# CIVILITY MATTERS

# A PANEL DISCUSSION

**INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS**

**OCTOBER 15, 2016**

DONALD J. WINDER, ESQUIRE

DAVID A. FRENZNICK, ESQUIRE

**LIVING THE SIX PILLARS -**
**ETHICS & CIVILITY**
**A PANEL DISCUSSION**

## TABLE OF CONTENTS

# Section 1:
# Six Pillars

# Six Pillars of Primerus

Every lawyer in Primerus shares a commitment to a set of common values known as the Six Pillars.

**Integrity**
Research shows that integrity is the number-one quality clients want from their lawyers. We believe clients should be able to trust their attorney completely.

**Excellent Work Product**
Work product is more than winning or losing. It means that all of a lawyer's work for clients is of consistent, high quality. It means that records, as well as communications with clients, are detailed and clear. It means phone calls are returned, deadlines met and promises kept.

There are two ways Primerus ensures the quality of members' work product. One is through reputation and strict pre-screening, checking with clients, judges and other local attorneys. The other is by choosing members who specialize in certain areas of law such as business or family law.

**Reasonable Fees**
Primerus member firms may work by the hour, on a contingency plan (pay if you win) or on other fee arrangements. But regardless of the structure, the fees must be reasonable, based on what is customary in their geographic area, and on the individual attorney's knowledge and experience. We know clients are looking for value now more than ever, and Primerus members are here to deliver high-quality legal services for a good value.

**Continuing Education**
For Primerus members, education doesn't end with a law degree. Primerus attorneys are required to complete an average of 30 hours of CLE (Continuing Legal Education) per year. This is more than twice the typical state bar CLE requirement.

**Civility**
Primerus members still hold the courtroom to be a place of honor. Accordingly, as officers of the court, all lawyers and judges deserve our respect, even when in disagreement. Members may express themselves strongly, but never rudely. Primerus attorneys pledge professionalism, in accordance with the profession's noblest traditions.

**Community Service**
Law, in its purest sense, is community service. The law, fundamentally, exists to hold communities together. Primerus members pledge themselves to numerous community service endeavors including *pro bono* services for those who cannot afford legal counsel.

# Section 2:
# Map

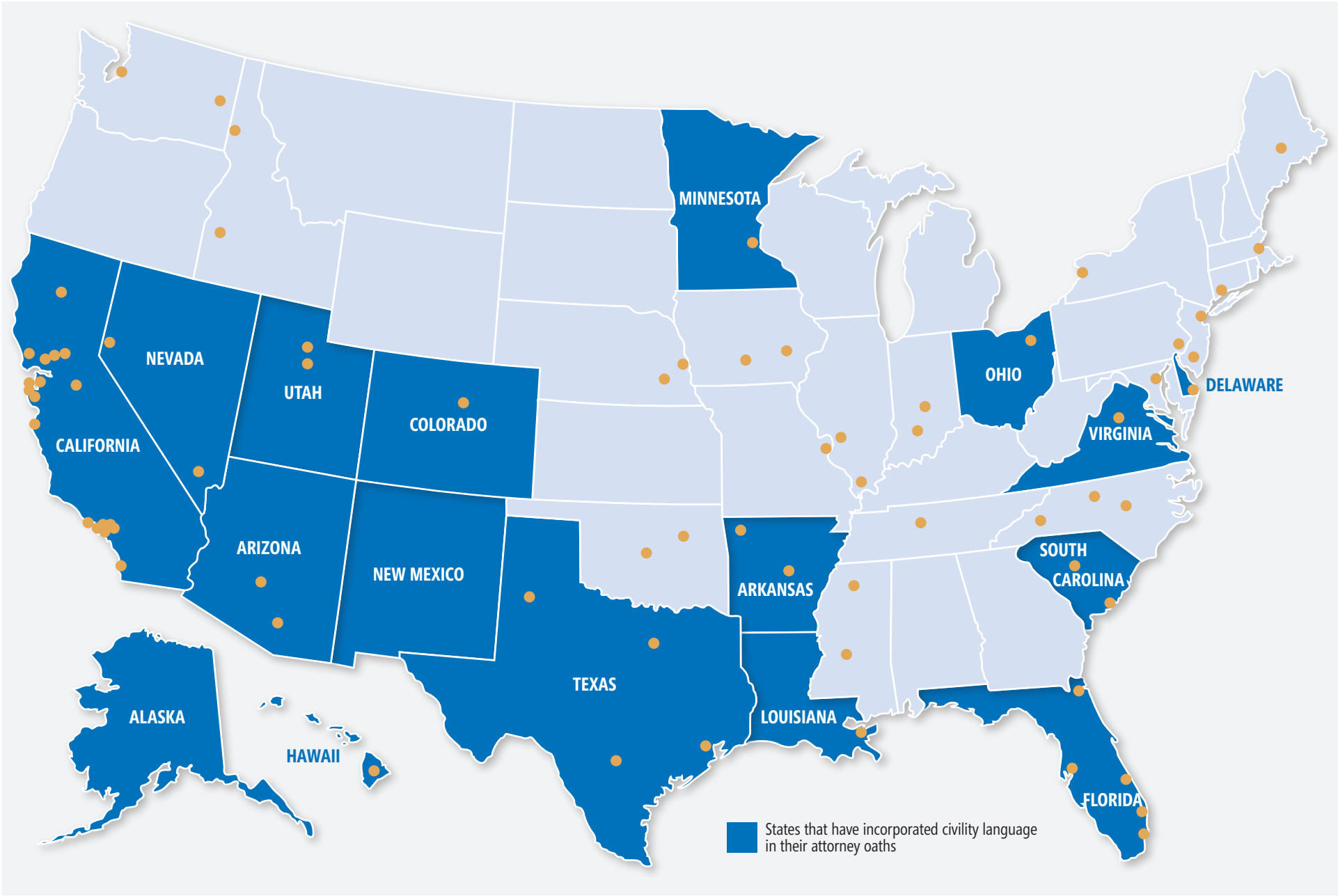
# Civility Matters Presentations

ABOTA FOUNDATION

JAMS FOUNDATION

*Endorsed by the American Inns of Court*

AMERICAN ASSOCIATION FOR JUSTICE · ADTA · DRI The Voice of the Defense Bar · FDCC Federation of Defense & Corporate Counsel · NCSC www.ncsc.org · Primerus




The Civility Matters program has been adopted by the American Inns of Court and its more than 360 chapters. As of April 3, 2015

# Section 3:
# ABA Report on Professionalism

# Point of Agreement from the ABA Report to the House of Delegates

Civility oaths based on rules of court have been adopted in several states. Courts are using violations of these oaths as the basis of disciplinary sanctions and lawyers consequently can see the limits of appropriate conduct. Efforts to incorporate civility oaths into court rules should be encouraged in those states which have not yet adopted them.

**105B**

**AMERICAN BAR ASSOCIATION**

**TORT TRIAL AND INSURANCE PRACTICE SECTION**
**COMMISSION ON THE AMERICAN JURY PROJECT**
**JUDICIAL DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

RESOLVED, That the American Bar Association endorses the 2014 American Civil Trial Bar Roundtable's *A White Paper on Increasing the Professionalism of American Lawyers* and urges lawyers and legal organizations to implement its recommendations.

# AMERICAN CIVIL TRIAL BAR ROUNDTABLE
# A WHITE PAPER ON INCREASING THE PROFESSIONALISM OF AMERICAN LAWYERS

Collaborative Points of Agreement by the National Legal Associations Concerned with Trial Practice and Known as the American Civil Trial Bar Roundtable[*]

## I. INTRODUCTION

The American Civil Trial Bar Roundtable has been in existence since 1997. There are 14 participating organizations. The Roundtable brings together the most significant law or bar related organizations and trial practitioners representing diverse viewpoints in the civil trial bar. Participants acknowledge lack of consensus on some issues, but express common belief in the importance of the civil trial system to the American justice system and the importance of a forum for the exchange of ideas.

The Roundtable occasionally issues White Papers on issues participating organizations find to be of significant importance to maintaining the American justice system, especially the civil trial system. The Roundtable issued a White Paper in 2000, revised in 2006, concerning the state of the civil justice system in the United States with recommendations for strengthening it.[1]

This White Paper builds on our earlier 2006 White Paper, which noted:

1. America's civil justice system is the envy of other nations in both the developed and undeveloped world.
2. The civil justice system operates best when each party is on as level a playing field as possible with regard to trial resources and litigants are represented by qualified and competent counsel.
3. A sophisticated economic system like that in place in the United States needs a reliable judicial system rendering fair and impartial justice.[2]

The 2006 White Paper also observed:

> . . . the legal system and . . . civil trial practice in particular have come under rather sharp attack. Lack of respect and confidence seems to have developed in the public's mind for . . . trial practice and trial practitioners of all types. Much of the criticism appears without justification but nevertheless has taken hold . . . the perception of lack of civility of lawyers toward one another leading to "win at any cost" tactics and hardball ultimatums have reduced the public's esteem of lawyers

[*] The assistance in the preparation of this white paper of the Nelson Mullins Riley Scarborough Center on Professionalism and Dean Emeritus John E. Montgomery at the University of South Carolina School of Law are acknowledged.

[1] American Civil Trial Bar Roundtable, A White Paper Concerning an Overview of the Civil Justice System (2000, revised Sept. 9, 2006).

[2] *Id.* at 2.

> generally and trial practitioners in particular . . . . Roundtable organizations and legal organizations of all types should encourage their members to persuade partners and associates to help in the effort to restore a sense of professionalism in younger colleagues through mentoring and other programs that stress fair and ethical treatment of opposing counsel.[3]

The 2006 Civil Justice System White Paper raised two broad themes on which this White Paper will build:

1. The civil justice system, properly functioning, ensures that rule of law principles, the foundation of a democratic society, apply to every dispute.

2. Unprofessional conduct of lawyers undermines both the efficient, effective operation of the civil justice system and the standing of the legal profession, especially trial practitioners, in the eyes of broader society.

This White Paper addresses an important, related topic, increasing the professionalism of lawyers. Lack of professionalism not only decreases public confidence in the American civil justice system and impairs its effective operation, it undermines the legal profession itself. Finding ways to strengthen professionalism is essential.

## II. PURPOSE

The purpose of this White Paper is to suggest effective strategies for strengthening the professionalism of lawyers, building on the extensive initiatives of courts, bars, legal organizations and law schools. These initiatives, for the most part, have consisted of codes, standards, and oaths asserting the importance of professional conduct and establishing principles for lawyer conduct. Reflecting the aspirational nature of professionalism, these efforts have focused primarily on education, not enforcement, with the hope that education about professionalism will cause lawyers to avoid unprofessional behavior.[4]

This White Paper goes a step beyond existing efforts and proposes a more comprehensive approach to improving the professionalism of lawyers, and, in so doing, strengthening the American civil justice system.

## III. THE IMPORTANCE OF LAWYER PROFESSIONALISM TO THE AMERICAN CIVIL JUSTICE SYSTEM

There is no generally accepted definition of professionalism,[5] which complicates the task of improving it. While a precise definition remains elusive, broad agreement exists on

---

[3] *Id.* at 5.

