prospective jurors, the benefits of such research are potentially immense. For example, a trial consultant in Philadelphia stated that in a product liability case in which her client was representing the defendant, she discovered through online research that a juror had posted on Facebook that one of the juror's heroes was Erin Brokovich. This research helped the trial consultant's client decide to remove the juror from the panel. B. Grow, Internet v. Courts: Googling for the Perfect Juror, Reuters (Feb. 17, 2011). Likewise, in a case in the Circuit Court of Jackson, Mississippi, Khoury v. Conagra, social media research enabled attorneys for the defendant, Conagra, to have a juror dismissed for anti-corporate sentiments after it was discovered he maintained a corporate blog called “The Insane Citizen: Ramblings of a Political Madman,” which included statements such as “**** McDonald’s.” Id.; see also Khoury v. Conagra Foods, Inc., 368 S.W.3d 189 (Mo. Ct. App. 2012).
10 Id.
11 But see U.S. v. Kilpatrick, 2012 U.S. Dist. LEXIS 110165 (E.D. Mich. Aug. 7, 2012) (during the high-profile prosecution of Detroit's former mayor, the court impaneled an anonymous jury and held that parties were not permitted to monitor jurors' social media use, but the court would do so).
12 S. Eder, Jurors’ Tweets Upend Trials, Wall Street Journal (March 5, 2012). Interestingly, as pointed out by Judge Peter E. Doyne in In re Daniel Kaminsky, 2012 N.J. Super. Unpub. LEXIS 539, *5-9 n.3 (March 9, 2012), which is discussed in greater detail infra, Judge Shira A. Scheindlin of the Southern District of New York attempts to prevent the problem of juror Internet research by requiring jurors to sign, under penalty of perjury, a pledge agreeing to obey the court's Internet use instructions in highly publicized criminal trials.
14 381 S.W.3d 215 (Ky. 2012).
15 Id. at 223.
16 Ibid.
17 655 F.3d 288 (3d Cir. 2011).
18 Id. at 299.
See Formal Opinion 2012-2, supra, note 1; NJ RPC 3.3; U.S. v. Watts, 2013 U.S. Dist. LEXIS 42242, *104 (E.D.N.Y. March 22, 2013). Additionally, it appears to be a well-settled concept that a sitting juror commits misconduct by violating her oath, or by failing to follow the instructions and admonitions given by the trial court. As such, a juror may well have an obligation to report fellow juror misconduct either by accepting the oath or, perhaps more pointedly, if instructed by the court to do so.


See Eder, supra, note 10; see also R. Eckhart, Juror Jailed over Facebook Friend Request, Sarasota Herald-Tribune (Feb. 16, 2012).

An attorney cannot friend a party the attorney knows or should know is represented by counsel. NJ RPC 4.2.


In Sept. 2012, before the ethics hearings began, the two lawyers filed suit against the Office of Attorney Ethics in the Superior Court of New Jersey seeking declaratory and injunctive relief. See M. Gallagher, Facebook Case Tests Courts’ Power To Review Ethics Tribunals’ Actions, N.J. Law Journal (July 2, 2013). On Jan. 22, 2013, the lower court dismissed the case, Robertelli v. OAE, for lack of jurisdiction. Id. The case is pending in the Appellate Division. Id.


See M. McDonough, Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches, A.B.A. Chicago (July 31, 2009).

306 S.W.3d 551 (Mo. 2010).

Id. at 558.

Id. at 559.
SOCIAL MEDIA ETHICS GUIDELINES
OF THE
COMMERCIAL AND FEDERAL LITIGATION SECTION
OF THE
NEW YORK STATE BAR ASSOCIATION

UPDATED MAY 11, 2017

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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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INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools for legal professionals and the people with whom they 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 ethics issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association is updating these social media guidelines – which were first issued in 20141 – 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 content on lawyers’ competence, the retention of social media by lawyers, client confidences, potential positional conflicts of interest associated with social media posts, the tracking of client social media use, communications by lawyers with judges, and lawyers’ use of social media platforms, such as LinkedIn, to communicate with selected audiences, or with the public in general.

These Guidelines should be read as guiding principles rather than as “best practices.” The world of social media is rapidly changing and “best practices” will continue to evolve to keep pace with such developments. Since there are multiple ethics codes that govern attorney conduct throughout the United States, these Guidelines do not attempt to define a universal set of “best practices” that will apply in every jurisdiction. In fact, even where different jurisdictions have enacted nearly-identical ethics rules, their individual ethics opinions on the same topic may differ due to different social mores, the priorities of different demographic populations, and the historical approaches to ethics rules and opinions in different localities.

In New York State, ethics opinions are issued by the New York State Bar Association and also by local bar associations located throughout the State.2 These Guidelines are predicated upon the New York Rules of Professional Conduct (“NYRPC”)3 and ethics opinions interpreting those rules that have been issued by New York bar associations. In addition, illustrative ethics opinions from other jurisdictions are referenced throughout where, for example, 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.

1. The Social Media Ethics Guidelines were most recently updated in June 2015.
2. A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but they may be used as a defense in certain circumstances.
3. NY RULES OF PROF’L CONDUCT (NYRPC) (NY STATE UNIFIED CT. SYS. 2013). (These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court In addition, the New York State Bar Association has promulgated comments regarding particular rules, but these comments, which are referenced in these Guidelines have not been adopted by the Appellate Divisions of the Supreme Court).
Social media communications that reach across multiple jurisdictions may implicate other states’ ethics rules. Those rules may differ from the NYRPC. Lawyers should consider the controlling ethical requirements the jurisdictions in which they practice.

The ethical issues discussed in the NYRPC frequently arise in the information gathering phase prior to, or during, litigation. One of the best ways for lawyers to investigate and obtain information about a party, witness, juror or another person, without having to engage in formal discovery, is to review that person’s social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. 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. For example, it is not always readily apparent whether a lawyer’s social media communications constitute regulated “attorney advertising.” Similarly, privileged or confidential information can be unintentionally divulged beyond the intended recipient if a lawyer communicates to a group using social media. In addition, lawyers must be careful to avoid creating an unintended attorney-client relationship when communicating through social media. Finally, certain ethical obligations arise when a lawyer counsels a client about the client’s own social media posts and the removal or deletion of those posts, especially if such posts are subject to litigation or regulatory preservation obligations. These ethical obligations will also be discussed herein.

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, for purposes of complying with these Guidelines, these terms are interchangeable, and a reference to one should be viewed as a reference to all for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each Guideline, and definitions of important terms used in the Guidelines are set forth in the Appendix.
1. ATTORNEY COMPETENCE

Guideline No. 1.A: Attorneys’ Social Media Competence

A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation.

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 uses in connection with the practice of law or that his or her client may use if it is relevant to the purpose or purposes for which the lawyer was retained.

Maintaining this level of understanding 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 must “understand the functionality and privacy settings of any [social media] service she wishes to utilize for research, and to be aware of any changes in the platforms’ settings or policies.”6 The ethics opinion also holds that


5. Id. Competence may require understanding the often lengthy and unclear “terms of service” of a social media platform and ascertaining 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 functions.

“[i]f an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site...”

Indeed, a lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the lawyer’s use of social media. In fact, Comment 8 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.

Commentary to Rule 1.1 of the NYRPC, which is offered by the New York State Bar Association as informal guidance to practitioners, has also been amended to provide:

To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer’s practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

Many other states have also adopted a duty of competence in technology in their ethical codes. Although a lawyer may not delegate his or her obligation to be competent, he or she may rely, as appropriate, on other lawyers or professionals in the field of electronic discovery and social media to assist in obtaining such competence. 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.”

8. NYRPC 1.1 cmt. 8.
9. As of this writing, 27 states have included a duty of competence in technology in their ethical codes. See Robert Ambrogi, 27 States Have Adopted Ethical Duty of Technology Competence, LAW SITES (retrieved on April 30, 2017).
For a discussion of eDiscovery competence in general, see ethics opinions issued by the New York County Lawyers Association Professional Ethics Committee\textsuperscript{10} and the State Bar of California’s Committee on Professional Responsibility and Conduct.\textsuperscript{11}

\begin{flushleft}
\footnotesize
\textsuperscript{10} New York County Lawyers Association Professional Ethics Committee, Formal Op. 749 (Feb. 21, 2017).

\textsuperscript{11} The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Op. 2015-93.
\end{flushleft}
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. 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.

NYRPC 1.0, 7.1, 7.3., 7.4, 7.5, 8.4(c)

Comment: It is clear that a social media profile that is used for work purposes is subject to attorney advertising and solicitation rules. In the case of a lawyer’s profile on a hybrid account that 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. 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.”

The NYCLA ethics opinion states that if 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. If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2)

12. 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.”


statements that compare the lawyer’s services with the services of other 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.”

The NYCLA opinion provides that 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).17 Also, the NYCLA opinion noted that if an attorney claims to have certain skills, they 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).18

After NYCLA Formal Opinion 748 was issued, the New York City Bar Association issued Opinion 2015-7 addressing attorney advertising. The New York City Bar opinion addressed attorney advertising in a different manner and provides that an attorney’s LinkedIn profile may constitute attorney advertising only if it meets the following five criteria:

(a) it is a communication made by or on behalf of the lawyer;  
(b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising.19

The New York City Bar Association opinion notes that it should not be presumed that an attorney who posts information about herself on LinkedIn is doing so for the primary purpose of attracting paying clients.20 If someone merely includes a list of “Skills,” a description of one’s practice areas, or displays “Endorsements” or “Recommendations,” without more on their LinkedIn account, this does not, by itself, constitute attorney advertising.21

16. Id.  
17. NYRPC 7.1(e)(3) provides: “[p]rior results do not guarantee a similar outcome.”  
20. Id.  
21. Id.
New York City Bar Formal Op. 2015-7 also notes that if an attorney’s LinkedIn profile meets the five-pronged attorney advertising definition, he or she must comply with requirements of Article 7 of the NYRPC, which include, but are not limited to:

(1) labeling the LinkedIn content “Attorney Advertising”;  
(2) including the name, principal law office address and telephone number of the lawyer;  
(3) pre-approving any content posted on LinkedIn;  
(4) preserving a copy for at least one year; and  
(5) refraining from false, deceptive or misleading statements.  
These are only some of the requirements associated with attorney advertising.22

Attorneys practicing in New York should be aware of both opinions when complying with New York’s attorney advertising rules. 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. 748.23

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, attorneys should consider only posting tweets that would not be categorized as attorney advertising to avoid having to comply with the attorney advertising rules within the Twitter environment.24

Rule 7.1(k) of the NYRPC provides that all advertisements “shall be pre-approved by the lawyer or law firm.” It requires that a copy of an advertisement “shall be retained for a period of not less than three years following its initial dissemination,” but specifies a one-year retention period for advertisements contained in a “computer-accessed communication” and yet another retention scheme for websites.25 Rule 1.0(c) of the NYRPC defines “computer-accessed communication” as any communication made by or on behalf of a lawyer or law

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25. Id.
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.” Thus, social media posts that are deemed “advertisements,” are “computer-accessed communications, and their retention is required only for one year.”