[4] Public education is a widely used strategy to convey information about a specific problem and ways to address it. It is probably the most cost-effective strategy for organizations to employ but alone is never completely effective.

[5] See Neil Hamilton, *Professionalism Clearly Defined*, 18 PROFESSIONAL LAWYER 4 (2008), for a particularly thoughtful approach. A few state codes have attempted a definition. The Oregon Bar Statement of Professionalism defines it as "the courage to care about and act for the benefit of our clients,

professionalism's major components: competency, ethics, integrity, access to justice, respect for the rule of law, independent judgment, and civility are all generally accepted aspects of professionalism. Stated another way, professionalism encompasses the core values of the American legal profession and reflects the moral traditions of lawyering: the obligation to represent clients diligently, and the obligation to support the processes and institutions of the justices system.[6]

While the definition of professionalism is elusive, the effects of its absence are not. Despite the efforts of bars, courts, legal organizations, and law schools to improve professionalism, the common experience of the profession suggests that unprofessional conduct of lawyers remains unacceptably high.[7]

Lack of professionalism has a negative impact on the civil justice system, the legal profession, and even lawyers who cross acceptable behavioral lines. Ultimately, and of most significance, professionalism is of crucial importance to the rule of law and the civil justice system itself. Rule of law principles are universally agreed upon and include clear, publicized, fair laws, accountable government officials, access to justice provided by competent, honest, ethical attorneys and judges and an accessible, fair, impartial, efficient justice system, which resolves disputes based on legal principles and processes, not arbitrariness or the power or resources of any individual or entity.[8] All of the accepted elements of professionalism, from civility to integrity to ethics, access to justice and independence, have a direct impact on respect for the rule of law and the strength of the civil justice system.

Lawyers play a central role in assuring that rule of law principles apply. Without exaggeration, in every proceeding, lawyers have the obligation, through diligently representing clients, to assure that rule of law principles govern the resolution of their clients' disputes. This is one of the pillars of a democratic society.

---

our peers and the public good." *See* Oregon State Bar, Statement of Professionalism, *available at* http://www.orbar.org/_docs/forms/Prof-ord.pdf (last visited Aug. 6, 2013).

[6] Virtually all professional codes and statements of professionalism reflect obligations both to clients and to the justice system. *See id.*

[7] One survey of Illinois lawyers reported that 92% of responding attorneys experienced "strategic incivility" at some point in their careers and 98% believed that a "win at all costs" mentality contributed to unprofessional behavior. *See* SURVEY ON PROFESSIONALISM: A STUDY OF ILLINOIS LAWYERS 11 (Dec. 2007) [hereinafter SURVEY ON PROFESSIONALISM].

[8] For a general and representative expression of rule of law principles, see REPORT OF THE SECRETARY-GENERAL: THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES, UNITED NATIONS (2004); UNITED NATIONS RULE OF LAW, WHAT IS THE RULE OF LAW?, http://www.unrol.org/article.aspx?article_id=3 (last visited Aug. 6, 2013). John Adams included the principle in the Massachusetts constitution ("a government of laws and not men"). MASSACHUSETTS CONST., Part the First, art. XXX (1780).

Unprofessional conduct, whether uncivil behavior, improper exercise of independent judgment to needlessly prolong discovery, or lack of integrity, imposes unnecessary delays and costs and can result in loss of public confidence in both the legal profession and the civil justice system itself. Lawyers, by engaging in unprofessional conduct, are violating the profession's social contract with the public to maintain the framework of the justice system and placing the independence and self-governance privilege of the profession at risk.

Aside from these broader obligations of lawyers to the justice system, the public, and the profession itself, unprofessional conduct often undermines the lawyer's own self-interest as a member of a learned profession. Whatever the perceived, immediate benefit in any individual representation of uncivil conduct or "win at any cost" tactics, lawyers often ultimately suffer the considerable costs of their own unprofessional conduct. Loss of respect by other lawyers and judges, loss of referrals and even loss of clients are not insignificant consequences of unprofessional behavior.

## IV. THE BACKGROUND OF CURRENT PROFESSIONALISM INITIATIVES

The roots of modern professionalism extend back two millennia to the Roman legal system. Advocates in that system were required to take an "oath of calummy" which obligated them to exhibit proper conduct, integrity and fair dealing.[9] Beginning in the thirteenth century, English lawyers had obligations similar to those expected of American lawyers today. Fair dealing, competency, loyalty, confidentiality, reasonable fees and public service all were obligations assumed by English advocates.[10] Those obligations have continued in the modern era through the English Inns of Court.

In nineteenth century America, David Dudley Field, the author of the Field Code, included in his model statute, adopted by about 15 states, basic ethical obligations for lawyers.[11] Two law professors, David Hoffman of Maryland and George Sharswood of Pennsylvania, proposed what in effect were codes of lawyer conduct in their treatises. Hoffman referred to his as "resolutions," which urged lawyers to demonstrate loyalty, competency, gentlemanly behavior, civility and respect.[12]

---

[9] See generally JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS (2008), which discusses the influence of the Roman legal system on medieval lawyers.

[10] See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004), for an exhaustive treatment of the historical development of lawyer conduct standards and the significant overlap of medieval English standards and modern lawyer conduct standards.

[11] *Id.* at 1425. The Field Code specified duties to maintain confidentiality, to respect courts, not to mislead courts, to do justice, to abstain from offensive personality, to not unduly prejudice parties or witnesses, to not incite passion or greed in litigation and to take cases on behalf of the poor and oppressed.

[12] *Id.* at 1427–28.

The twentieth century was marked by continued efforts to codify and make mandatory ethical standards which themselves include some elements of professionalism.[13]

Modern efforts to improve the professionalism of lawyers extend back four decades. In the 1970's Chief Justice Warren Burger, concerned about the state of the American legal profession, urged organized bars to take steps to increase professionalism. The ABA responded through the Stanley Commission Report, which urged a greater emphasis on lawyers' public obligations to the profession and to society[14]. At the state level, the Conference of Chief Justices' National Action Plan on Lawyer Conduct and Professionalism introduced the idea that professionalism is aspirational, encompassing broader standards than compliance with ethical rules.

> Professionalism is a much broader concept than legal ethics—professionalism includes not only civility among members of the bench and bar, but also competency, integrity, respect for the rule of law, participation in pro bono and community service and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethics are what a lawyer *must* obey. Principles of professionalism are what a lawyer *should* live by in conducting his or her affairs.[15]

In 2008, the ABA Standing Committee on Professionalism reexamined professionalism and issued its own White Paper.[16] It recommended steps to strengthen professionalism and, in doing so, promoting ". . . the fundamental traditions and core values of the legal profession . . . inculcating and enhancing professionalism among lawyers practicing in the 21st Century."[17]

---

[13] Alabama enacted the first state bar code of ethics in 1887. It became a model for several state ethics codes and was the basis for the American Bar Association's 1908 Canons of Ethics. Ethics codes, which do address some aspects of professionalism, are now in force in every state.

[14] ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (A.B.A. Commission on Professionalism 1986), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/stanley_commission_report.authcheckdam.pdf.

[15] Paula L. Hannaford, *A National Action Plan on Lawyer Conduct and Professionalism: A Role for the Judge in Improving Professionalism in the Legal System*, COURT REVIEW 2 (Fall 1999) (adopted January 21, 1999, by the Conference of Chief Justices), *available at* http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3%20Hannaford.pdf.

[16] RONALD C. MINKOFF, REVIVING A TRADITION OF SERVICE: REDEFINING LAWYER PROFESSIONALISM IN THE 21ST CENTURY (A.B.A. Standing Committee on Professionalism Report 2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/century.authcheckdam.pdf.

[17] *Id*. at 1.

All these "foundational" reports and White Papers have had the laudatory effect of contributing to broad initiatives from every part of the profession—courts, bars, legal organizations and law schools—to establish professionalism codes, creeds and oaths, continuing education and legal education programs and, increasingly, mentoring to improve the professionalism of American lawyers.

Efforts of the profession to improve the professionalism of American lawyers are national in scope and comprehensive in content. A review of those professionalism initiatives follows.

## V. PROFESSIONALISM INITIATIVES

### 1. State Court Professionalism Commissions

Professionalism commissions, usually established by state supreme courts, are active in 12 states.[18] Most were established in the 1990s and early 2000s. Their common mission is to promote professionalism. Their activities include coordination with bars, courts and law schools, initiating and sponsoring professionalism initiatives, improving access to justice and administering the justice system and providing guidance and assistance on professionalism initiatives.

Professionalism commissions have been very active in promoting professionalism and initiating professionalism initiatives. The commissions have well defined missions and responsibilities and, in most cases, permanent staff and budgets. Many professionalism initiatives in place today have their origins in these commissions. Statewide mentoring programs for new lawyers are a prime example.[19]

While all commissions are very active, the work of these organizations in Georgia, North Carolina, Colorado, Illinois, Florida, Ohio, and Texas are illustrative of the kinds of professionalism initiatives which commissions have advocated. Development of MCLE programs emphasizing professionalism, mentoring, regular convocations for the bench, bar, and law schools and special professionalism programs and courses are typical examples.[20]

---

[18] For detail on specific commissions, see Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law, http://professionalism.law.sc.edu/ (last visited Aug. 7, 2013). The Supreme Court of Florida Commission is a representative example. In 1987 a Florida Bar task force found "steep decline" in the professionalism of Florida lawyers, in 1996 the Bar requested the Supreme Court create a Supreme Court of Florida Commission on Professionalism. Its objective is to increase the professionalism aspirations of all lawyers in Florida and ensure that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well. *See* Supreme Court of Florida, No. SC 13-688, In re Code for Resolving Professionalism Complaints (June 6, 2013).

[19] Statewide mentoring programs in Georgia, Ohio, and South Carolina, for example, originated form those states' supreme court professionalism commissions.

[20] Commissions are effective in promoting professionalism because they bring together all interests in the profession and have the support of their supreme courts.

2. State Bar Professionalism Committees

Almost half of the states and the District of Columbia have bar professionalism committees.[21] Four states have both court commissions and professionalism committees with complimentary missions.[22] A number of states have ethics and professional responsibility committees, which do not separately address professionalism,[23] although a few deal with both areas.[24]

Like commissions, state bar professionalism committees generally have specific responsibilities for promoting professionalism. One of their major responsibilities has been developing professionalism standards for their states. Specific activities of these committees include: promoting professionalism to the profession and the public, sponsoring programs to increase ethical, professional conduct, and educating newly admitted members of the bar on professionalism.[25]

3. Bar Professionalism Codes, Creeds, Principles and Standards

Almost two thirds of state bars, the District of Columbia, scores of local bars and many federal district courts have adopted professionalism standards.[26] While they generally cover all aspects of professionalism, civility is the most widely addressed topic. While language varies, most standards, codes, or creeds emphasize the core values of the profession: honesty, integrity, civility, and service. Those values are also affirmed by Roundtable organizations.
The accompanying charts included in the Appendix categorize these standards by topics covered. Appendix A summarizes by state the most common standards, the majority of which address civility. Appendix B includes standards on areas of professionalism other than civility.