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. This 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 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.

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.

26. Id.
27. Id.
29. One court has found that the prohibition on the words “expertise” and “specialty” in relation to attorney advertising is unconstitutional; see Searcy v. Florida Bar, 140 F. Supp. 3d 1290 (N.D. Fla. 2015).
A lawyer shall not list information under the ethically prohibited heading of “specialist” in any social media network unless appropriately certified as such. Skills or practice areas listed on a lawyer’s profile under the headings “Experience” or “Skills,” do not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4. A lawyer may include information about the lawyer’s experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under “specialist,” but also under headings such as “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.

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 who maintains a social media profile 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 account, blog or profile.

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 may wish to ask that person to remove it.

NYRPC 7.1, 7.2, 7.3, 7.4.

32. See NYRPC 7.4.
33. See Fl. Bar Standing Comm. on Advertising, Guidelines for Networking Sites (revised May 9, 2016); see also Peter Geraghty, Social Media Endorsements: Undue Flattery Will Get You Nowehere, YOURABA (July 2016).
Comment: While a lawyer is not responsible for a post made by a person who is not his agent, 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 to whether a curative post needs to be made. Although social media communications tend to be far less formal than traditional forms of communication to which the ethics rules apply, these rules apply with the same force and effect to social media postings.

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 monitor and verify that posts about them made to profiles they control 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. 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. 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.

When an attorney provides information on social media related to successful results she has achieved for a client, she should be careful to avoid disclosing confidential information about her client and the matter. The risk of disclosure of confidential

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


information can also arise when a lawyer deems it necessary to correct adverse comments made by clients or former clients about the lawyer’s legal skills made on social media (known as “reverse advertising”). New York has not addressed the issue, but the Texas Center for Legal Ethics recently opined that in such a situation, a lawyer may post a “proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct.”

Guideline No. 2.E: Positional Conflicts in Attorney Advertising

When communicating and stating positions on issues and legal developments, via social media or traditional media, a lawyer should attempt to avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on behalf of her clients and the clients of her firm.

NYRPC 1.7, 1.8

Comment: While commenting on issues and legal developments can certainly assist in advertising a lawyer’s particular knowledge and strengths, a position stated by a lawyer on a social media site in an attempt to market her legal services could inadvertently create a business conflict with a client. A lawyer needs to be cognizant of the fact that conflicts are imputed to the lawyer’s firm.

While no New York ethics opinion has addressed the issue, the D.C. Bar Legal Ethics Committee recently provided guidance on this subject stating, “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. [D.C. Rule of Professional Conduct] 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 [D.C. Rule of Professional Conduct] 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts.”

38. Tex. Ctr. Legal Ethics Op. 662 (Aug. 2016); see also Kurt Orzech, Texas Attys Can Use Rivals in Ad Keywords, Ethics Panel Says, LAW360 (Aug. 1, 2016) (discussing the Panel’s decision to allow use of competing attorneys or firms in a lawyer’s online advertising).

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:* A client and lawyer must knowingly enter into an attorney-client relationship. Informal communications over social media may 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, which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not “solicit” business from the public through such means.

40. “Computer-accessed communication” as defined by NYRPC 1.0(c) means “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.” 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.”

41. “Solicitation” as defined by NYRPC 7.3(b) 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.”

If a potential client\(^{43}\) initiates a specific request seeking to 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.\(^{44}\) Emails and attorney communications via a website or over social media platforms, such as Twitter,\(^{45}\) 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.\(^{46}\)

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

**Comment:** Answering general questions\(^{47}\) on the Internet is analogous to writing for any publication on a legal topic.\(^{48}\) “Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites

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43. 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.”).

44. “If a lawyer subject to the D.C. Rules of Professional Conduct engages in chat room communications of sufficient particularity and specificity to give rise to an attorney-client relationship under the substantive law of a state with jurisdiction to regulate the communication, that lawyer must comply with the full array of D.C. Rules governing attorney-client relationships.” D.C. Ethics Op. 316.

45. 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.

46. NYRPC 7.3(a)(1).

47. 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…’” NYSBA, Op. 1049 (2015).

cannot be construed as a ‘specific request’ to retain the lawyer.”

In responding to questions, a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.

Moreover, 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.” 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. 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

49. See id.

50. 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).”).

51. Id.

52. In addition, when “answering general questions on the Internet, specific answers or legal advice can lead to … the unauthorized practice of law in a forum where the lawyer is not licensed.” Paul Ragusa & Stephanie Diehl, Social Media and Legal Ethics—Practical Guidance for Prudent Use, BAKER BOTTS LLP (Nov. 1, 2016).

53. See NYRPC 7.1(f), (h), (k).

54. 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 NYSBA, Op. 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.’

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email, telephone, etc., and second, the lawyer’s actual response should not be made through a real-time communication.55

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...”.56 NYRPC 1.0(x), the definition of “writing,” was expanded in late 2016 to specifically include a range of electronic communications.57

The NYRPC “does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation.”58 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, which the lawyer believes need to be saved.59 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

55. Id.
56. NYRPC 1.0(n), Terminology.
57. NYRPC 1.0(x): “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, email or other electronic communication or any other form of recorded communication or recorded representation. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
59. Id.
by the counterparty to the communication without the knowledge of the lawyer.\textsuperscript{60}

Casual communications may be deleted without impacting ethical rules.\textsuperscript{61}

\textbf{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 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.\textsuperscript{62}

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

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\textsuperscript{60} Id.\textsuperscript{;} see also Pennsylvania Bar Assn.\textsuperscript{, 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.”)

\textsuperscript{61} Id.

\textsuperscript{62} NYCBA, 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.”
\end{flushright}
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.

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.

This allowance is based, in part, on case law that holds that a person is said to have very little expectation of privacy with respect to their social media content, let alone those that are specifically designated as “public.”

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

A lawyer may communicate with an unrepresented party and also request permission to view a restricted portion of the party’s social media website or profile. However, the lawyer must use her full name and an accurate profile, and may not create a different or false profile in order to mask her identity. If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the person or otherwise cease all further communications and withdraw the request if applicable.

NYRPC 4.1, 4.3, 8.4.

63. A lawyer should 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.


65. Romano v. Steelcase Inc., 30 Misc.3d 426 (Sup. Ct. Suffolk Cty. 2010) (“She consented to the fact that her personal information would be shared with others, notwithstanding her privacy setting. Indeed that is the very nature and purpose of these social networking sites else they would cease to exist.”)

66. 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.
Comment: It is permissible for a lawyer to join a social media network solely for the purpose of obtaining information concerning a witness.67 The New York City Bar Association has opined, however, that a lawyer shall not “friend” an unrepresented individual using any form of “deception.”68

In New York, no “deception” occurs when a lawyer utilizes his or her “real name and profile” to contact an unrepresented person to send a “friend” request to obtain information from that person’s account.69 In New York, the lawyer is not required to initially disclose the reasons for the communication or “friend” request.70

However, other states require that a lawyer’s initial “friend” request must contain additional information to fully apprise the witness of their true identity and intention. For example, the New Hampshire Bar Association, holds that an attorney 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.”71 The Massachusetts and San Diego Bar Associations simply require disclosure of the lawyer’s “affiliation and the purpose for the request.”72 The Philadelphia Bar Association notes that failure to disclose the attorney’s true intention constitutes an impermissible omission of a “highly material fact.”73

In Oregon, there is an opinion that if the person being sought out on social media “asks for additional information to identify [the] lawyer, or if [the] lawyer has some other reason to believe that the person misunderstands her role, [the] lawyer must provide the additional information or withdraw the request.”74

69. Id.
70. See id.
Guideline No. 4.C: Contacting a Represented Party and/or Viewing Restricted Social Media Website

A lawyer shall not contact a represented person or request access to review the restricted portion of the person’s social media profile unless express consent 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.

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.”

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.

Note that there is an apparent gap in authority with respect to whether a represented party’s receipt of an automatic notification from a social media platform constitutes an impermissible communication with an attorney, as opposed to within the juror context, which has been covered by several jurisdictions.

Nevertheless, in New York, drawing upon those opinions addressing jurors, receipt of an automatic notification can be considered an improper communication with someone who is represented by counsel, particularly where “the attorney is aware that their actions would cause the juror to receive such message or notification.”

Conversely, ABA, Formal Op. 466 opined that, at least within the juror context, an automatically generated notification does not constitute an impermissible communication since “the ESM service is communicating with the

juror based on a technical feature of the ESM," and the lawyer is not involved. This view has also been adopted by the DC and Colorado Bar Associations.

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, 8.4.

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


78. See *D.C. Bar Ethics Formal Op. 371, Social Media II: Use of Social Media in Providing Legal Services (Nov. 2016); Colorado Bar Ass’n Ethics Comm., Formal Op. 127 (Nov. 2015).*

79. See *N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2010-2 (2010).*

80. See *N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 (2013).*
5. COMMUNICATING WITH CLIENTS

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

A lawyer may advise a client as to what content\(^{81}\) may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings.\(^{82}\) 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. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations.\(^{83}\) Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account 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”\(^{84}\) or where preservation is required by common law, statute, rule, regulation or other requirement. Failure to do so may result in sanctions or other penalties. “[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,\(^{85}\) 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.”\(^{86}\) 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 litigation has commenced.

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81. “Content” may, as appropriate, include metadata.

82. Mark A. Berman, Counseling a Client to Change Her Privacy Settings on Her Social Media Account, NEW YORK LEGAL ETHICS REPORTER (Feb. 2015).


85. See Phil. Bar Ass’n, Prof’l Guidance Comm. Op. 2014-5 (noting that, a lawyer “must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.”).

A lawyer should 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 or other means. Similarly, a post or other data shared with others may have been copied by another user or in other online accounts not controlled by the client.

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

A lawyer may advise a client with regard to posting new content on social media, 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.”

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 social media in advance of posting and guide the client, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may, for example, 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 posts may be perceived; and discuss how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client that social media content or data that the client considers highly private or personal, even if not shared with other social media users, may be reviewed by opposing parties, judges and others due to court order, compulsory process, government searches, data breach, sharing by others or unethical conduct. A lawyer may advise a client to refrain from or limit social media posts, including during the course of a litigation or investigation.