4. Oaths

A significant number of states have some form of civility oath. In 12 states, the oaths are incorporated into the oath of admission prescribed by the state's supreme court and are included

[21] Twenty-six states have such commissions. For details, see the Nelson Mullins Professionalism website, *supra* note 18 and the ABA Center on Professional Responsibility website, http://www.americanbar.org/groups/professional_responsibility.html (last visited Aug. 7, 2013).

[22] Florida, Georgia, Maryland, New York. The Florida Bar professionalism committee specifically supports that state's supreme court professionalism commission. *See* Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It*, 79 FLA. BAR J. 38, n.3 (2005).

[23] Twelve states have such bar committees. For details, see Nelson Mullins Professionalism website, *supra* note 18.

[24] Indiana and Maryland.

[25] In states without supreme court professionalism commissions, bar professionalism committees have responsibilities similar to commissions. In general, they have not been as involved as court commissions in mentoring and in sponsoring regular meetings of all parts of the profession on professionalism.

[26] There are well over one hundred different professionalism codes, guidelines, standards, and creeds. Some states have both codes and creeds. Guidelines and codes tend to focus more on specific types of conduct, creeds on the central values of the profession. See Rizzardi, *supra* note 22, for a discussion of Florida's guidelines, ideals, and creed.

in a court rule, making them enforceable.[27] In other states, civility language makes reference to rules of professional conduct which prohibits any action which interferes with the administration of justice.[28]

5. Mandatory CLE Programs

Currently, 44 states have mandatory CLE requirements. Forty-three of the forty-four require some portion of hours (usually 1 or 2) be on ethics or professional responsibility.[29] Nineteen states allow either ethics or professionalism to fulfill that requirement.[30]

6. Mentoring Programs

The majority of states have some form of mentoring program for newly admitted attorneys. A number of these are mentor-match programs where, if requested, the bar assists in locating a mentor.[31] These programs are extremely limited in scope and the number of new lawyers who participate is hard to determine. Of much great impact are the 13 voluntary and 8 mandatory mentoring programs, which operate on a statewide basis.[32] Georgia pioneered mandatory mentoring for all newly admitted lawyers and its program is about a decade old. Ohio has an extremely successful voluntary program with a large percentage of those eligible participating.[33] These programs have become models for other state programs. All these programs place significant emphasis on professionalism and the core values of the profession.

There are also a large number of local bar mentoring programs, which often mirror the structure of state programs. Texas has a particularly strong system of local bar-based mentoring programs

[27] For typical language, see the South Carolina oath, which states "to opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications." *See* http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=402&subRuleID=&ruleType=APP (last visited Aug. 28, 2013). The Alaska oath states, "I will be candid, fair and courteous before the court and other attorneys." *See* http://www.courts.alaska.gov/bar.htm#5 (last visited Aug. 5, 2013).

[28] Most states have disciplinary rules based on ABA Model Rules of Professional Conduct Rule 8.4(d), which provides it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

[29] Conversation with Mary Germack, Director, South Carolina Supreme Court Continuing Education Commission (Oct. 15, 2012).

[30] *Id.*

[31] A compilation and description of all state mentoring programs can be found at the websites in *supra* note 21.

[32] Voluntary and mandatory programs handle the vast majority of new lawyers participating in statewide mentoring, probably exceeding 95%. Mentor-Match programs have few participants.

[33] According to Lori Keating, Secretary of the Ohio Supreme Court Professionalism Commission, about two-thirds of eligible lawyers in Ohio participate (Interview, Aug. 1, 2012).

in most of the state's largest metropolitan areas.[34] Further, some national legal organizations provide mentoring or otherwise participate in mentoring. The American Inns of Court Model Mentoring Program, available for use by local inns, is an example.[35]
Mentoring is rapidly growing in the legal profession. Many firms, in addition to bars, have strong mentoring programs. A recently formed national organization, the National Legal Mentoring Consortium, with representatives from bars, courts, law schools, law firms, and corporations, is working to facilitate effective mentoring practices throughout the profession.[36] Most mentoring programs are regularly evaluated and participants, both mentors and mentees, report they are highly effective in addressing problems of new lawyers.[37] These programs now provide mentoring to some 9,500 new lawyers each year, about 20 percent of all new lawyers annually admitted to practice.[38]

7. Law Schools

A decade ago, few law schools placed any emphasis on professionalism. That has started to change with the publication of influential studies on legal education[39] and pressures from legal employers to graduate students better prepared for practice. While a strong focus on professionalism can be found at only a few law schools,[40] most law schools are incorporating

[34] State Bar of Texas, Texas Bar Transition to Practice Program, http://www.texasbar.com/AM/Template.cfm?Section=Transition_to_Practice (last visited Aug. 7, 2013).

[35] *See* http://home.innsofcourt.org (last visited Aug. 7, 2013).

[36] *See* http://www.legalmentoring.org (last visited Aug. 6, 2013).

[37] Good examples are the evaluation processes established at the start of statewide mentoring in Georgia, Ohio, and South Carolina. These evaluations, conducted during every mentoring cycle, indicate that around 90% of participants find mentoring to be valuable in learning the proper way to practice, introducing new lawyers to the "culture" of law practice and in increasing satisfaction with practice.

[38] Derived from ABA statistical information on the number of lawyers admitted annually and from state bar and court statistics on the number of participants in statewide mentoring programs. For the most comprehensive information on mentoring, see NALP FOUNDATION, THE STATE OF MENTORING IN THE LEGAL PROFESSION (2013).

[39] *See* WILLIAM M. SULLIVAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

[40] A comprehensive assessment of professionalism programs in American law schools can be found in Alison D. Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57 (2012). A consortium of law schools making up the National Institute for the Teaching of Ethics and Professionalism (NIFTP) has a particularly strong focus on professionalism. Member Schools are: Georgia State (Headquarters school), Mercer, Fordham, Indianan-Bloomington, St. Thomas and the University of South Carolina. The Halloran Center at St. Thomas focuses on professional identity formation. The Nelson Mullins Riley Scarborough Professionalism Center at the University of South Carolina specializes in mentoring. All member schools have specialized and innovative courses emphasizing professionalism.

professionalism in orientation programs, specific classes or clinics, lectures and other programs. A rapidly growing number of law schools have established mentoring programs,[41] special lectures on professionalism and awards. Schools in states with court professionalism commissions usually work with those commissions' on professionalism initiatives.[42]

Law schools, while perhaps slower than the rest of the profession to make professionalism a priority, are making an increasingly important contribution. First, they serve as valuable "laboratories" in trying and evaluating new ways to introduce professionalism. With some 200 ABA accredited law schools in the United States, the sheer number and diversity of their approaches to professionalism is indeed impressive. With time, some best practices to introducing professionalism to law students will emerge. Second, law schools are serving as important collectors and disseminators of information on professionalism initiatives both in legal education and in the profession.[43] It is far easier than a decade ago to access information on professionalism in the profession because some law schools are regularly collecting the information.[44] This is an important addition to the ABA Center for Professional Responsibility's valuable website[45] and makes information sharing much easier. Finally, law schools, are increasingly relying on lawyers, judges, and members of national legal organizations to lecture and participate in professionalism programs. This brings a measure of real world practice experience beyond the capabilities of most law schools.

8. National Legal Organizations

Many national legal organizations, especially Roundtable members, place significant emphasis on professionalism generally or one of its major components. They have been leaders in the professionalism movement. As representative examples, the American Board of Trial Advocates has established a Code of Professionalism, Principles of Civility, Integrity and Professionalism

---

Also of note are programs at the University of Denver Sturm College of Law, which have a strong professionalism focus. Educating Tomorrow's Lawyers (ETL) collects information on law school courses which have a professionalism focus. *See* http://educatingtomorrowslawyers.du.edu (last visited Aug. 7, 2013), which is an initiative of the Institute for the Advancement of the American Legal System at the University of Denver Sturm College of Law.

[41] Of special note are the three-year mandatory mentoring programs for all students at St. Thomas Law School, the situational mentoring program at Cooley Law School and the combined legal profession class, mandatory mentoring and judicial observation program for the first year students at the University of South Carolina School of Law.

[42] Most supreme court commissions have law school representatives. The Georgia, Ohio, and South Carolina commissions are representative examples.

[43] *See* Educating Tomorrow's Lawyers website, *supra* note 40; Nelson Mullins Riley & Scarborough Center on Professionalism website, *supra* note 18.

[44] In part this reflects the establishment of centers and initiatives at several law schools which regularly collect and disseminate information about professionalism generally and programs involving professionalism.

[45] *See* ABA Center for Professional Responsibility, *supra* note 21.

and the educational publication "Civility Matters."[46] The Defense Research Institute, the voice of the defense bar supports excellence and fairness in the civil justice system.[47] DRI's Substance Law Committee on Professionalism and Ethics coordinates with the organization's other committees to make sure every DRI seminar has professionalism panels and supports work with law schools. The American Association for Justice promotes a fair and effective justice system and access to justice.[48] The International Association of Defense Counsel supports enhanced skills and professionalism to serve clients, the civil justice system, and society.[49] The International Academy of Trial Lawyers, with both plaintiff and defense members and prosecutors and civil defense attorneys, supports law reform, facilitates the administration of justice, promotes the rule of law internationally and elevated standards of integrity, honor, and courtesy in the legal profession.[50] The Federal Bar Association, serving the needs of the federal public and private practitioner and the judiciary, supports the sound administration of justice and professional and ethical practice in the federal bar.[51] The Federation of Insurance and Corporate Counsel is "dedicated to pursuing professionalism . . . and a course of balanced justice."[52] The Association of Defense Trial Attorney, ". . . champions the jury trial system as being essential to an American system of jurisprudence."[53] The Association of Defense Counsel of Northern California ". . . promotes the administration of justice . . ." and enhancing ". . . the standards of civil defense practice."[54] The American Inns of Court promotes professionalism, ethics, and integrity and has established a professionalism creed.[55] The American Bar Association through its many committees, sections, and divisions, places significance on professionalism. The Torts and Insurance Practice section, the Standing Committee on Professionalism, the Professionalism Consortium, the Young Lawyers Division and the Gambrell Professionalism Award are representative of the ABA's work in the area of professionalism.[56]

---

[46] https://www.abota.org/ (last visited Aug. 7, 2013).

[47] http://www.dri.org/about (last visited Aug. 7, 2013).

[48] http://www.justice.org/cps/rde/xchg/justice/hs.xsl/418.htm (last visited Aug. 7, 2013).

[49] http://www.iadclaw.org/about/association.aspx (last visited Aug. 7, 2013).

[50] http://www.iatl.net/i4a/pages/index.cfm?pageID=3511 (last visited Aug. 7, 2013).

[51] http://www/fedbar.org/About-us/FBA-Mission.aspx (last visited Aug. 19, 2013).

[52] http://www.thefederation.org/process.cfm?pageid=1 (last visited Aug. 19, 2013).

[53] htttp://www.adtalaw.com/shared/content/adtahistory.pdf (last visited Aug. 19, 2013).

[54] http://www.adcnc.org/about.asp (last visited Aug 19, 2013).

[55] *See supra* note 35.

[56] Professionalism programs of the ABA can be accessed through its website. *See* http://www.americanbar.org/aba.html (last visited Aug. 7, 2013). One valuable recent ABA publication is *Essential Qualities of the Professional Lawyer* (Paul A. Haskins ed. 2013).

The commitment of these organizations is representative of the work and purposes of many others. Collectively, national legal organizations demonstrate impressive commitment to professionalism. Through programs for their members, educational initiatives such as ABOTA's "Civility Matters," these organizations provide significant support for a strong civil trial system. For the most part, the efforts of these organizations are focused on their members and not on outreach to the profession generally. A few, for example, the ABA, ABOTA and the American Inns of Court, have programs more broadly directed at the profession. Several are actively engaged in law reform efforts.[57]

9. Bar, Bar Counsel and Disciplinary Office Initiatives

A significant number of state bars and bar and disciplinary counsel offices conduct training, educational and rehabilitation programs with an emphasis on professionalism. They are far too numerous and diverse to categorize. The Texas Center for Legal Ethics, for example, offers numerous courses, which emphasize ethics and professionalism.[58] Its course on professionalism is an excellent example.[59] Professionalism, especially civility, is also a common topic in many state "bridge the gap" programs for new lawyers. Disciplinary offices and bar counsel talk widely to lawyer groups and some states have "schools" for lawyers who have been warned or sanctioned for unprofessional conduct,[60] usually day-long remedial programs on specific topics.

10. Other Significant Judicial and Bar Initiatives

Courts in Florida and Utah have created, by court order, new mechanisms designed to address unprofessional conduct. The Colorado Bar has established a similar process. These are innovative new approaches which hold promise.

The Utah Supreme Court has established a board of five counselors to "counsel and educate members of the Bar concerning the Court's Standards of Professionalism and Civility."[61] The purposes of the board are to counsel lawyers on professionalism issues in response to complaints by other lawyers and referrals from judges, to provide counseling upon request from lawyers about their obligations under the standards, provide CLE on the standards and publish advice and information on the board's work. The board will respond to complaints, inquiries, and referrals from lawyers and judges but not from the public. Complaints may be resolved by face-to-face meetings or by written advisory opinions, which may also be provided to the attorneys, supervisors, or employers.

---

[57] The ABA is a prime example.

[58] http://www.legalethicstexas.com/courses/online-courses/Justice-James-A--Baker-Guide-to-the-basics-of--%281%29.aspx (last visited Aug. 7, 2013).

[59] http://www.legalethicstexas.com/Courses/Live-Courses/Justice-James-A-Baker-Guide-to-the-Basics-of-Law-P.aspx (last visited Aug. 7, 2013).

[60] South Carolina is typical of many states which offer remedial courses through the office of the Supreme Court Disciplinary Counsel.

[61] The text of the Utah Supreme Court Standard Order No. 7, which was effective April 1, 2008, and revised in 2012, is at http://www.utcourts.gov/resources/rules/urap/supctso.htm (last visited Aug. 7, 2013)

In June 2013, the Florida Supreme Court issued an order establishing a Code for Resolving Professionalism Complaints, based on a proposal from the Supreme Court of Florida Professionalism Commission.[62] The new Florida Code prohibits members of the Florida Bar from engaging in "unprofessional conduct," defined as "substantial or repeated violations of the Florida Bar Oath of Admission, the Florida Bar Creed of Professionalism, the Florida Bar Ideals and Goals of Professionalism, the Rules Regulating the Florida Bar and the decisions of the Florida Supreme Court."[63]

The Code provides that complaints be directed either to the Attorney Consumer Assistance and Intake Program or a local district professionalism panel. If the complaint involves violation of a disciplinary rule, it will be handled by normal disciplinary procedures. If the complaint involves unprofessional conduct, which does not constitute a disciplinary rule violation, it will be handled either by the attorney intake process or a local district panel. Any person, including non-lawyers, may initiate a complaint. The Florida Bar may also initiate complaints on its own initiative.[64] Complaints may be resolved informally, such as by providing remedial guidance. There are also procedures for review by the Grievance Committee and a number of possible actions such as letters of advice and recommendations for diversion to a practice and professionalism enhancement program.[65]

The Colorado Bar has established the Peer Professionalism Assistance Group which offers assistance on professionalism issues. Judges and lawyers can refer attorneys to the group for such matters as lack of cooperation in scheduling, refusing to communicate, personal attacks and rude, contentious communications. Matters are addressed and resolved through mentoring, counseling, and other informal means. Complaints are addressed by single members or by panels. [66]

The approaches of the Utah and Florida supreme courts and the Colorado Bar are new avenues to strengthening professionalism beyond the philosophy of education on professionalism followed universally by bars, courts, legal organizations, and law schools. For the first time, two courts and a state bar have established processes for raising professionalism complaints not involving separate violations of court or professional responsibility rules and having them resolved. The Utah and Colorado processes also allow for guidance, similar to obtaining ethics advisory opinions. By creating these newer procedures there will also be the opportunity to collect

[62] *See* Supreme Court of Florida Code for Resolving Professionalism Complaints, *supra* note 18.

[63] *Id.* at 6.

[64] *Id.* at 8.

[65] *Id.* at 9.

[66] http://www.cobar.org/index.cfm/ID20950 (last visited Aug 19, 2013).

information on the number of unprofessional conduct cases arising in the three states, a metric so far, unavailable elsewhere.[67]

11. The Use of Judicial Sanctions and Disciplinary Actions for Unprofessional Conduct

Judicial sanctions for unprofessional conduct are uncommon, except in limited circumstances involving particularly egregious conduct.[68] They are not appropriate for broad application. Professionalism is universally considered to be aspirational, a level of practice which every lawyer should aspire to achieve, not something mandated because of ethical requirements.[69] Many bar professionalism codes and standards specifically state that professionalism codes and standards are not to be used as the basis of disciplinary actions. Trial judges are also sometimes reluctant to take valuable court time to resolve disputes between lawyers which often have little to do with the merits of the case. In the words of the Supreme Court of Florida, "professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances."[70] Establishing clear standards on which sanctions for unprofessional conduct could be based, in the areas of reflective judgment or self-understanding, for example, is not feasible and could raise free speech concerns. Accordingly, initiatives to strengthen professionalism in its broad scope have focused on educating lawyers about the various aspects of professionalism and its importance to the profession.

Judicial sanctions are not a broadly applicable or effective means to improve professionalism beyond their current use for clearly egregious behavior. Professionalism is not a lawyering trait amenable to clear standards enforceable by sanctions.[71] Further, expanded use of sanctions cuts against the fundamental aspirational basis of professionalism.

---

[67] Both Utah and Colorado have some experience with their respective programs. Over the past few years, the Utah Professionalism Board has dealt with approximately 50 complaints. Most involved civility issues, both inadvertent and "tactical." The Utah process has been particularly helpful for new lawyers unsure about how to deal with a particular situation. The Colorado program has experienced a comparable volume of complaints, again with most dealing with civility. Colorado has a much larger group (15 versus 5 in Utah) to deal with complaints and consequently, a group of panelists with more diverse practice experience. Both programs engage in outreach programs to educate lawyers about using the programs. (Interview with Robert Clark, Chair, Utah Supreme Court Professionalism Board, Aug. 18, 2013, and John Baker, Director, Colorado Mentoring Program and member, Colorado Bar Peer Professionalism Assistance Group, Aug. 19, 2013).

[68] The majority of cases involve discovery abuse. *See* e.g. – For egregious examples of sanctionable conduct in discovery, see State v. Mumford, 731 A.2d 831 (Del. Super. 1999) (repeated use of obscenities by client during deposition, which lawyer made no attempt to control); Mullaney v. Aude, 730 A.2d 759 (Md. Ct. Spec. App. 1999) (male lawyer addressed female opposing counsel as "bimbo" and "babe" during deposition). See Eric D. Miller, Lawyers Gone Wild: Are Depositions Still a "Civil Procedure," 42 CONN. L. REV. 1527 (2010), for a comprehensive discussion.

[69] *See* Hannaford, *supra* note 15.

[70] *See supra* note 18, at 2.

[71] For example, in PNS Stores, INC. v. Rivera, 379 S.W. 34 267-77 (Tex. 2012), the Supreme Court of Texas stated the Lawyer's Creed was intended to encourage lawyers to be mindful that abusive tactics–

There are however, limited areas where disciplinary actions for very specific types of unprofessional conduct have been based on court rulescourt rules. Civility, an important part of professionalism, is part of the oath of admission in several states and falls within court rules.[72] Based on court rules requiring civility and on administration of the justice system, several states have imposed disciplinary sanctions such as public reprimands or suspensions for egregious uncivil conduct.[73]

## VI. OBSERVATIONS ON CURRENT INITIATIVES TO STRENGTHEN PROFESSIONALISM

Efforts to strengthen the professionalism of American lawyers through broad education efforts are truly impressive. Virtually the entire legal profession has implemented a broad range of professionalism initiatives. Chief Justice Warren Burger's call to improve professionalism has been embraced by the profession.

Two critical questions remain: have these initiatives been effective in increasing the professionalism of practicing attorneys and what more can and should be done?

Insight into those questions comes from the Supreme Court of Florida's rule creating a structure for resolving professionalism complaints, a rule adopted after Florida already had a professionalism code, a professionalism creed and a civility oath in place. The Court observed, "Although it is impossible to determine with scientific certainty the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by

---

ranging from hostility to obstructionism–do not serve justice. *Id.* at 276. The court continued that the Lawyer's Creed serves as an important reminder that the conduct of lawyers "should be characterized at all times by honesty, candor, and fairness." *Id.* (citing the Lawyer's Creed) However, the court also stated that the Lawyer's Creed is aspirational. *Id.* "It does not create new duties and obligations enforceable by the courts beyond those existing as a result of (1) the courts' inherent powers and (2) the rules already in existence." *Id.* at 276-77"

[72] South Carolina had three significant disciplinary cases involving violation of its civility oath in 2011 alone. *See In re* White III, 707 S.E.2d 411 (S.C. 2011) (sanctions for letter suggesting opposing counsel had "no brains" and questioning if "he has a soul"; argument he was acting on client wishes rejected); *In re* Anonymous Member of South Carolina Bar, 709 S.E.2d 633 (S.C. 2011) (derogatory remarks in email to opposing counsel suggesting counsel's daughter involved with drugs, which had no relation to legal matter at issue); *In re* Lovelace, 716 S.E.2d 919 (S.C. 2011) (attorney threatened and slapped a witness during deposition). The first recorded South Carolina case sanctioning a lawyer for uncivil conduct was decided in 1850. See The State v. B.F. Hunt, 355 S.C. L. (4 Strob.) 322, 1850 WL 2817 (1850). *See also In re* Abbott, 925 A.2d 482 (Del. 2007) (violation of attorney oath by accusing another lawyer of fabrication; civility not incorporated in court rule); *cf.* Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962 (Utah 2007) (uncivil language in brief). Michigan has no oath but has sanctioned lawyers for incivility through its professional responsibility rules. Grievance Adm'r v. Fiezer, 719 N.W.2d 123 (Mich. 2006). For a review of civility cases involving written documents, see Judith D. Fischer, *Incivility in Lawyers Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365 (2011). A very useful discussion of civility cases is Donald A. Winder, Enforcing Civility in an Uncivilized World (unpublished paper, available from the author, at Winder and Counsel PC, Salt Lake City Utah, updated July 17, 2013).