89. A lawyer may consider periodically following or checking her client’s social media activities, especially in matters where posts may be relevant to her client’s claims or defenses. 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(s) for other issues relating to the lawyer’s representation of the client. An attorney may wish to notify a client if he or she plans to closely monitor a client’s social media postings.

Pa. Bar Ass’n Ethics Comm., Formal Op. 2014-300 (2014) (noting that “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 and if proper inquiry of the client does not negate that conclusion.90

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.”91 Frivolous conduct includes the knowing assertion of “material factual statements that are false.”92

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

A lawyer may review a represented person’s non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain non-public 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.”93 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.”94

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,”

91. NYRPC 3.1(a).
92. NYRPC 3.1(b)(3).
94. Id.
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.

A New Hampshire opinion states that a lawyer’s client may, for instance, send a friend request or request to follow a private 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. In addition, the client’s profile needs to “reasonably reveal[] the client’s identity” to the other person.

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.”

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 activities and a lawyer’s website or blog must comply with these limitations.

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool or practice

96. Id.
98. See NYRPC 1.6.
operates before using it and consider whether any activity places client information and confidences at risk.\textsuperscript{99}

Where a client has posted an online review of the lawyer or her services, the lawyer’s response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{99} D.C. Bar Legal Ethics Comm., Op. 370 (2016) explains one risk of services that import email contacts to generate connections: “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.”
\item Similarly, a lawyer’s request to connect to a person who is represented by opposing counsel may be embarrassing or raise questions regarding NYRPC 4.2 (Communication with Persons Represented by Counsel).
\item \textsuperscript{100} NYRPC 1.6(c). The New York Rules of Professional Conduct were amended on November 10, 2016 and Rule 1.6(c) was modified to address a lawyer’s use of technology. See Davis, Anthony, \textit{Changes to NY RPCs and an Ethics Opinion On Withdrawing for Non-Payment of Fees}, \textit{NEW YORK LAW JOURNAL} (January 9, 2017).
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NYSBA Comment 16 to NYRPC 1.6 provides:

Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer’s duties when sharing information with nonlawyers inside or outside the lawyer’s own firm, see Rule 5.3, Comment [2].
Comment: A lawyer is prohibited, absent a recognized exception, from disclosing client confidential information. Additionally, 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, 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.” NYSBPA Ethics Opinion 1032 indicates that the self-defense exception applies 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 procedure that can result in a sanction” but not to a “negative web posting.” As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on platforms such as Avvo, Yelp or Facebook.

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

Comment 17 further 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. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client’s information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked “Confidential” or “Confidential – Attorneys’ Eyes Only”; the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) may require a lawyer to take specific precautions with respect to a client’s or adversary’s medical records; and court rules may require a lawyer to block out a client’s Social Security number or a minor’s name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.


(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.”104 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.”105

If a lawyer chooses to respond to a former client’s online review, a lawyer should consult the relevant definition of “confidential information” as the definition may be quite broad. For instance, pursuant to NYRPC 1.6(a), “confidential information” includes, but is not limited to “information gained during or relating to the representation of a client, whatever its source, that is . . . likely to be embarrassing or detrimental to the client if disclosed.” Similarly, Texas Disciplinary Rule of Professional Conduct 1.05(a) defines “confidential information” as including “…all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.” See also DC Bar Ethics Opinion 370 which states a “confidence” is “information protected by the attorney-client privilege” and a “secret” is “…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.”

Moreover, any response should be limited and tailored to the circumstances. Texas State Bar Ethics Opinion 662. See also DC Bar Ethics Opinion 370 (even self-defense exception for “specific” allegations by client against lawyer only allows disclosures no greater than the lawyer reasonably believes are necessary).

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.”

At this juncture, it is “not only permissible for trial counsel to conduct Internet research on prospective jurors, but [] it may even be expected.”

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.”

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice.” However, Opinion 466 does not address “whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors.”


107. *See* *Social Media Jury Instructions Report, NYSBA Commercial and Federal Litigation Section (2015)*.


109. *Id.*

110. *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.111

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.112

“Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper communication.”113 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.114 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.”115

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.116 They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic


115. Id.

116. Id.
message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing). 117

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). 118 The ABA held that, as a general rule, an automatic notification represents a communication between the juror and a given ESM platform, as opposed to an impermissible communication between the lawyer and the attorney. The Colorado Bar Association and DC Bar have since adopted the ABA’s position, i.e., “such notification does not constitute a communication between the lawyer or prospective juror” as opposed to a “friend” request. 119

According to ABA, Formal Op. 466, this type of notice is “akin to a neighbor’s recognizing a lawyer’s car driving down the juror’s street and telling the juror that the lawyer had been seen driving down the street.” 120 Yet, this 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.” 121

Under ABA, Formal Op. 466, 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

117. If a lawyer logs into LinkedIn and clicks on a link to a LinkedIn profile of a juror, an automatic message may 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 his or her settings so that he or she is anonymous or, alternatively, be fully logged out of his or her LinkedIn account.


120. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014); see also Pa. Bar Ass’n Ethics Comm., Formal Op. 2014-300 (2014) (“[t]here is no ex parte communications if the social networking website independently notifies users when the page has been viewed.”).

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.123

New York guidance similarly holds that when reviewing social media to perform juror research, a lawyer 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.124

The New York opinions cited above draw a distinction between public and private juror information.125 They opine that viewing the public portion of a social 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.”126

122. Id.
123. Id.
125. Id.
“Subordinate lawyers and non-lawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access” to portions of social media accounts not otherwise accessible to the lawyer.127

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.

Yet, 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.128

[While an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney’s duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.129

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.130 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

128. 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.
objective." 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.  

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.”

**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.  

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.”  

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

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132. Id.


has knowledge.”136 If a lawyer learns of “juror misconduct” due to social media research, he or she “must” promptly notify the court.137 “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.”138

The DC Bar opines that the determination of “[w]hether and how such misconduct must or should be disclosed is beyond the scope” of precise ethical guidance, except in instances “clearly establishing that a fraud has been perpetrated upon the tribunal.”139

136. N Y R P C 3.5(d).


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 consider that any such communication can be problematic because the “intent” of such communication by a lawyer will be judged under a subjective standard, including whether reposting a judge’s posts would be improper.

A lawyer may connect or 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,” 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.”

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.”

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

141. NYRPC 3.5(a)(1).
bond. A judge must, therefore, consider whether any such online 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 – Social Media Definitions

This appendix contains a collection of popular social technologies and terminology, both general and platform-specific, and is designed for attorneys seeking a basic understanding of the social media landscape.

A. Social Technologies

**Facebook**: an all-purpose platform that connects users with friends, family, and businesses from all over the world and enables them to post, share, and engage with a variety of content such as photos and status updates. Founded in 2004, the site now has in excess of 1.5 billion active monthly users.

**Instagram**: a visually-focused platform that allows users to post photos and videos. Created in 2010, and later purchased by Facebook, it has approximately 500 million active monthly users.

**LinkedIn**: an employment-based networking platform which focuses on engagement with individuals in their respective professional capacities. Launched in 2002, it now boasts roughly 100 million active monthly users.

**Periscope**: a video-streaming mobile application that allows users to broadcast live video. Created in 2014, and purchased by Twitter shortly thereafter, it has in excess of 10 million active monthly users.

**Pinterest**: a platform that essentially functions as a social scrapbook, allowing users to save and collect links to share with other users. Started in 2010, it has in excess of 100 million active monthly users, majority of whom are female.

**Reddit**: a social news and entertainment website where all content is user-submitted and the popularity of each post is voted upon by the user base itself. Created in 2005, it has more than 240 million active monthly visitors.
**Snapchat**: an image messaging application that allows users to send and receive photos and videos known as "snaps," which are hidden from the recipients once the time limit expires. Officially released in September 2011, it has in excess of 200 million active monthly users.

**Tumblr**: a microblogging platform that allows users to post text, images, video, audio, links, and quotes to their blogs. It was created in 2007 and has more than 500 million active monthly users.

**Twitter**: a real-time social network that allows users to share updates that are limited to 140 characters. Founded in 2006, it has more than 315 million active monthly users.

**Venmo**: a peer-to-peer payment system where users send money from their bank or credit/debit card to another member. Introduced in 2009, and acquired by PayPal in 2013, it handles approximately 10 billion dollars of social transactions per year.

**Waze**: a social-based GPS platform that is based upon crowd sourcing of events such as accidents and traffic jams from its user base. Founded in 2008, and purchased by Google in 2013, it has 50 million active users.

**WhatsApp**: a cross-platform instant messaging service that allows users to exchange text, images, video, and audio messages for free. Launched in January 2010, and acquired by Facebook in 2014, it now has more than 1 billion users.

**B. Social Terminologies**

**Add**: process on Snapchat of subscribing to another user’s account in order to receive access to their content. This is a “unilateral connection” that does not provide dual-access to both users’ content or require the second user to expressly approve or deny the first user’s access.
**Automatic Notification**: an automatic message sent by the social media platform to the person whose account is being viewed by another. This message may indicate the identity of the person viewing the account as well as other information about such person.

**Bilateral Connection**: a two-way connection between users. That is, for one user to connect with a second, the second user must expressly accept or deny the first user’s access.

**Block**: refers to a user’s option to restrict another’s ability to interact with the user and/or the user’s content on a given platform.

**Connections**: term used on LinkedIn to describe the relationship between two users, indicated by varying degrees.

- **1st Degree Connection**: those who have bilaterally agreed to share and receive exclusive content from one another beyond those available to the LinkedIn community at large.

- **2nd Degree Connection**: those who share a mutual 1st degree connection but are not themselves directly connected.

- **3rd Degree Connection**: those who share a mutual 2nd degree connection but are not themselves directly connected.

**Cover Photo**: a large, horizontal image at the top of a user’s Facebook profile. Similar to a profile photo, a cover photo is public.

**Direct Message**: private conversations that occur on Twitter. Both parties must be following one another in order to send or receive messages.

**Facebook Live**: a feature on Facebook that allows users to stream live video and interact with viewers in real-time.

**Fan**: a user who follows and receives updates from a particular Facebook page. The user must “like” the page in order to become a fan of it.

**Favorite**: an indication that someone “likes” a user’s post on Twitter, given by clicking the star icon.

**Filter**: an aesthetic overlay that can be applied to a photo or video.

**Follow**: process of subscribing to another user in order to receive access to their content. This is a unilateral connection as it does not provide access to one’s own content.

**Follower**: refers to a user who subscribes to another user’s account and thereby receives access to the latter’s content.

**Following**: refers to those accounts that a particular user has subscribed to in order to view and/or receive updates about the content of those accounts.
**Friend**: refers to those users on Facebook who bilaterally agreed to provide access to each other’s account beyond those privileges afforded to the Facebook community at large. “Friend” 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 “Follower” on Twitter or “Connections” on LinkedIn.

**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.

**Geofilter**: a type of Snapchat filter that is specific to a certain location or event and is only available to users within a certain proximity to said location or event.

**Handle**: a unique name used to refer to a user’s account on a given platform.

**Hashtag**: mechanism used to group posts under the same topic by using a specific word preceded by the # symbol.

**Home Page**: section of Instagram users' accounts where they can see all the latest updates from those who they are following.

**Lenses**: used on Snapchat to allow users to add animated masks to their postings and stories.

**Like**: an understood expression of support for content. The amount of likes received is generally tied to the popularity of a given post.

**News Feed**: section of Facebook users' accounts where they can see all the latest updates from those accounts which they are subscribed to, e.g., their friends.

**Notification**: a message sent by a given platform to a user to indicate the presence of new social media activity.

**Pinboard**: the term used on Pinterest for a collection of “pins” that can be organized by any theme of a user’s choosing.

**Posting or Post**: Uploading 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).

**Privacy Settings**: allow a user to determine what content other users are able to view and who is able to contact them.

**Private**: state of a social media account (or a particular post) that, because of heightened privacy settings, is hidden from the general public.

**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.

**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.

**Repin**: on Pinterest, where a user saves another’s pin to their own board. Similar to a “retweet” on Twitter.

**Restricted (“private”)**: 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.

**Retweet**: a Twitter user sharing another’s “tweet” with their own followers.

**Snap**: the term used to describe an image posted to the Snapchat platform.

**Social Media (also called a social network)**: An Internet-based service allowing people to share content and respond to postings by others. Social media may be viewed via websites, mobile or desktop applications, text messaging or other electronic means.

**Social Network**: online space consisting of those who personally know one another or otherwise have agreed to provide them with access to their content.

**Social Profile**: a personal page within a social network that generally displays posts from that person as well as the person’s interests, education, and employment, and identifies those accounts that have access to their content.

**Status**: the term for a user posting to the user’s own page which is simultaneously published on the home page of a particular site, e.g., Facebook’s News Feed.

**Story**: the term used on Snapchat and Instagram for a designated string of images or videos that only are accessible for a period of 24 hours.

**Subreddit**: a smaller sub-category within Reddit that is dedicated to a specific topic or theme. These are defined by the symbol “/r/”.

**Tag**: a keyword added to a social media post with the original purpose of categorizing related content. A tag can also refer to the act of tagging someone in a post, which creates a link to that person’s social media profile and associates the person with the content.
Timeline: section of Twitter users' accounts where they can see all the latest updates from those whom they are following.

Tweet: the term for a user’s post on Twitter that can contain up to 140 characters of text, as well as photos, videos, and links.

Unfollow: the action of unsubscribing from receiving updates from another user.

Unfriending: the action of terminating access privileges as and between two users.

Unilateral connection: a one-way connection between users. That is, a user may connect with a second without the second user connecting with the first or requiring the second to expressly approve or deny the first’s request.

Verified: this refers to a social media account that a platform has confirmed to be authentic. This is indicated by a blue checkmark and is generally reserved for brands and public figures as a way of preventing fraud and protecting the integrity of the person or company behind the account.

Views: this simply refers to the amount of people who have watched a certain video or story.

Wall: the space on a Facebook profile or fan page where users can share posts, photos and links.
Formal Opinion 2012-2:  
JURY RESEARCH AND SOCIAL MEDIA  

TOPIC: Jury Research and Social Media  

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

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

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

OPINION  

I. Introduction  

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

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

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case. However, social media services and websites can blur the line between independent, private research and interactive, interpersonal “communication.” Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations. This opinion applies the New York Rules of Professional Conduct (the “Rules”), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.¹

The Committee believes that the principal interpretive issue is what constitutes a “communication” under Rule 3.5. We conclude that if a juror were to (i) receive a “friend” request (or similar invitation to share information on a social network site) as a result of an attorney’s research, or (ii) otherwise to learn of the attorney’s viewing or attempted viewing of the juror’s pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror’s social media activities, the lawyer must promptly reveal the improper conduct to the court.

¹ Rule 3.5(a)(4) states: “a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.”
II. Analysis Of Ethical Issues Relevant To Juror Research

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

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

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

Missouri Rule of Professional Conduct 3.5 states: “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.”

The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that “if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the...
Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 (“SDCBA 2011-2”) examined whether an attorney can send a “friend request” to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to “friend” a party, even if the “friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication” and is therefore prohibited by the rule against ex parte communications with represented parties.\(^4\) In addition, the New York State Bar Association (“NYSBA”) found that obtaining information from an adverse party’s social networking personal webpage, which is accessible to all website users, “is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Nexis or Factiva and that is plainly permitted.” (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers’ Association (“NYCLA”) published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 (“NYCLA 743”) examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is “proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror’s social networking site, provided there is no contact or communication with the prospective juror and the lawyer does not seek to „friend” jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not „friend” the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring.” (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety “before taking any further significant action in the case.” \(^\text{Id.}\) NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

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

\(^4\) California Rule of Profession Conduct 2-100 states, in part: “(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”
B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

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

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

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

2. What Constitutes a “Communication”?

Any research conducted by an attorney into a juror or member of the venire’s background or behavior is governed in part by Rule 3.5(a)(4), which states: “a lawyer shall not . . . (4)

5 As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.
communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.” The Rule does not contain a mens rea requirement; by its literal terms, it prohibits all communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney’s purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for the very purpose of communication, and automatic features or user settings may cause a “communication” to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror’s social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of “communicate” and “communication,” which are not defined either in the Rule or the American Bar Association Model Rules.⁶

Black’s Law Dictionary (9th Ed.) defines “communication” as: “1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception. 2. The information so expressed or exchanged.” The Oxford English Dictionary defines “communicate” as: “To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across.” Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines “communication” (for the purposes of discovery requests) as: “the transmittal of information (in the form of facts, ideas, inquiries or otherwise).”

Under the above definitions, whether the communicator intends to “impart” a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the “transmission of,” “exchange of” or “process of bringing” information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the “sender” was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

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⁶ Although the New York City Bar Association Formal Opinion 2010-2 (“NYCBA 2010-2”) and SDCBA 2011-2 (both addressing social media “communication” in the context of the “No Contact” rule) were helpful precedent for the Committee’s analysis, the Committee is unaware of any opinion setting forth a definition of “communicate” as that term is used in Rule 4.2 or any other ethics rule.
3. An Attorney May Research a Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror’s social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably “communicated” with the juror. The transmission of the information that the attorney viewed the juror’s page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), infra.

Although the text of Rule 3.5(a)(4) would appear to make any “communication”—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee’s current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney’s research or actions. However, other services may be more difficult to navigate depending on their functionality and each user’s particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites’ social functionality. An attorney may not, for example, send a chat, message or “friend request” to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that
their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a “communication” would be generated by the website.

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

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

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

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

7 Rule 8.4 prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation,” and also states “a lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts or another.” (Rule 8.4(c),(a).)
and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to “friend” an adverse party. (NYCLA 743 at 2.) We agree with these conclusions; attorneys may not shift their conduct or assignments to non-attorneys in order to evade the Rules.

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

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

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

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries. Research permitted as to potential jurors is permitted as to sitting jurors. Although there is, in light of the discussion in Section III, infra, great benefit that can be derived from detecting instances when jurors are not following a court’s instructions for behavior while empanelled, researching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney’s duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.
III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: “a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge.” Although the Committee concludes that an attorney may conduct jury research on social media websites as long as “communication” is avoided, if an attorney learns of juror misconduct through such research, she must promptly notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.9

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

The law requires jurors to comply with the judge’s charge10 and courts are increasingly called upon to determine whether jurors’ social media postings require a new trial. See, e.g., Smead v. CL Financial Corp., No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror’s posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror’s conduct is misconduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a “conversation,” it may

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

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

10 People v. Clarke, 168 A.D.2d 686 (2d Dep’t 1990) (holding that jurors must comply with the jury charge).
not always be obvious whether a particular post is “connected with” the trial. Moreover, a juror may be permitted to post a comment “about the fact [of] service on jury duty.”

IV. Post-Trial

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

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. “Communication,” in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney’s research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is the process of bringing an idea, information or knowledge to another’s perception—including the fact that they have been researched. In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in

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11 US v. Fumo, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) aff’d, 655 F.3d 288 (3d Cir. 2011) (“[The juror’s] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.”) (internal citations omitted).
conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.
NYCLA ETHICS OPINION 745
JULY 2, 2013

ADVISING A CLIENT REGARDING POSTS ON SOCIAL MEDIA SITES

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

DIGEST: It is the Committee’s opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4.1

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

OPINION:

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

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

1 This opinion is limited to conduct of attorneys in connection with civil matters. Attorneys involved in criminal cases may have different ethical responsibilities.
That information posted on social media may undermine a litigant’s position has not been lost on attorneys. Rather than hire investigators to follow claimants with video cameras, personal injury defendants may seek to locate YouTube videos or Facebook photos that depict a “disabled” plaintiff engaging in activities that are inconsistent with the claimed injuries. It is now common for attorneys and their investigators to seek to scour litigants’ social media pages for information and photographs. Demands for authorizations for access to password-protected portions of an opposing litigant’s social media sites are becoming routine.

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

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

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

A number of recent cases have considered the extent to which courts may direct litigants to authorize adverse counsel to access the “private” portions of their social media postings. While a comprehensive review of this evolving body of law is beyond the scope of this opinion, the premise behind such cases is that social media websites may contain materials inconsistent with a party’s litigation posture, and thus may be used for impeachment. The newest cases turn on whether the party seeking such disclosure has laid a sufficient foundation that such impeachment material likely exists or whether the party is engaging in a “fishing expedition” and an invasion of privacy in the hopes of stumbling onto something that may be useful.\footnote{In Tapp v. N.Y.S. Urban Dev. Corp., 102 A.D.3d 620, 958 N.Y.S. 2d 392 (1st Dep’t 2013), the First Department held that a defendant’s contention that Facebook activities “may reveal daily activities that contradict or conflict with}
Given the growing volume of litigation regarding social media discovery, the question arises whether an attorney may instruct a client who does not have a social media site not to create one: May an attorney pre-screen what a client posts on a social media site? May an attorney properly instruct a client to “take down” certain materials from an existing social media site?