[73] *Id.*

preventing a further decline . . ."[74] This observation of the Florida Supreme Court is worth elaboration because it is probably representative of reactions to professionalism initiatives across the profession.

First, since professionalism is considered to be aspirational, the overriding strategy behind professionalism initiatives has been educational. Standards, codes, CLE programs, lectures and articles, the core of most professionalism initiatives, all are aimed at informing lawyers of the various aspects of professionalism and proper responses to specific practice situations. Less frequently, some states have adopted oaths and make reference to central professional values. Remedial measures such as disciplinary actions have been used only in limited circumstances where court rules prohibit certain kinds of unprofessional conduct, for example, incivility. Second, despite the comprehensiveness of professionalism education initiatives, there has been no real measurement of their effect. No doubt, all these educational efforts have had some success in improving professionalism but the extent of the improvement is uncertain. The common experience of many in the profession and a few surveys suggest that unprofessional conduct remains at unacceptably high levels.[75] It is hard to say whether some, any or all the professionalism initiatives have had major impact because of insufficient data collection. As a profession, we have been responsible for adopting a broad range of initiatives designed to strengthen professionalism but have not followed up with measuring their effectiveness. Third, most professionalism initiatives do not explicitly state a central purpose or focus on why professionalism is important. Some also do not set out the central values of the profession such as integrity, civility, ethics and a commitment to service. This is in contrast to the values often referred to in the missions of many national legal organizations.[76] That one of the most important purposes of professionalism is to support the rule of law and the civil justice system also is rarely referenced in most initiatives. As a consequence, lawyers are not reminded sufficiently of the core values of the profession or the importance of professionalism to the operation of the justice system.

Finally, of all the professionalism initiatives in place, mentoring is the one approach that clearly makes a positive difference. States with both mandatory and voluntary statewide programs such as Georgia, South Carolina, Utah, and Ohio have conducted extensive evaluations of their programs. They have found that mentoring works well in introducing lawyers to the important values of the profession, helps them develop proper habits and increases their satisfaction with practice.[77]

---

[74] *See* Supreme Court of Florida Code for Resolving Professionalism Complaints, *supra* note 18, at 2.

[75] *See* SURVEY ON PROFESSIONALISM, *supra* note 7. An early study on the frequency of unprofessional conduct is Wayne D. Brazil, *Views from the Front Lines*, 1980 AM. B. FOUND. RES. J. 217 (1980).

[76] *See supra* notes 46-57 and accompanying text.

[77] *See supra* note 37.

At one level, mentoring of course is an educational process, usually in one-on-one or small group settings. As such, it is consistent with the broad education strategy of professionalism initiatives generally. Yet mentoring is different because it relies on close interpersonal contact and building a relationship of trust with another experienced, professional lawyer. This process is effective in conveying the importance of professionalism and establishing a norm of professional conduct.[78]

The central goal in the profession's commitment to increase professionalism should be to instill a norm of professional conduct in lawyers. The Conference of Chief Justices National Action Plan stated as much over two decades ago.[79] Current initiatives, while laudatory in both scope and content, do work but only to a point. There remain a group of lawyers, unknown in size but probably significant, for whom professionalism is not a practice norm or at least not an important factor in how they practice. Nor is it likely that current initiatives will persuade them otherwise. Establishing a more broadly accepted professionalism norm requires both an understanding of existing behavior and barriers to changing unprofessional conduct. For some lawyers lack of professionalism may be attributable to lack of knowledge about the importance of professionalism or what it requires in a particular practice setting. For this group, the current education approach should work. There are, however, other barriers to change which are more difficult to overcome. Some lawyers may respond unprofessionally because of their belief that these clients expect "hardball" tactics. Addressing this may be not so much a lawyer education issue but a client education issue. Lawyers should educate their clients about what is professional in a representation and exercise their independent judgment about how to address their client's needs.[80] Both national legal organizations and bars should urge lawyers to better educate their clients on the importance of civility and consider adding a client education component to professionalism codes and creeds. This could specifically address the assertions of many lawyers that they are only doing what their clients demand. Finally, there are lawyers who believe "win at any cost" tactics benefit them financially or produce better results for their clients, no matter what the costs to others or to the civil trial system itself. For them, unprofessional conduct is perhaps nothing more than a strategy of winning embraced in the notion of zealous advocacy. Of course, it is not. Such lawyers in effect are treating the civil justice system as a "free good" allowing the use of any "legal" or "ethical" tactic without regard to the costs or consequences to others or to the civil trial system itself. They are certainly not fulfilling their professional obligations to the justice system.

---

[78] *See* THE STATE OF MENTORING IN THE LEGAL PROFESSION, *supra* note 38, at 127.

[79] *See* Hannaford, *supra* note 15.

[80] Some state bar professionalism codes and creeds actually suggest this. See, for example, the Arizona Lawyer's Creed which instructs attorneys to inform clients of the importance of civility ("I will advise my client that civility and courtesy are not equated with weakness."), *available at* http://www.azbar.org/membership/admissions/lawyer'screedofprofessionalism (last visited Aug. 22, 2013). *See also* Denis T. Rice, *Incivility In Litigation: Causes and Possible Cures* 10 (unpublished paper prepared for ABA Tort Trial and Insurance Practice Session 2013 Annual Meeting, Aug. 13, 2013, San Francisco, CA) ("A lawyer should educate his or her client to appreciate that incivility will not benefit the client's interest. Not only do hardball battles over discovery drive up the fees, but it rarely improves the client's litigation posture. The client should understand that credibility with counsel and the court is a highly valuable asset").

The challenge here is to strengthen the professionalism of the great majority of American lawyers who already practice with professionalism and pursue a more effective strategy to change the behaviors of the group who do not. How ideas, innovations and values become norms which are widely adopted has been exhaustively studied. It is well established that the ideas and innovations of small groups become the norms of the great majority through a process social scientists refer to as diffusion.[81] Education can introduce an idea broadly but people are far more likely to actually adopt it and make it a norm when others they know and trust embrace the idea and provide personal evidence of its importance. Peer-to-peer communication and the influence of peer networks are crucial to the process. This process is known to work in professional groups like physicians in the adoption of new practice standards.[82] The process of diffusion is also remarkably similar to what goes on in a mentoring environment where an experienced professional who practices with professionalism as a norm transmits an approach to practice based on the central values of the profession. Related to this is the common observation that lawyers are less likely to act improperly to other lawyers they know and handle matters with repeatedly. It is far easier to be uncivil to a lawyer in a single matter than one likely to be seen again. The growth of the profession and handling more matters through exchange of paper and email has reduced personal contact and the opportunity for the diffusion process to have as great an effect.[83]

This is to suggest that if we as a profession want to strengthen professionalism further and reach lawyers who do not see or are indifferent to its importance, we must think beyond the current education strategy. To be sure, the education strategy common in the professionalism movement works and must be continued. It should, however, be more focused and tied more directly to the importance of professionalism to the rule of law and the effective operation of the civil justice system. The professionalism panels created by the Florida and Utah supreme courts and the Colorado Bar are a promising middle ground to resolve professionalism complaints informally using something similar to a mediation process.

Mentoring offers significant promise in furthering professionalism. It does require individual commitment to the intensive task of transmitting to others appropriate practice norms. Yet thousands of lawyers are already engaged in state, local, firm and law school mentoring program around the country. A broader commitment to mentoring in the profession would certainly be in keeping with other professionalism obligations such as service to the profession. Increasing transmittal of the importance of professionalism both to individual lawyers and even to clients, has the potential beyond current initiatives to strengthen professionalism and could reach a broader audience than education initiatives alone. Obviously, mentoring can have the greatest long-term benefit if it is focused on new lawyers.

---

[81] The standard work is EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS (5th ed. 2003). There are more than 6,000 research studies and field tests of this process.

[82] *See* Soumerai et al., *Effect of local medical opinion leaders on quality of care for acute myocardial infarction: A randomized controlled trial*, 279 J. AM. MED. ASS'N 1358 (1998).

[83] For a discussion, see Rice, *supra* note 79, at 2–3.

Finally, the whole area of professionalism suffers from a lack of hard information on the frequency and types of unprofessional conduct occurring. Ways to bridge this information gap are clearly important.

## VII. Points of Agreement and Recommendations

Professionalism of lawyers is essential to the effective operation of the civil justice system, which in turn is crucial to the rule of law and a democratic society. Strengthening the civil justice system has long been a priority of the Civil Trial Bar Roundtable. The following recommendations to strengthen professionalism will contribute to a strong civil trial system, which operates with fairness, effectiveness, and efficiency:

1. The professionalism movement so far has concentrated on educating lawyers about the various aspects of professionalism. It needs more focus. Current professionalism initiatives could be more effective if they have a central focus on supporting rule of law principles, the civil justice system, and the core values of the profession: honesty, integrity, civility, and service. While current initiatives are impressive in scope and have drawn the active involvement of bars, courts, legal organizations, and law schools, few articulate a central purpose of professionalism or the central values of the profession. A new focus on the importance of professionalism to the rule of law and the civil justice system could improve their effectiveness and should be encouraged. Also, a new emphasis on lawyers educating their clients should be added to professionalism codes and creeds. This, coupled with other efforts to better educate clients on the importance of civility, could improve professionalism.

2. Civility oaths based on rules of court have been adopted in several states. Courts are using violations of these oaths as the basis of disciplinary sanctions and lawyers consequently can see the limits of appropriate conduct. Efforts to incorporate civility oaths into court rules should be encouraged in those states which have not yet adopted them.

3. New initiatives by the Florida and Utah supreme courts and the Colorado Bar to establish professionalism boards to resolve professionalism complaints informally appear promising. They are important first steps in creating a mechanism to address professionalism issues which fall outside the scope of disciplinary rules. If these approaches prove successful, their adoption by other bars and state supreme courts should be encouraged and supported.

4. Mentoring can take many forms and is rapidly increasing in the legal profession. It is demonstrably effective in transmitting the "culture" of a professional approach to law practice. It also is known to be one of the most effective ways in establishing new behavioral norms where education alone won't succeed. Mentoring can be most effective in impressing on new lawyers the importance of professionalism. Its increased use in the legal profession should be strongly encouraged and supported.

5. Supreme court professionalism commissions have been the most active organizations in the profession in dealing with professionalism by bringing together all stakeholders.

They operate in only about 25% of the states. Their creation in every state should be encouraged.

6. Hard information on the frequency of unprofessional conduct, either nationally or in individual states, is difficult to obtain and not routinely collected. Nor have the effectiveness of individual initiatives such as professionalism codes been evaluated. The only exception here is mentoring which is evaluated in most states on an ongoing basis. More comprehensive gathering of data on professionalism and the effectiveness of various initiatives should be encouraged. As a part of this process, the Civil Trial Bar Roundtable supports the development of a "professionalism directory" for each state. This directory would be a qualitative state-by-state measure of the breadth of each state's professionalism efforts. Possibilities for inclusion are the existence of supreme court commissions, bar committees, professionalism standards, civility oaths, bar and disciplinary counsel programs, mentoring, CLE programs on professionalism, access to justice initiatives, working with law schools and data gathering. This is not an inclusive list. The Roundtable supports such an effort and is willing to participate in a meaningful way in its development.