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

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

An attorney also has an ethical obligation not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”

plaintiff’s” claim isn’t enough. “Mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account’s usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff’s Facebook account — that is, information that ‘contradicts or conflicts with plaintiff’s alleged restrictions, disabilities, and losses, and other claims.’”1 Also, see, Kregg v. Maldonado, 98 A.D.3d 1289, 951 N.Y.S. 2d 301 (4th Dep’t 2012); Patterson v. Turner Constr. Co., 88 A.D.3d 617, 931 N.Y.S. 2d 311 (1st Dep’t 2011); McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 910 N.Y.S. 2d 614 (4th Dep’t 2010).
RPC 3.1(a). Frivolous conduct includes the knowing assertion of “material factual statements that are false.” RPC 3.1(b)(3). Therefore, if a client’s social media posting reveals to an attorney that the client’s lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements. See, also, RPC 3.3; 4.1 (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”)

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

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

CONCLUSION:

Lawyers should comply with their ethical duties in dealing with clients’ social media posts. The ethical rules and concepts of fairness to opposing counsel and the court, under RPC 3.3 and 3.4, all apply. An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on “private” social media pages, and what may be “taken down” or removed.

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3 We do not suggest that all information on Facebook pages would constitute admissible evidence; such determinations must be made as a matter of substantive law on a case by case basis.
172 F.Supp.3d 1100
United States District Court,
N.D. California.

Oracle America, Inc., Plaintiff,
v.
Google Inc., Defendant.

No. C 10–03561 WHA
Signed March 25, 2016

Synopsis

Background: Copyright owner brought action against alleged infringer for violation of owner's copyright in programming platform that alleged infringer used to compose operating system for mobile devices.

[ Holding: ] The District Court, William Alsup, J., held that if both parties were unable to consent to complete ban on internet and social research on venire or empaneled jury, parties would follow procedures regarding use and disclosure of such research to venire and jury.

Ordered accordingly.

West Headnotes (1)

[1] Jury

Examination by court

Rights and privileges of jurors

Court would order, in absence of complete agreement by both parties on ban against internet and social media research on venire members, that certain procedures would be followed at jury instruction to inform venire members about specific extent to which each party would use internet and social media searches to investigate and monitor jurors both during and after trial, so that venire members could adjust their privacy settings from mobile devices if they wished, and as trial progressed, each party would immediately report any apparent misconduct by a juror to the court and preserve an exact record of every search and all information viewed so that court and parties could see when objecting side of motion alleging juror misconduct first learned of a problem, and further, no personal appeals to particular jurors were allowed at any time during trial.

Cases that cite this headnote

Attorneys and Law Firms


ORDER RE INTERNET AND SOCIAL MEDIA SEARCHES OF JURORS

WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE

Trial judges have such respect for juries—reverential respect would not be too strong to say—that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.

In this high-profile copyright action, both sides requested that the Court require the venire to complete a two-page jury questionnaire. One side then wanted a full extra day to digest the answers, and the other side wanted two full extra days, all before beginning voir dire. Wondering about the delay allocated to reviewing two pages, the judge eventually realized that counsel wanted the names and residences from the questionnaire so that, during the delay, their teams could scrub Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information. Upon inquiry, counsel admitted this. The questionnaire idea cratered, and the discussion moved to whether Internet investigation by counsel about the venire should be allowed at all. That led to a series of memoranda by counsel on the subject and now to this order.

An ordinary Google search on the venire would fetch hits, including links to many Facebook profiles, which, in turn, would at least display profile information classified as “public.” Counsel could uncover even more personal information by logging onto their own Facebook accounts and researching the specific venire persons. In this way, counsel could mine not only the “public” data but the details classified as “for friends only” or “friends of friends,” depending on the fortuity of friend listings. The same is true, more or less, for other social media sites.

The Court, of course, realizes that social media and Internet searches on the venire *1102 would turn up information useful to the lawyers in exercising their three peremptory challenges, and, might even, in a very rare case, turn up information concealed during voir dire that could lead to a for-cause removal. While the trial is underway, ongoing searches might conceivably reveal commentary about the case to or from a juror.

Nevertheless, in this case there are good reasons to restrict, if not forbid, such searches by counsel, their jury consultants, investigators, and clients.

The first reason is anchored in the danger that upon learning of counsel's own searches directed at them, our jurors would stray from the Court's admonition to refrain from conducting Internet searches on the lawyers and the case. This is a high-profile lawsuit, as stated, and dates back to 2010. Nearly one million hits (including tens of thousands of news results) appear in a Google search for “Oracle v. Google.” These include strong opinions on both sides and at least the usual amount of inaccurate information. In this very case, we earlier learned that both sides hired online commentators who have promoted their respective litigation viewpoints on blogs and other websites. Numerous of the top results for searches on counsel for either party (or for the undersigned judge) include discussions of this controversy and its national policy implications. As a result, we have an unusually strong need to prevent any member of our jury from yielding to the impulse to conduct Internet searches on our lawyers or our case or its history.

Our jury will, of course, be admonished to refrain from any Internet research about the lawsuit, the parties, the lawyers, or the judge—an admonition that will be regularly repeated. See Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (June 2012). Indeed, the entire venire will be told to refrain from any such research soon after it reaches the courtroom and well before the final jury is even selected.
Google is willing to accept an outright ban on Internet research about the venire and our jury, provided the ban applies equally to both sides. Oracle, however, will not. Oracle initially took a broad position on the scope of Internet research it intended to conduct, but it has since purported to scale back its plan. On numerous occasions, Oracle has supplied confusing answers to the Court's inquiries about its plan, and its responses make little sense in light of how the Court understands the most prominent social media sites to operate. For purposes of this order, it is unnecessary to pin Oracle down in its intentions, but it will need to be necessary for Oracle to pin down its specific search intentions by the time jury selection begins, as outlined below.

To return to the first concern, the apparent unfairness in allowing the lawyers to do to the venire what the venire cannot do to the lawyers will likely have a corrosive effect on fidelity to the no-research admonition. Once our venire learns of the lawyers’ Internet searches (as the venire would via the instruction Oracle requests), a very serious risk will be presented that they will feel justified in doing to the lawyers (and to the case itself) what the lawyers are doing to them, namely, conducting Internet searches—despite the no-research admonition. The one-sidedness of Oracle’s approach will be hard to accept and therein lies the danger. Given the massive volume of Internet commentary on the lawyers and the case, this presents a significant risk.

A second danger posed by allowing counsel to conduct research about the venire *1103 and the jury is that it will facilitate improper personal appeals to particular jurors via jury arguments and witness examinations patterned after preferences of jurors found through such Internet searches. For example, if a search found that a juror’s favorite book is *To Kill A Mockingbird*, it wouldn’t be hard for counsel to construct a copyright jury argument (or a line of expert questions) based on an analogy to that work and to play upon the recent death of Harper Lee, all in an effort to ingratiate himself or herself into the heartstrings of that juror. The same could be done with a favorite quote or with any number of other juror attitudes on free trade, innovation, politics, or history. Jury arguments may, of course, employ analogies and quotations, but it would be out of bounds to play up to a juror through such a calculated personal appeal, all the moreso since the judge, having no access to the dossiers, couldn’t see what was really in play. See *United States v. Nobari*, 574 F.3d 1065, 1077 (9th Cir.2009).

A third reason is to protect the privacy of the venire. They are not celebrities or public figures. The jury is not a fantasy team composed by consultants, but good citizens commuting from all over our district, willing to serve our country, and willing to bear the burden of deciding a commercial dispute the parties themselves cannot resolve. Their privacy matters. Their privacy should yield only as necessary to reveal bias or a reluctance to follow the Court’s instructions. It is a weak answer that venire persons, through their social media privacy settings, have chosen to expose their profiles to scrutiny, for navigating privacy settings and fully understanding default settings is more a matter of blind faith than conscious choice. (Otherwise, there would be no need for websites explaining the intricacies of privacy settings.)

For all these reasons, the Court has considered exercising its discretion to impose an outright ban preventing counsel and the parties from conducting social media and Internet searches on venire persons as well as on the final empaneled jury. Such a ban would be within the sound exercise of discretion to protect the integrity of our process and to curb unnecessary intrusions into juror privacy. A main problem in doing so, however, is that the lawyers would then be precluded from learning information readily available to the press and every member of the public in the gallery. That is, with an outright ban, everyone in the gallery could have more information about the venire persons and the empaneled jurors than the lawyers themselves. Of course, the Court cannot control those in the gallery, but it can control the trial teams. And, lawyer surveillance is what leads to the problems above, so such a ban on the trial teams would be logical. Still, the Court respects the excellent trial lawyers in this case and their burden in this trial and is reluctant to order them. Rather, the Court calls upon them to voluntarily consent to a ban against Internet research on the venire or our jury until the trial is over. If they will so agree, we will so advise the venire at the start of jury selection and this will surely have a positive effect on fidelity to the no-research admonition. If all counsel so agree, counsel will be given an enlargement of time to conduct extra voir dire themselves.

In the absence of complete agreement on a ban, the following procedure will be used. At the outset of jury...
selection, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors, including specifically searches on Facebook, LinkedIn, Twitter, and so on, including the extent to which they will log onto their own social media accounts to conduct searches and the extent to which they will perform ongoing searches while the trial is underway. Counsel shall not explain away their searches on the ground that the other side will do it, so they have to do it too. Nor may counsel intimate to the venire that the Court has allowed such searches and thereby leave the false impression that the judge approves of the intrusion. Counsel may simply explain that they feel obliged to their clients to consider all information available to the public about candidates to serve as jurors. Otherwise, counsel must stick to disclosing the full extent to which they will conduct searches on jurors. By this disclosure, the venire will be informed that the trial teams will soon learn their names and places of residence and will soon discover and review their social media profiles and postings, depending on the social media privacy settings in place. The venire persons will then be given a few minutes to use their mobile devices to adjust their privacy settings, if they wish. The venire persons will also be given the normal admonition that they cannot do any research about the case, the parties, or the lawyers and that they cannot speak to anyone about the case, including by making any social media postings about it. Only the names and places of residence of those called forward to the box shall be provided to counsel (so the identities of venire persons still in the gallery will remain private).

In this case, there is a further special point that both sides may wish to address with the venire. The very name of the defendant—Google—brings to mind Internet searches. On their own, prospective jurors are likely to wonder whether Google will be mining the histories of Internet searches by the venire persons to determine their interests in politics, careers, hobbies, dating, shopping, travel, or other intimate facts. Although Google has assured the Court that it has no intention to review such search histories, our venire will not know this (unless told) and may speculate. It would, therefore, be prudent to explain to our venire that neither party will resort to examining search histories on any search engine.

Thereafter, until the trial is over, each side will be permitted to view online whatever it told the venire it would review—but nothing more. If, as we proceed forward, either side detects any apparent misconduct by a juror, counsel must immediately report it to the Court and the other side regardless of whether the juror appears favorable to their side or not. Each side must preserve an exact record of every search and all information viewed so that if a motion is later made alleging misconduct by a juror, we will all be able to see when the objecting side first learned of the problem.

During voir dire, each prospective juror that has been called forward will be asked if he or she can still follow the usual prohibitions on research and public statements about the case despite the one-sidedness (that is, despite the fact that one or both trial teams will be trying to monitor each juror's social media postings). If the prospective juror cannot do so, he or she will be excused on that basis.

With regard to the problem of personal appeals, this order rules now that no personal appeals to any juror may be made. This prohibition bars witness examinations or jury arguments (or opening statements) exploiting information learned about a juror via searches, such as, without limitation, favorite books, texts, verses, songs, or analogies to likes or dislikes expressed on the Internet. This prohibition, of course, applies whether or not the name of the particular juror is called out.

In addition to the Court's own thorough voir dire, each side shall have twenty minutes of venire examination directed to bias or other for-cause challenges, subject to enlargement for good cause (but this may not be used for "conditioning the jury" or "extracting promises" or drawing out argumentative material from jurors to argue the case).

The Court would much prefer to fully protect the privacy of all venire persons from Internet searches and only reluctantly allows the foregoing.

* * *

This is an emerging and developing concern. To that end, this order will now step back and offer a snapshot of how some of today's prominent social media sites protect (or don't protect) personal information, which information
may be useful for other judges, lawyers, and academics in working through this concern:

• With regard to Facebook, typical profiles contain the following information: lists of personal connections (i.e., “friends”), pictures, videos, check-ins at real-world locations, scheduled events, posts dating back to the creation of the user’s profile (including commentary on news stories and discussions with other “friends”), relationship status, work experience, educational background, current city, home town, contact information, and certain personal interests such as favorite quotes, membership in certain groups, hobbies, political preferences, religious views, sexual orientation, and preferred media. Access to segments of this information can be regulated by the account holder according to various privacy settings. The highest level of privacy keeps information accessible only to the user. This is rarely used, inasmuch as a key purpose of Facebook is to share information with other people using the platform. The next level of privacy allows a user to reveal information only to his or her “friends” (or to a more limited list). The next level allows access to “friends of friends,” which includes not only the user's friends but all of the friends of the user's friends, which can vastly multiply access. (For example, if someone has three hundred friends and each of them has three hundred different friends, access would expand to 90,000 viewers.) The most expansive setting is “public,” meaning at least everyone with a Facebook account. Certain “public” information, including a user's primary picture, list of likes, hometown, current city, education and work history, and favorite quote, is even available to Internet users without Facebook accounts or who have not logged onto their accounts. Generally, a Facebook user's post history (i.e., the stream of text, articles, discussions, pictures, and videos the user shares) is not available to searchers without a Facebook account. By default today, most information is accessible only to friends, although a default setting of “friends of friends” has been employed by Facebook in the past. This means that someone may log onto Facebook and automatically access all Facebook information (including post history) on a juror classified as “public,” as “friends of friends” (if there is a “friend” in common) or as “friends only” (if the investigator happens to be a Facebook “friend” of the juror). “Public” information (excluding post history) is accessible as well via ordinary Google searches without ever logging onto Facebook. Finally, Facebook does not notify its users when their profiles have been visited.

• With regard to Twitter, a typical user's profile includes that user's *1106 “tweet” history, which includes all posts made since the user created the account, the list of other Twitter accounts that user “follows” and the list of other users that “follow” that user's account. When one Twitter user “follows” another Twitter user, the latter's posts appear in the former's default real-time feed of tweets. Access to this information is regulated by a choice between two privacy settings. The default privacy setting keeps all of a user's tweets public, in which case anyone may view those tweets, even without ever logging onto a Twitter account. Alternatively, a user may elect to keep tweets “protected,” in which case the above information is available only to other Twitter users whom the user has affirmatively approved to view that information. Twitter does not notify its users when their profiles have been visited.

• With regard to LinkedIn, a typical user's profile includes a picture, the user's employment and education history, contact information, a list of skills, publications, awards and interests, among other line items that might appear on a résumé. The profile also includes information such as a list of the “connections” the user has established on the site. (Two users “connect” once one user sends a request to connect and the other accepts the request, which opens up additional personal data and avenues of communication.) A user's profile also displays a list of groups established on the site that the user has joined. Users can post content, such as links to news articles or original writing. For each item on a user's profile (except for the list of “connections”), the user may elect to publish the item to his or her “public profile,” making it visible to everyone, including individuals who are not even logged onto LinkedIn, or to make it visible only to the user's “connections.” A user may further select whether to user's “connections.” A user may further select whether to

each time his or her profile is visited by another LinkedIn user and identifying that visitor by name. A visitor may change that setting so that a visitee receives no notification, or so the notification only displays the visitor's place of employment without any further identifying information.

With regard to the case law, most of it discusses the problems of jurors using of social media and conducting Internet searches, thereby exposing jurors to commentary about the case. E.g., United States v. Feng Li, 630 Fed.Appx. 29, 33–34, 2015 WL 7005595, at *3 (2d Cir.2015); United States v. Fumo, 655 F.3d 288 (3d. Cir.2011); Dimas-Martinez v. State, 2011 Ark. 515, 385 S.W.3d 238 (2011). Several other decisions address whether a party waives arguments seeking to set aside a verdict based on a juror's apparent bias if that apparent bias could have been discovered through an Internet search of that juror before the verdict (where counsel were allowed and able to conduct such searches).


There are precious few decisions addressing our immediate problem, namely, whether counsel should be allowed to conduct Internet and social media research about prospective and empaneled jurors.

The American Bar Association issued an opinion that, within limits, it is ethical for counsel to conduct Internet searches on prospective jurors. Specifically, in Formal Opinion No. 466, the ABA considered the extent to which an attorney may conduct Internet searches of jurors and prospective jurors without running afoul of ABA Model Rule 3.5(b), which prohibits ex parte communication with jurors. That opinion determined that “passive review” of a juror's website or social media that is available without making an “access request” and of which the juror is unaware is permissible within ABA Model Rule 3.5(b). The ABA likened such review to “driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions.” Access requests, such as friend requests on Facebook, “following” users on Twitter, or seeking to “connect” on LinkedIn, whether on one's own or through a jury consultant or other agent, constitute forbidden ex parte communications within the rule. That such searches are not unethical does not translate into an inalienable right to conduct them.

Although the ABA determined that a range of activities is permitted without violating a professional duty, it cautioned that judges may limit the scope of the searches that counsel could perform regarding the juror's social media “if a judge believes it to be necessary, under the circumstances of a particular matter....”

California has not promulgated a rule regarding the ethical scope of Internet research on jurors or prospective jurors, nor has the California State Bar issued an opinion on that subject. The California State Bar website provides a link to the ABA opinion discussed above as well as links to opinions from the Association of the Bar of the City of New York and the Oregon State Bar. Formal Opinion No. 2012–2, issued by the ABCNY, largely mirrors the ABA opinion, except that the ABCNY would prohibit any Internet research that notified the juror such research occurred (such as using LinkedIn in a manner that sent an automatic notification informing the user that another user had visited his or her profile). Formal Opinion No. 2013–189, issued by the Oregon State Bar provides, unlike the ABA or the ABCNY, that a lawyer may affirmatively request access to private aspects of a juror's social media profiles, provided the lawyer accurately represents his or her role in a case when asked by the juror. Neither the New York City opinion nor the Oregon opinion addressed the judge's discretion in prohibiting such searches or access requests.

In United States v. Norwood, No. 12–CR–20287, 2014 WL 1796644 (E.D.Mich. May 6, 2014) (Judge Mark A. Goldsmith), the defendants opposed a plan to empanel an anonymous jury (which would protect the jury from intimidation in a case involving a violent criminal enterprise). Defendants argued that their counsel needed access to the jurors' identifying information to monitor their social media accounts during the trial to ensure compliance with the no-discussion admonition. Judge Goldsmith rejected the defendants' argument because the proposed monitoring would “unnecessarily chill the willingness of jurors summoned from [the] community to serve as participants in our democratic system of justice.” Id. at *4 (quoting United States v. Kilpatrick, No. 10–20403, 2012 WL 3237147, at *1 (E.D.Mich. Aug. 7, 2012)
A jury questionnaire had also specifically asked prospective jurors whether they could abide by the judge's admonitions regarding Internet and social media. Thus, the defendants' interest in monitoring the jurors' social media postings could not overcome the interest in protecting the jurors from intimidation and violence, which interest was served by empaneling an anonymous jury.

In *Carino v. Muenzen*, No. A–5491–08T1, 2010 WL 3448071, at *10 (N.J.Super.App.Div. Aug. 30, 2010), a trial court in New Jersey prohibited the plaintiff's counsel from using the Internet to investigate the jurors because they had failed to notify opposing counsel that they would be conducting such searches, although the trial court cited no basis for requiring such notification. The New Jersey Appellate Division determined that the trial court abused its discretion by imposing such a prohibition “in the name of ‘fairness’ or maintaining a ‘level playing field.’” *Ibid.*

Oracle cites *Sluss v. Commonwealth*, 381 S.W.3d 215, 226–227 (Ky.2012), for the contention that counsel's lack of access to social media “effectively precluded” full voir dire, but that decision did not address a prohibition on social media and Internet searches. Rather, it addressed two jurors' false statements made during oral voir dire regarding their respective relationships to the victim's mother. A review of the jurors' respective Facebook profiles later revealed that both jurors were Facebook “friends” with the victim's mother. One of the jurors in question unequivocally denied having a Facebook account (which later proved false). Thus, the case was remanded for a hearing regarding the jurors' honesty and whether the true facts warranted for-cause removal.

Finally, in *Steiner v. Superior Court*, 220 Cal.App.4th 1479, 1493, 164 Cal.Rptr.3d 155 (2013), as modified on denial of rehearing (Nov. 26, 2013), the California Court of Appeal recognized that although certain tools are available to ensure that jurors do not conduct research about the attorneys or the case, a judge lacks the authority “to impose, as a prophylactic measure, an order requiring” defense counsel to remove pages from their website to ensure they could not be viewed by the jurors, which “constituted an unlawful prior restraint on counsel's constitutional right to free speech.”