7. The Civil Trial Bar Roundtable, through local groups of its national organizations, encourages active involvement with as many law schools as possible. The experience of individuals in member organizations could be invaluable in assisting law schools to strengthen their professionalism programs. This is a time of declining enrollments and tight resources for law schools. They could benefit from the active participation of Roundtable organizations and their members in increasing the professionalism and skills of law students.

## REPORT

This resolution seeks American Bar Association endorsement of a White Paper it and some of its constituent entities helped develop as part the American Civil Trial Bar Roundtable. The White Paper urges all lawyers and legal organizations to support a more comprehensive approach to strengthening the professionalism of lawyers while building on the extensive existing professionalism initiatives of courts, bars, legal organizations and law schools. The American Civil Trial Bar Roundtable, in conjunction with the work of the American Inns of Court Foundation, has prepared this extensive White Paper outlining a number of strategies to be utilized in the further education and promotion of lawyer professionalism. That White Paper constitutes is appended to this report.

For decades, the American Civil Trial Bar Roundtable has brought together leaders of the major civil trial bar organizations and the ABA to work together in the continuation and preservation of the civil trial justice system. Its goal is to provide its member organizations with a forum to foster and encourage frank and open discussion and dialogue on the status of the U.S. civil justice so as to seek improvements in that system that all stakeholders can support. The American Bar Association is represented at the American Civil Trial Bar Roundtable by the American Bar Association (as a whole), the Section of Litigation, the Tort Trial and Insurance Practice Section, and the Commission on the American Jury Project. In addition, other national trial legal organizations that are members and have endorsed this White Paper include the American Association for Justice, American Board of Trial Advocates, Association of Defense Trial Attorneys, American Board of Professional Liability Attorneys, Academy of Rail Labor Attorneys, Defense Research Institute, Federal Bar Association, Federation of Defense and Corporate Counsel, International Association of Defense Counsel, International Academy of Trial Lawyers, International Society of Barristers, and National Crime Victim Bar Association. Although the American Inns of Court Foundation has approved the White Paper, it does not normally take public positions on issues that might come before the Roundtable. The Roundtable takes no position unless all members of the Roundtable endorse the proposal.

**BACKGROUND**

The Tort Trial and Insurance Practice Section has long promoted professionalism through resolutions approved by the American Bar Association House of Delegates. In 1988 the House adopted Resolution 116A, sponsored by TIPS, which recommended state and local bar associations encourage members to accept as a guide for the individual conduct a lawyer's creed of professionalism. In 1991 the House adopted Resolution 104, sponsored by TIPS, recommending a discussion of professional by law school faculties. The Tort Trial and Insurance Practice Section is represented in the American Civil Trial Bar Roundtable.

The Commission on the American Jury Project also cosponsors this resolution, recognizing the importance of professionalism to a properly functioning jury system.

A persistent impression that professionalism, and civility in particular, have declined and continue to wane within the profession prompted the drafting of the White Paper. A recent poll

found that more than two-thirds of all lawyers believe civility continues to ebb among lawyers and 80 percent of judges have witnessed attorney conduct within their courtrooms that lacked civility.[84] One commentator found that many lawyers view civility as "anachronistic or incompatible with the modern day practice of law."[85] Nonetheless, courts generally "believe and defend the idea that maintaining a bar that promotes civility and collegiality is in the public interest and greatly advances judicial efficiency: better 'to secure the just, speedy[,] and inexpensive determination of every action and proceeding,' as Rule 1 demands." *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1244 n.5 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 415 (2010).

The American Bar Association has consistently taken a stand that professionalism is a necessary component of a lawyer's job as an officer of the court and requires the exercise of civility. Operating in a professional manner is necessary to making the justice system work for all. The Association's efforts on professionalism include a number of resolutions approved by the House of Delegates. For example, the House of Delegates renewed the Association's commitment to civility in 2011 and also approved a 1995 resolution encouraging bar associations and courts to adopt standards of civility, courtesy and conduct as aspirational goals to promote professionalism of lawyers and judges. The Association's efforts have not gone unnoticed. The ethical implications of uncivil conduct has received increasing attention in the states, with some states adopting enforceable civility codes.[86]

The adoption of this White Paper continues those efforts to advance civility and professionalism by calling attention to a number of existing programs and initiatives that may be adopted in other venues.

**EXPLANATION OF THE RESOLUTION**

The White Paper this resolution endorses details salutary strategies for strengthening the professionalism of lawyers by moving beyond aspirational approaches to more concrete steps. The paper recognizes that unprofessional conduct adversely affects the quest for justice, as well as public respect and confidence in both the legal profession and the civil justice system itself. Appalling conduct includes uncivil behavior, dilatory tactics, and lack of integrity, all of which imposes unnecessary delays and costs and can result in loss of public confidence in both the legal profession and the civil justice system itself.

Among the many strategies utilized in different states and described in the White Paper are: state court professionalism commissions, state bar professionalism committees, bar professionalism

[84] Nancy Levit & Douglas O. Linder, The Happy Lawyer: Making a Good Life in the Law 59 (2010).

[85] Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer,* 5 Conn. Pub. Int. L.J. 31, 35-36 (2005).

[86] *See* G.M. Filisko, You're Out of Order! Dealing with the Costs of Incivility in the Legal Profession, ABA J., January 2013, at 32, 35; G.M. Filisko, Be Nice More States Are Treating Incivility As A Possible Ethics Violation, ABA J., April 2012, at 26. *See also, e.g.,* Amelia Craig Cramer *et. al., Civility for Arizona Lawyers: Essential, Endangered, Enforceable,* 6 Phoenix L. Rev. 465 (2013).

codes, creeds, principles and standards promoting honesty, integrity, civility, and service, civility oaths, mandatory CLE programs on ethics or professionalism, mentoring programs, law school programs and courses on professionalism, programs sponsored by national legal organizations, bar and bar/disciplinary counsel professionalism initiatives, and other efforts. The White Paper provides descriptions of these programs for potential replication.

Respectfully submitted,

Eugene G. Beckham, Chair
Tort Trial and Insurance Practice

August 2014

# 105B

## GENERAL INFORMATION FORM

Submitting Entities: Tort Trial & Insurance Practice Section; Commission on the American Jury Project

Submitted By Eugene G. Beckham, Chair

**1.** SUMMARY OF RESOLUTION

The Resolution endorses a White Paper prepared under the auspices of the American Civil Trial Bar Roundtable, of which the American Bar Association is a member, that recognizes concrete strategies to advance the professionalism of lawyers in order to the strengthen the American civil justice system and describes the extensive existing initiatives of courts, bars, legal organizations and law schools.

**2.** APPROVAL BY SUBMITTING ENTITY

February 9, 2014

**3.** HAS THIS OR A SIMILAR RESOLUTION BEEN SUBMITTED TO THE HOUSE OR BOARD PREVIOUSLY?

No

**4.** WHAT EXISTING ASSOCIATION POLICIES ARE RELEVANT TO THIS RESOLUTION AND HOW WOULD THEY BE AFFECTED BY ITS ADOPTION.

1988 Resolution 116A and 1991 Resolution 104. Neither would be affected in its current applications.

**5.** WHAT URGENCY EXISTS WHICH REQUIRES ACTION AT THIS MEETING OF THE HOUSE?

The need to combat the decline in professionalism and civility that has affected the profession advises in favor of immediate action. Moreover, this meeting of the House is the first opportunity since approval of the White Paper by the American Civil Trial Bar Roundtable and its constituent members for adoption by the House.

**6.** STATUS OF LEGISLATION (IF APPLICABLE)

N/A

**7.** BRIEF EXPLANATION OF PLANS FOR IMPLEMENTATION OF THE POLICY, IF ADOPTED BY THE HOUSE OF DELEGATES

The Tort Trial & Insurance Practice, with the Resolution co-sponsors, will promote the strategies outlined in the report.

**8.** COST TO THE ASSOCIATION (BOTH DIRECT AND INDIRECT COSTS)

No cost

**9.** DISCLOSURE OF INTEREST (IF APPLICABLE)

N/A

**10.** REFERRALS

This Resolution has been sent to other ABA entities requesting support or co-sponsorship:

Section of Litigation
Standing Committee on Bar Activities and Services
Standing Committee on Ethics and Professional Responsibility
Standing Committee on Lawyers' Professional Liability
Standing Committee on Professional Discipline
Standing Committee on Professionalism

**11.** CONTACT NAME AND ADDRESS INFORMATION (PRIOR TO THE MEETING)

Dick A Semerdjian
Schwartz Semerdjian Ballard & Cauley LLP
101 W. Broadway, Ste 810
San Diego, CA 92101
Phone: 619/699-8326
FAX: 619/236-8827
das@ssbclaw.com

or

TIPS Delegate Robert Peck
Center for Constitutional Litigation, PC
777 6th Street, N.W.
Suite 520
Washington, DC 20001
Phone: 202-944-2874
Fax: 202-965-0920
Email: robert.peck@cclfirm.com

# 105B

**12.** CONTACT NAME AND ADDRESS INFORMATION (WHO WILL PRESENT THE REPORT TO THE HOUSE)

TIPS Delegate Robert Peck
Center for Constitutional Litigation, PC
777 6th Street, N.W.
Suite 520
Washington, DC 20001
Phone: 202-944-2874
Fax: 202-965-0920
Email: robert.peck@cclfirm.com

## EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for the American Bar Association to endorse the 2014 White Paper produced by the American Civil Trial Bar Roundtable, which describes strategies and initiatives to enhance professionalism in order to support the rule of law, the civil justice system, and core values of the profession, including honesty, integrity, civility, and service.

2. Summary of the Issue that the Resolution Addresses

Many observers believe that professionalism is in decline. That decline is marked by tactics that demonstrate lack of respect for adversaries, incivility and even dishonesty. The White Paper highlights some of the efforts throughout the nation that attempts to reverse this trend.

3. Please Explain How the Proposed Policy Position will address the issue

Through endorsement, the American Bar Association will aid in dissemination of descriptions of programs and other efforts designed to enhance professionalism within the legal profession.

4. Summary of Minority Views

The co-sponsors are not aware of any minority views or opposition.