* * *

Both sides shall inform the Court By MARCH 31 AT NOON, whether they will consent to a ban against Internet research on the venire or the empaneled jury until the trial is over.

IT IS SO ORDERED.

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172 F.Supp.3d 1100
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NOTE: These rules shall be referred to as the Rules of Professional Conduct and shall be abbreviated as "RPC."
RPC 1.0  Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent."

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely adoption and enforcement by a law firm of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
(n) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, electronic communication, and embedded information (metadata) in an electronic document. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(p) "Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins.

Note: Adopted November 17, 2003 to be effective January 1, 2004; paragraph (o) amended and new paragraph (p) adopted August 1, 2016 to be effective September 1, 2016.

RPC 1.1 Competence

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall
abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

A lawyer may counsel a client regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (c) amended, and paragraph (e) deleted and redesignated as RPC 1.4(d) November 17, 2003 to be effective January 1, 2004; paragraph (d) amended August 1, 2016 to be effective September 1, 2016.

RPC 1.3  Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.4  Communication

(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new paragraphs (a) and (d) adopted and former paragraphs (a) and (b) redesignated as paragraphs (b) and (c) November 17, 2003 to be effective January 1, 2004.

RPC 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is notified of the fee division; and

(3) the client consents to the participation of all the lawyers involved; and

(4) the total fee is reasonable.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new subparagraph (e)(2) added and former subparagraphs (e)(2) and (e)(3) redesignated as subparagraphs (e)(3) and (e)(4) November 17, 2003 to be effective January 1, 2004.

RPC 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c) and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to prevent the client from causing death or substantial bodily harm to himself or herself;

(4) to comply with other law; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

(f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Official Comment (August 1, 2016)

Paragraph (d)(5) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering merger, or a lawyer is considering the purchase of a law practice. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the
client or former client gives informed written consent. A lawyer’s fiduciary duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these Rules.

Any information disclosed pursuant to paragraph (d)(5) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (d)(5) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (d)(5). Paragraph (d)(5) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Paragraph (f) requires a lawyer to act competently to safeguard information, including electronically stored information, relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer’s supervision. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (f) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent in writing to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

Official Comment (September 1, 2018)

The Court adopts the comment in the Restatement (Third) of the Law Governing Lawyers on confidential information, which states:

Whether information is “generally known” depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods
of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended, new paragraph (c) added, former paragraph (c) redesignated as paragraph (d), and former paragraph (d) amended and redesignated as paragraph (e) November 17, 2003 to be effective January 1, 2004; former subparagraph (d)(3) redesignated as subparagraph (d)(4) and new subparagraph (d)(3) adopted July 19, 2012 to be effective September 4, 2012; new subparagraph (d)(5) and new paragraph (f) adopted, and Official Comment added, August 1, 2016 to be effective September 1, 2016; paragraphs (a) and (b) amended, and additional Official Comment added July 27, 2018, to be effective September 1, 2018.

**RPC 1.7 Conflict of Interest: General Rule**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text deleted and new text adopted November 17, 2003 to be effective January 1, 2004.
RPC 1.8 Conflict of Interest: Current Clients; Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and

(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advise of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.
Note: Adopted September 10, 1984 to be effective immediately; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; caption amended, paragraphs (a), (b), (c), (f), (g), (h) amended, former paragraph (i) deleted, former paragraph (j) redesignated as paragraph (i), former paragraph (k) deleted, and new paragraphs (j), (k) and (l) added November 17, 2003 to be effective January 1, 2004; subparagraph (e)(3) amended July 22, 2014 to be effective January 1, 2015.

RPC 1.9 Duties to Former Clients

(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client’s interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (b) amended, and new paragraphs (c) and (d) added November 17, 2003 to be effective January 1, 2004.
RPC 1.10  
**Imputation of Conflicts of Interest: General Rule**

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

(1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in RPC 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by RPC 1.11.

(f) Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that: (1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter, (2) the screened attorney acknowledges the obligation to remain screened and takes action to insure the same, and (3) the screened attorney is apportioned no part of the fee therefrom.
Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (b) corrected in Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 217-18 (1988); caption and paragraphs (a), (b), and (c) amended, paragraph (d) deleted, former paragraph (e) amended and redesignated as paragraph (d), new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.

RPC 1.11 Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

(1) in which the lawyer participated personally and substantially as a public officer or employee, or

(2) for which the lawyer had substantial responsibility as a public officer or employee; or

(3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

(c) In the event a lawyer is disqualified under (a) or (b), the lawyer may not represent a private client, but absent contrary law a firm with which that lawyer is associated may undertake or continue representation if:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(2) written notice is given promptly to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:
(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment,

(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c).

(e) As used in this Rule, the term:

(1) "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency;

(2) "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

Comment by Court (Regarding 2008 Amendment)

In In re ACPE Opinion 705, 192 N.J. 46 (2007), the Court deferred to the Legislature in the spirit of comity and held that the post-government employment restrictions imposed by the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-17, apply in the context of former State attorneys. The 2008 amendment to paragraph (c) implements that decision.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended, text of paragraph (b) deleted and new text adopted, new paragraph (c) adopted, former paragraphs (c) and (d) amended and redesignated as paragraphs (d) and (e), and former paragraph (e) merged into redesignated paragraph (e) November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 9, 2008 to be effective September 1, 2008.
RPC 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk

(a) Except as stated in paragraph (c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding have given consent, confirmed in writing.

(b) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral. A lawyer serving as law clerk to such a person may negotiate for employment with a party or attorney involved in a matter in which the law clerk is participating personally and substantially, but only after the lawyer has notified the person to whom the lawyer is serving as law clerk.

(d) An arbitrator selected by a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended, new paragraph (b) adopted, former paragraphs (b) and (c) amended and redesignated as paragraphs (c) and (d) November 17, 2003 to be effective January 1, 2004.

RPC 1.13 Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data.
respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.
(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. If the organization's consent to the dual representation is required by RPC 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

(f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996.

RPC 1.14 Client Under a Disability

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.

RPC 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property
shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;
the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. No lawyer shall assert a common law retaining lien.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b), (c), and (d) amended November 17, 2003 to be effective January 1, 2004; paragraph (d) amended March 25, 2013 to be effective April 1, 2013.

RPC 1.17 Sale of Law Practice

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in this jurisdiction.

(b) The entire practice is sold to one or more lawyers or law firms.

(c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.
(1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.

(2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

(3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the New Jersey Law Journal and the New Jersey Lawyer at least thirty days in advance of the effective date of the transfer.

(d) The fees charged to clients shall not be increased by reason of the sale of the practice.

(e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.

(f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

Note: Adopted October 16, 1992, to be effective immediately; paragraph (f) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended November 17, 2003 to be effective January 1, 2004.

RPC 1.18 Prospective Client

(a) A lawyer who has had communications in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.

(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).
(c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.

(d) A person who communicates with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a “prospective client,” and if no client-lawyer relationship is formed, is a “former prospective client.”

Official Comment (August 1, 2016)

A person who communicates with a lawyer to disqualify that lawyer is not considered a prospective client. For example, an uninvited electronic communication is not, without more, considered to be a consultation with a prospective client.

Note: Adopted November 17, 2003 to be effective January 1, 2004; paragraphs (a) and (d) amended, and Official Comment adopted, August 1, 2016 to be effective September 1, 2016.

RPC 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 2.2 (Reserved)

Note: RPC 2.2 ("Intermediary") adopted July 12, 1984 to be effective September 10, 1984; caption and rule deleted November 17, 2003 effective January 1, 2004.

RPC 2.3 Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless:

1. the lawyer describes the conditions of the evaluation to the client, in writing, including disclosure of information otherwise protected by RPC 1.6;
2. the lawyer consults with the client; and
3. the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.

(d) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended and redesignated as paragraphs (a) and (b), former paragraph (b) redesignated as paragraph (d), and paragraph (c) amended November 17, 2003 to be effective January 1, 2004.

RPC 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform the parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Note: Adopted November 17, 2003 to be effective January 1, 2004.

RPC 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that 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, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
RPC 3.2   Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 3.3   Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

   (1) make a false statement of material fact or law to a tribunal;

   (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

   (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

   (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

   (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
**RPC 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(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;

(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

(g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

**Note:** Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990.

**RPC 3.5 Impartiality and Decorum of the Tribunal**

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law;

(c) engage in conduct intended to disrupt a tribunal; or

(d) contact or have discussions with a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral (hereinafter "judge") about the judge’s post-retirement employment while the lawyer (or a law firm with or for whom the lawyer is a partner, associate, counsel, or contractor) is involved in a pending matter in which the judge is participating personally and substantially.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b) and (c) amended and new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.

RPC 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Official Comment by Supreme Court (November 17, 2003)

A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(1) amended October 1, 1992, to be effective immediately; paragraph (a) amended, paragraph (b) deleted and restated in Official Comment, paragraph (c) amended and redesignated as paragraph (b), and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.
RPC 3.7  Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 3.8  Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
(1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (c) and (d) amended and new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.

RPC 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a) through (d), RPC 3.4(a) through (g), and RPC 3.5(a) through (c).

Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.

RPC 4.1 Truthfulness in Statements to Others

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) 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.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.
RPC 4.2  Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Official Comment by Supreme Court (November 17, 2003)

Concerning organizations, RPC 4.2 addresses the issue of who is represented under the rule by precluding a lawyer from communicating with members of the organization's litigation control group. The term "litigation control group" is not intended to limit application of the rule to matters in litigation. As the Report of the Special Committee on RPC 4.2 states, "... the 'matter' has been defined as a 'matter whether or not in litigation.'" The primary determinant of membership in the litigation control group is the person's role in determining the organization's legal position. See Michaels v. Woodland, 988 F.Supp. 468, 472 (D.N.J. 1997).

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. See State v. Bisaccia, 319 N.J. Super. 1, 22-23 (App. Div. 1999).

Concerning communication with governmental officials, the New Jersey Supreme Court Commission on the Rules of Professional Conduct agrees with the American Bar Association's Commission comments, which state:

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996; amended November 17, 2003 to be effective January 1, 2004.
RPC 4.3  Dealing with Unrepresented Person; Employee of Organization

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. 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. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996.

RPC 4.4  Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.

A lawyer who receives a document or electronic information that contains privileged lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information (2) return the document to the other lawyer and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

Official Comment (August 1, 2016)

Lawyers should be aware of the presence of metadata in electronic documents. “Metadata” is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when
documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications.