# Section 4:

# Conference of Chief Justices, Resolution I

## CONFERENCE OF CHIEF JUSTICES

## RESOLUTION 1

**Commending to the Conference of Chief Justices the American Civil Trial Bar Roundtable Policy Paper on Increasing the Professionalism of American Lawyers**

WHEREAS, in 1999 the Conference of Chief Justices adopted a National Action Plan on Lawyer Conduct and Professionalism which set forth the premise that professionalism is aspirational and encompasses broader standards than compliance with ethical rules, observing that ethics are what a lawyer must obey, while principles of professionalism are what a lawyer should live by in conducting his or her affairs; and

WHEREAS, while there is no agreed-upon definition of professionalism, a broad consensus exists as to its major elements, which include respect for the rule of law, integrity and trustworthiness, competency and ethical conduct, participation in pro bono and access to justice initiatives, community service and leadership, civility, and the appropriate exercise of independent judgment; and

WHEREAS, the American Civil Trial Bar Roundtable has developed a Policy Paper to assess current efforts to strengthen the professionalism of lawyers and to make recommendations directed at enhancing professionalism; and

WHEREAS, this Policy Paper sets forth that State Supreme Court Commissions on Professionalism are the most effective organizations for bringing the profession together to implement focused professionalism initiatives, and recommends the creation of such commissions in states without them; and

WHEREAS, the Policy Paper encourages collection of more data on the frequency of unprofessional conduct and the effectiveness of professionalism initiatives; and

WHEREAS, the American Bar Association adopted Resolution 105B at its 2014 Annual Meeting commending the American Civil Trial Bar Roundtable Policy Paper and recommending that bar organizations study the efforts described in the paper to enhance efforts to improve professionalism;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices commends to its members the American Civil Trial Bar Roundtable Policy Paper on Increasing the Professionalism of American Lawyers and encourages them to review the findings and recommendations when considering ways to improve the professionalism of the bar.

Adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the 2015 Midyear meeting on January 28, 2015

# Section 5:
# Civility Revisited

# *Civility Revisited*

*by Donald J. Winder*

In May 2009, the *Utah Bar Journal* published my article on the movement toward civility in our profession and enforcement of our responsibility in this regard. Donald J. Winder & Jerald V. Hale, *Enforcing Civility in an Uncivilized World*, 22 Utah B.J. 36 (May/June 2009). Since publication of that article, various jurisdictions across the country have, like Utah, pushed the concept of civility from the periphery of professional responsibility to the forefront. Accordingly, I update the earlier work to highlight these changes in Utah and around the country.

Recent cases from Utah courts underscore the growing recognition that the concept of civility is no longer merely aspirational. *See, e.g., Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 43, 238 P.3d 1035, 1043 ("We encourage lawyers and litigants to follow [the Utah Standards of Professionalism and Civility.]"); *Featherstone v. Schaerrer*, 2001 UT 86, ¶ 16, 34 P.3d 194 ("[C]ourts are endowed with the inherent authority to regulate attorney misconduct."); *Robinson v. Baggett*, 2011 UT App 250, ¶ 27 n.14, 263 P.3d 411 (citing the Utah Standards of Professionalism and Civility as authority); *State v. Doyle*, 2010 UT App 351, ¶ 12, 245 P.3d 206 (stating conduct of all lawyers "should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms" (citation and internal quotation marks omitted)); *Superior Receivable Servs. v. Pett*, 2008 UT App 225, ¶ 12, 191 P.3d 31 (mem.) (citing to Standard 1, Utah Standards of Professionalism and Civility while reiterating a previous Utah Supreme Court case holding incivility may warrant sanctions and will often diminish a lawyer's effectiveness); *Advanced Restoration, LLC v. Priskos*, 2005 UT App 505, ¶ 37 n.13, 126 P.3d 786 (citing Standard 3, Utah Standards of Professionalism and Civility, that "[d]erogatory references to others or inappropriate language of any kind has no place in an appellate brief" (citation and internal quotation marks omitted)).

The Utah Supreme Court has made clear counsel should comply with the Utah Standards of Professionalism. In *Arbogast Family Trust*, the court stated,

> A party's counsel can and should simultaneously comply with the rules of civil procedure and the standards of professionalism and civility. Our standards of professionalism and civility often promulgate guidelines that are more rigorous than those required by the Utah Rules of Civil Procedure and the Utah Code of Professional Conduct. Adherence to those standards promotes cooperation and resolution of matters in a "rational, peaceful, and efficient manner." Utah Standards of Professionalism and Civility pmb1. The rules of civil procedure establish minimum requirements that litigants must follow; the standards of professionalism supplement those rules with aspirational guidelines that encourage legal professionals to act with the utmost integrity at all times.

2010 UT 40, ¶ 40. The court highlighted the commitment to enforcement of civility in the practice of law in Utah noting, "We encourage lawyers and litigants to follow [the Utah Standards of Professionalism and Civility 14-301 (16)], and we caution that lawyers who fail to do so without justification may open themselves to bar complaints or other disciplinary consequences if their conduct also runs afoul of the Utah Rules of Professional Conduct." *Id.* ¶ 43.

As another example, in *Doyle*, the Utah Court of Appeals called into question certain tactics a prosecutor used in failing to fully respond to discovery requests. Highlighting the need for civility in this particular context, the court cited to the Utah Standards of Professionalism and Civility and observed, "[F]or all lawyers, and especially for prosecutors, 'conduct should be characterized at all times by personal courtesy and professional integrity in

*DONALD J. WINDER has practiced for over 40 years, is managing partner in the Salt Lake City firm Winder & Counsel, PC, has a varied trial practice focusing on business litigation, and has also been privileged to serve on the Utah Supreme Court Committee on Professionalism since its inception.*

the fullest sense of those terms…[and] we must be mindful of our obligations to the administration of justice, which is a truth-seeking process.'" 2010 UT App 351, ¶ 12 (omission and second alteration in original) (citing Utah Standards of Professionalism & Civility 14-301).

Likewise, in *Pett*, the Utah Court of Appeals reiterated the dangers of incivility in written briefs and correspondence as detailed in *Peters v. Pine Meadow Ranch Home Ass'n*, 2007 UT 2, 151 P.3d 962 , a case highlighted in my 2009 article. While not ruling directly on the issue, the court felt compelled to make special note of its dismay for the tactics used by respondent's counsel in their briefs. Specifically, the court noted,

> Our Standards of Professionalism and Civility provide that "lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner" Utah Standards of Professionalism & Civility 1. [Respondent's] appellate brief's description of the district court's ruling as "inane" and "a most incredible leap of illogical, irrational, unreasonable, fallacious, and specious lack of reasoning" fails to grant the district court the dignity and respect it deserves. We also caution that "[e]ven where a lawyer's unprofessionalism or incivility does not warrant sanctions, it often will nevertheless diminish his or her effectiveness," *Peters v. Pine Meadow Ranch Home Ass'n*, 2007 UT 2, ¶ 20, 151 P.3d 962, and in extreme cases can result in the assessment of fees against the offending lawyer or even striking of substantive arguments to the client's detriment, *see id.* ¶ 9.

2008 UT App 225, ¶ 12.

A most important aspect of the move toward civility in the legal profession has been the inclusion of a civility requirement in the attorney oath. In 2003, the South Carolina Bar amended its lawyer's oath to include the following: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." S.C. App. Ct. R. 402(k)(3) (2013). In Utah, the attorney's oath was modified to include promises to "discharge the duties of attorney…with honesty, fidelity, professionalism, and civility" and to "faithfully observe…the Standards of Professionalism and Civility." Utah R. Prof'l Conduct, *Preamble: A Lawyer's Responsibilities*, [1]. Several other states have also recently amended their attorney oaths to incorporate similar language, recognizing the need for civility in all aspects of the practice of law. These include New Mexico, *see* N.M. Rules Gov. Admiss. Bar R. 15-304 (2010) ("I will maintain civility at all times"), as well as Florida, Louisiana, and Arkansas, which all follow the South Carolina model, "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communication," *available at* www.scourts.org/courtOrders/displayOrder.Cfm?orderNo=2003-10-22-03. The American Board of Trial Advocates members actively participated in bringing about these results.

Efforts by the ABA have also contributed. *See ABA Recommends Creeds for Bar Associations*, ABA J., Jan. 1989, at 58 (providing a discussion of the model lawyer creeds proposed by the ABA's Young Lawyers Division and the ABA's TIPS section). Other states with civility components in their oaths include Arizona and Ohio. Although Arizona does not specifically refer to civility in its oath, it does reference adherence to the state bar's "Lawyers Creed," providing, "I will advise my client that civility and courtesy are not to be equated with weakness," and "I will be courteous and civil, both in oral and in written communications," *available at* www.azbar.org/membership/admissions/lawyer'screedofprofessionalism (last visited Oct. 7, 2013). Ohio Rule 1 section 8 requires an attorney to "conduct myself with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons." Ohio Gov. Bar R. I, § 8(A). Likewise, Hawaii recognizes the need for civility in the practice of law, albeit with a slightly less broad scope. *See* Haw. Sup. Ct. R. 1.5(a)(3)(c) ("I will conduct myself with dignity and civility towards judicial officers, court staff and my fellow professionals."). In all, nine states have now modified their attorney oaths to specifically include reference to the requirement of civility in the practice of law.

In addition to the specific references to civility in the attorney oaths, several other states have included references to other definitional analogs to civility, such as courtesy and respect. *See* Alaska Bar R. 5, § 3 ("I will be candid, fair and courteous before the court and other attorneys. . . ."); Colo. Oath of Admission ("I will treat all persons…with fairness, courtesy, respect and honesty"); Minn. Stat. § 358.07(a) (providing that attorneys shall conduct themselves "in an upright and courteous manner"); Del. Supr. Ct. R. 54 (requiring attorneys to behave "with all good fidelity as well to the court as to the client"), and Va. Attorney Oath (requiring attorneys to swear to "courteously demean [themselves] in the practice of law"). Alaska, Colorado, Minnesota, Delaware, and Virginia all include specific references to being courteous, which any dictionary will confirm is the touchstone of civility. *See* Merriam-Webster (defining "civility" as (2)(a) "civilized conduct; *especially* : COURTESY, POLITENESS"), *available at* http://www.merriam-webster.com/dictionary/civility (last visited June 25, 2013); Black's Law Dictionary (9th ed.

2009) (defining "legal etiquette" as "professional courtesy that lawyers have traditionally observed in their professional conduct, shown through civility and a strong sense of honor"). Thus, in addition to the nine states directly referencing civility in their oaths, these five analogous "oath states" make certain the modern trend of law is moving swiftly toward a standard of civility that is made clear to attorneys from the moment they take the oath of their respective jurisdictions.

Michigan is a state that does not include civility in its oath. However, it enforces civility through its rules of professional conduct. *See Grievance Adm'r v. Fieger*, 719 N.W.2d 123 (Mich. 2006) (disciplining an attorney who violated the Michigan Rules of Professional Conduct (MRPC) prohibiting undignified or discourteous conduct toward tribunal subject to professional discipline under the Michigan Court Rules). The Michigan Supreme Court further upheld a constitutional challenge involving MRPC 6.5(a), which provides that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process." *Id.* at 162 (citation and internal quotation marks omitted).

As case law develops in this area, the inclusion of the requirement of civility in attorney oaths has also resulted in court-imposed sanctions for violations. *See generally*, Judith D. Fischer, *Incivility in Lawyers Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L. J. 365 (2011) (detailing case law regarding incivility in written legal documents). In the case *In re Abbott*, 925 A.2d 482 (Del 2007) (per curiam), the Delaware Supreme Court refers to the attorney oath wherein all attorneys swear to practice "'with all good fidelity as well to the Court as to the client,'" *id.* at 484–85 (quoting Del. Supr. Ct. R. 54), as a basis for publicly reprimanding a lawyer who, among other things, accused fellow counsel of fabrication. *Id.* As a leader in the charge to add civility to its oath, so too are South Carolina courts pushing hard against attorneys who violate their oath. *See* ABA J., Jan. 2013, at 32–40.