A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic “mining” software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simple computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata.

A document will not be considered “wrongfully obtained” if it was obtained for the purposes of encouraging, participating in, cooperating with, or conducting an actual or potential law enforcement, regulatory, or other governmental investigation. Government lawyers, namely, lawyers at the offices of the Attorney General, County Prosecutors, and United States Attorney, who have lawfully received materials that could be considered to be inadvertently sent or wrongfully obtained under this Rule are not subject to the notification and return requirements when such requirements could impair the legitimate interests of law enforcement. These specified government lawyers may also review and use such materials to the extent permitted by the applicable substantive law, including the law of privileges.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984; text redesignated as paragraph (a) and new paragraph (b) adopted November 17, 2003 to be effective January 1, 2004; paragraph (b) amended and Official Comment adopted August 1, 2016 to be effective September 1, 2016.
RPC 5.1 Responsibilities of Partners, Supervisory Lawyers, and Law Firms

(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.

(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.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or ratifies the conduct involved; or

(2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate or holds some other comparable status with the firm.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended November 17, 2003 to be effective January 1, 2004; new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.

RPC 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 5.3 Responsibilities Regarding Nonlawyer Assistance
With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the 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; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

   (1) the lawyer orders or ratifies the conduct involved;

   (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

   (3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Official Comment (August 1, 2016)

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm
A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdiction in which the services will be performed, particularly with regard to confidentiality. When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.

Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer should reach an agreement in writing with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; title amended and Official Comment adopted August 1, 2016 to be effective September 1, 2016.

RPC 5.4 Professional Independence of a Lawyer

Except as otherwise provided by the Rules of Court:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) lawyers or law firms who purchase a practice from the estate of a deceased lawyer, or from any person acting in a representative capacity for a disabled
or disappeared lawyer, may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed upon price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation, association, or limited liability entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a)(2) amended and paragraph (a)(3) adopted October 16, 1992, to be effective immediately; paragraph (d) amended July 10, 1998, to be effective September 1, 1998; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall:
(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;

(4) not hold himself or herself out as being admitted to practice in this jurisdiction;

(5) comply with R. 1:21-1(a)(1); and

(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, former text designated as paragraph (a), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; subparagraphs (b)(3)(ii) and (b)(3)(iii) amended, former subparagraph (b)(3)(iv) redesignated as subparagraph (b)(3)(v) and amended, new subparagraph (b)(3)(iv) adopted, and paragraph (c) and subparagraphs (c)(3) and (c)(6) amended July 23, 2010 to be effective September 1, 2010; subparagraph (b)(3)(iv) amended July 19, 2012 to be effective September 4, 2012; subparagraph (c)(5) amended July 9, 2013 to be effective September 1, 2013.

RPC 5.6  Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Note: Adopted July 12, 1984 to be effective September 10, 1984.
RPC 6.1. **Voluntary Public Interest Legal Service**

Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984; caption and text amended November 17, 2003 to be effective January 1, 2004.

RPC 6.2 **Accepting Appointments**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.3 **Membership in Legal Services Organization**

A lawyer may serve as a director, officer or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if:

(a) the organization complies with RPC 5.4 concerning the professional independence of its legal staff; and

(b) when the interests of a client of the lawyer could be affected, participation is consistent with the lawyer's obligations under RPC 1.7 and the lawyer takes no part in any decision by the organization that could have a material adverse effect on the interest of a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984.
RPC 6.4  Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client, except that when the organization is also a legal services organization, RPC 6.3 shall apply.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.5  Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to RPC 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to RPC 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by RPC 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), RPC 1.10 is inapplicable to a representation governed by this RPC.

Note: Adopted November 17, 2003 to be effective January 1, 2004.

RPC 7.1  Communications Concerning a Lawyer's Service

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
(3) compares the lawyer’s services with other lawyers’ services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or

(4) relates to legal fees other than:

(i) a statement of the fee for an initial consultation;

(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive.

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

Official Comment by Supreme Court (November 2, 2009)

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney’s fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (b) added June 26, 1987, to be effective July 1, 1987; paragraph (a) amended June 29, 1990, to be effective September 4,
RPC 7.2 Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a) amended December 10, 1986, to be effective December 10, 1986; paragraph (c) amended October 16, 1992, to be effective immediately; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; paragraph (b) amended July 27, 2018, to be effective September 1, 2018.

RPC 7.3 Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:
(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall contain nothing other than the lawyer's name, firm, return address and "ADVERTISEMENT" prominently displayed; and

(ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and

(iii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iv) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 970, Trenton, New Jersey 08625-0970. The name and address of the attorney responsible for the content of the letter shall be included in the notice.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if:

(1) the promotional activity involves use of a statement or claim that is false or misleading within the meaning of RPC 7.1; or
(2) the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by RPC 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school.

(ii) operated or sponsored by a bona fide nonprofit community organization.

(iii) operated or sponsored by a governmental agency.

(iv) operated, sponsored, or approved by a bar association.

(2) a military legal assistance office.

(3) a lawyer referral service operated, sponsored, or approved by a bar association.

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in
connection with matters when such organization bears ultimate liability of its member or beneficiary.

(ii) neither the lawyer, nor the lawyer's partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have received any financial or other benefit from such initiation or promotion.

(iii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(iv) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(v) any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own expense except where the organization's plan provides for assuming such expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.

(vi) the lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

(f) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(4) amended June 29, 1990, to be effective September 4, 1990; new paragraph (b)(4) adopted and former paragraph (b)(4) redesignated and amended as paragraph (b)(5) April 28, 1997, to be effective May 5, 1997; paragraph (b)(5) amended November 17, 2003 to be effective January 1, 2004; subparagraph (b)(5)(i) amended July 23, 2010 to be effective September 1, 2010; paragraphs (b) and (b)(5) amended July 22, 2014, to be effective September 1, 2014; subparagraph (b)(5)(iv) amended April 30, 2018 to be effective immediately.
RPC 7.4 Communication of Fields of Practice and Certification

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.

(d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; former rule amended and designated paragraph (a) and new paragraph (b) adopted July 15, 1993, to be effective September 1, 1993; paragraph (a) amended, paragraph (b) redesignated as paragraph (d), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004.

RPC 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. Except for organizations referred to in R. 1:21-1(e), the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a firm name, any advertisement, letterhead or other communication containing the firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.
(c) A firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

(d) Lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm’s performance of legal services.

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language. Use of a trade name shall be permissible so long as it describes the nature of the firm’s legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results. Such trade names shall be accompanied by the full or last names of one or more of the lawyers practicing in the firm or the names of lawyers who are no longer associated in the firm through death or retirement.

(f) In any case in which an organization practices under a trade name as permitted by paragraph (a) above, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

Official Comment to RPC 7.5(e) by Supreme Court (July 27, 2015)

By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Smith & Jones Millburn Personal Injury Lawyers," provided that the law firm’s primary location is in Millburn and its primary practice area is tax law or personal injury law, respectively. "John Smith Criminal Defense and Municipal Law" would also be permissible. However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results. Similarly, "Budget Lawyer John Smith, Esq." is not permissible as it is comparative and likely to be misleading; "Million Dollar Personal Injury Lawyer John Smith, Esq." is not permissible as it suggests the ability to achieve results; and "Tough As Nails Lawyer John Smith, Esq." is not permissible as it purports to describe the lawyer and does not describe the nature of the firm’s legal practice.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraphs (a) and (d) amended, paragraph (e) amended and redesignated as paragraph (f) and new paragraph (e) added June 29, 1990, to be effective September 4, 1990; paragraph (a) amended January 5, 2009 to be effective immediately; paragraph (e) amended, and Official Comment adopted July 27, 2015 to be effective September 1, 2015.
RPC 8.1  Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 8.2  Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 8.3  Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.

(d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:
(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (d) adopted October 5, 1993, to be effective immediately; paragraphs (a) and (b) amended November 17, 2003 to be effective January 1, 2004.

RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Official Comment by Supreme Court (May 3, 1994)
This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause
harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989).

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

RPC 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In the exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, 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. 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.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, text amended and redesignated as paragraph (a) with caption added, new paragraph (b) with caption adopted November 17, 2003 to be effective January 1, 2004; subparagraph (b)(2) amended August 1, 2016 to be effective September 1, 2016.
Attorney Advertising Guidelines
(As approved by the Supreme Court of New Jersey)

Attorney Advertising Guideline 1

In any advertisement by an attorney or law firm, the advertisement shall include contact information for the attorney or law firm. The contact information for the attorney or law firm may be any of the following: (a) street address of the regular place of business, (b) mailing address, (c) telephone number, (d) fax number, or (e) email address.

Note: Adopted June 29, 1990, to be effective September 4, 1990; amended August 14, 2013 to be effective October 1, 2013.

Attorney Advertising Guideline 2

(a) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i), at the top of the first page of text of a solicitation letter, must be at least two font sizes larger than the largest size used in the advertising text in the body of the letter.

(b) The font size of notices required by RPC 7.3(b)(5)(ii and iii) must be no smaller than the font size generally used in the advertisement.

(c) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) on the face of the outside of the envelope must be at least one font size larger than the largest font size used on the envelope. If any words on the outside of the envelope are in bold, the word "ADVERTISEMENT" must also be in bold. Pursuant to Committee Opinion 20, if the envelope contains a message relating to the subject matter of the correspondence to be found inside, the attorney must ensure that the face of the envelope also includes the notices required by RPC 7.3(b)(5)(ii) and (iii).

Note: Adopted March 2, 2005, to be effective immediately; paragraphs (a) and (c) amended August 14, 2013 to be effective October 1, 2013.

Attorney Advertising Guideline 3

Attorney Advertisements: Use of Quotations or Excerpts From Judicial Opinions About the Legal Abilities of an Attorney

An attorney or law firm may include, on a website or other advertisement, an accurate quotation or excerpt from a court opinion (oral or written) about the attorney’s abilities or legal services. The following disclaimer must be prominently displayed in proximity to such quotation or excerpt: "This comment, made by a judge in a particular case, is not an endorsement of my legal skill or ability."

Official Comment to Guideline 3 by the Supreme Court (October 15, 2014)
It is the responsibility of the attorney to confirm the accuracy of the quotation or excerpt. Court opinions or official transcripts of proceedings are the proper source to confirm statements posted on a website or used in some other form of advertising.

**Note:** Adopted May 15, 2012 to be effective June 1, 2012; revised Guideline and Official Comment adopted October 15, 2014 to be effective immediately.