In 2011 alone, three South Carolina Supreme Court cases dealt with sanctions imposed against attorneys for uncivil actions in violation of the South Carolina Rules of Professional Conduct and its lawyer oath. *See In re White III*, 707 S.E.2d 411 (S.C. 2011) (sanctioning an attorney for written correspondence suggesting opposing counsel had "no brains" and questioning if "he has a soul," among other derogatory remarks); *In re Anonymous Member of S. Carolina Bar*, 709 S.E.2d 633 (S.C. 2011) (sanctioning an attorney for derogatory remarks regarding opposing counsel's family unrelated to the matter at hand); *In re Lovelace*, 716 S.E.2d 919 (S.C. 2011) (sanctioning an attorney for threatening and then slapping defendant during a deposition). These cases dealt with various instances of attorney incivility in both oral

and written forms, but all indicate the South Carolina Court's intent to enforce sanctions for violations of the oath and the standards of civility attorneys have sworn to uphold.

*In re Anonymous Member of South Carolina Bar* provides a good example of this direct approach. For the benefit of the bar, the court took this opportunity to address the increasing complaints of incivility. 709 S.E. 2d at 635. In upholding the disciplinary panel's decision regarding sanctions, the court noted, "Respondent took the lawyer's oath which includes the following clause, 'To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in written and oral communications. . . .'" *Id*. at 637. It commented, "An e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client." *Id*.

The court went on to hold:

> In this case, there is no question that even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's "Drug Dealer" e-mail violates the civility clause. Casting aspersions on an opposing counsel's offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause. . . . Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath.

*Id*. In overruling due process and First Amendment challenges, the court stated,

> The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other in the manner in which Respondent attacked [opposing counsel]. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client.

*Id*. at 638.

Besides including civility in its lawyer's oath, South Carolina took a step further and, in 2004, amended Rule 7 of the Rules for Lawyer Disciplinary Enforcement to include violation of the lawyer's oath as grounds for discipline. *See* http://www.sccourts.org/courtOrder/displayOrder.cfm?orderNo=2004-09—22-01. Other states, like Kansas, although lacking a provision requiring civility in their oaths, do also include a provision that violating the oath is grounds for discipline under rules of professional conduct. *See* http://www.ksd.uscourts.gov/rule-83-6-1-professional-responsibility/. Such a provision is not necessarily a disciplinary requirement for acts of incivility. As noted above, the Delaware Supreme Court has enforced the lawyer's oath without such a rule. *See In re Abbott*, 925 A.2d 482 (Del. 2007). And other courts have also disciplined attorneys for violation of their oath, without such a provision in the rules of professional conduct. *See, e.g., State ex rel. Counsel for Discipline v. Sipple*, 660 N.W.2d 502 (Neb. 2003) (finding an attorney subject to discipline under both the rules of professional conduct and for violation of attorney's oath).

These cases in South Carolina, Delaware, Utah, and elsewhere continue to indicate the sea change taking place within our profession where civility in the practice of law is no longer tempered by notions of "zealous" or "aggressive" representation. By moving the civility requirement into the attorney oath, lawyers are now on notice that representation must be accomplished within the context of civility.

In June 2013, the Florida Supreme Court adopted procedures for, among other things, enforcing principles of civility as set forth in the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism*, and *The Florida Bar Ideals and Goals of Professionalism*. In so doing, the Florida Supreme Court rejected the prior passive academic approach to civility problems, stating further and more concrete actions are now required. Entitled a *Code for Resolving Professionalism Complaints*, any person may initiate a complaint either telephonically or by written request. *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013) (mem.). Depending on the severity of the complaint, resolution can be pursuant to a local professionalism panel or through the Florida Bar offices. Such a resolution may be informal or include diversion, admonition and even disciplinary action.

In closing, Utah should continue as a leader to set an example of civility in all phases of our profession. Programs such as the Utah Supreme Court's professionalism counseling for members of the Utah Bar may also help enforce the expectations of civility to which we all must aspire. *See* Utah Supreme Court Standing Order No. 7, issued January 9, 2008, effective April 1, 2008, *available at* http://www.utcourts.gov/resources/rules/urap/Supctso.htm#7. Members of the Utah Supreme Court Committee on Professionalism will be urging that Utah directly adopt the South Carolina and Florida approaches.

# Section 6:

# Utah Standards of Professionalism & Civility

**Rule 14-301. Standards of Professionalism and Civility.**

To enhance the daily experience of lawyers and the reputation of the Bar as a whole, the Utah Supreme Court, by order dated October 16, 2003, approved the following Standards of Professionalism and Civility as recommended by its Advisory Committee on Professionalism.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client’s case.

Although for ease of usage the term “court” is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

Cross-References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).

**1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.**

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers’ dress and conduct. When appearing in court, lawyers should dress professionally, use appropriate language, and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond. 3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

**2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.**

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof. Cond. 1.4(a)(5).

**3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.**

Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race, religion, gender, sexual orientation, age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

**4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.**

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).

**6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.**

Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond. 1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof. Cond. 1.16(d); R. Prof. Cond. 1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3; R. Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

**7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.**

Comment: When providing other counsel with a copy of any negotiated document for review, a lawyer should not make changes to the written document in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be sensitive to, and accommodating of, other lawyers' inability to make full use of technology and should provide hard copy drafts when requested and a redline copy, if available.

Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. App. P. 11(f).

**8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.**

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-306(6).

**9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.**

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

**10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.**

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond. 8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).

**11. Lawyers shall avoid impermissible ex parte communications.**

Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv. P. 2.9(A); Fed. R. Civ. P. 77(b).

**12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.**

Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).

**13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.**

Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.

**14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.**

Comment: Lawyers should not evade communication with other counsel, should promptly acknowledge receipt of any communication, and should respond as soon as reasonably possible. Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use of technology is concerned, including honoring reasonable requests to retransmit materials or to provide hard copies.

Lawyers should not request inappropriate extensions of time or serve papers at times or places calculated to embarrass or take advantage of an adversary.

Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Juv. P. 54.

**15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.**

Comment: When scheduling and attending depositions, hearings, or conferences, lawyers should be respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time. Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared. Lawyers who will be late for a scheduled appointment or are aware that another participant will be late, should notify the court, if applicable, and all other participants as soon as possible.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a); R. Juv. P. 20; R. Juv. P. 20A.

**16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.**

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

**17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.**

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P. 37(a)(1)(A), (D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P. 20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).

**18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.**

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R. Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A.

**19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.**

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R. Civ. P. 26(b)(1; R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).

**20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.**

# Section 7:
# Utah Attorney's Oath

# SUPREME COURT
## OF THE
# STATE OF UTAH

---

***I DO SOLEMNLY SWEAR*** that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts with honesty, fidelity, professionalism, and civility; and that I will faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility promulgated by the Supreme Court of the State of Utah.

# Section 8:
# Judicial Civility

# *Balancing the Scales: The Growth and Development of Civility Standards for Judges*

*by Donald J. Winder*

***AUTHOR'S NOTE:*** *The author wishes to thank Jerald V. Hale, an Administrative Law Judge for the Arizona Department of Transportation, for his assistance in preparing this article. Thanks also to Kent B. Scott for his research in gathering and examining the current judicial civility rules around the country as part of his service on the Utah Supreme Court's Advisory Committee on Professionalism, Subcommittee on Proposed Standards of Judicial Civility and Professionalism.*

> *"As the world changes and becomes less civil, there is a stark need for the legal profession to become more civil."*

In the practice of law, the twenty-first century has been witness to a sea change in how those in the legal profession are expected to conduct themselves. As civility has decreased in society at large over time, incivility on the part of attorneys seemed to become distilled to a pure form as a desirable trait in the practice of law by young and old lawyers alike. However, slow but steady progress has been made in replacing this "ideal" with recognizing and embracing civility in the practice of law. Following the establishment of civility guidelines and standards for attorneys, many states now have similar civility guidelines for members of the judiciary.

The American Board of Trial Advocates (ABOTA) has long been at the forefront of promoting civility in the legal profession. The ABOTA Principles of Civility provided the benchmark for establishing a framework for civility in all aspects of the legal profession. As a result of ABOTA's efforts and similar efforts in state and local bar associations and courts throughout the country, civility standards for lawyers are now the norm, rather than the exception.

The ABOTA Principles of Civility, Integrity and Professionalism outline the conduct expected of judges. Specifically, judges are requested to observe the following Principles:

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.

2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.

3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.

4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel if possible.

5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a

*DON WINDER is managing partner in the firm Winder & Counsel, P.C., in Salt Lake City, Utah. Mr. Winder has been practicing for more than forty years and has a varied trial and transactional practice focusing on business, commercial, and real estate law.*

time that conflicts with counsel's required appearance before another judge.

6. Make all reasonable efforts to promptly decide matters under submission.

7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.

8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.

9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.

10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.

11. Require court personnel to be respectful and courteous towards lawyers, parties, and witnesses.

12. Abstain from adopting procedures that needlessly increase litigation time or expense.

13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Following ABOTA's lead in this area, sixteen states currently have judicial standards of civility and professionalism. Of those, Delaware, Hawaii, Idaho, Louisiana, Maryland, Minnesota, New Mexico, and Oklahoma are directly based on the ABOTA standards. Another four jurisdictions, District of Columbia, New York, Pennsylvania, and West Virginia, have developed standards loosely based on the ABOTA standards. Three additional states, New Jersey, Ohio, and Wisconsin, have created standards outside the guiding framework of the ABOTA standards. Regardless of the specific language or pedigree, all of these jurisdictions are united in their commitment to civility in all aspects of the legal profession, including the judiciary.

As with developing formal civility standards for attorneys, Utah has been part of the early vanguard of jurisdictions working to put into place similar standards for judges. The Utah Supreme Court Committee on Professionalism, which was an integral part of the development of civility standards for lawyers, the establishment of a program of professionalism counseling for members of the Utah State Bar, and the placement of civility in the oath for admission, established a Subcommittee on Proposed Standards of Judicial Civility and Professionalism to propose judicial civility standards. The Subcommittee consisted of me,

Judge John Baxter, Kent B. Scott, and John Sundloff.

In developing the proposed standards for the Utah judiciary, members of the Subcommittee examined the judicial standards of civility and professionalism currently existing throughout the country. Using these various models, the Subcommittee created draft standards for judges. These standards were distilled from the ABOTA standards, and from creative and meaningful modifications and additions found in the standards of other jurisdictions. The Subcommittee's efforts resulted in principles for judges, approved by the Utah Supreme Court, as well as the Judicial Conduct Commission, as part of the Utah Standards of Judicial Professionalism and Civility. As noted in the Preamble to the Utah Standards, they are voluntary and aspirational.

The Utah Standards state:

1. Judges will refrain from manifesting or acting upon racial, gender, or other improper bias or prejudice toward any participant in the legal process.

2. Judges will not use language in oral or written communications, orders, or opinions that is profane or that gratuitously demeans or humiliates an attorney, litigant, witness, or other judge, recognizing, however, that judges are sometimes expected to stand up to obstinacy or insubordination with sharpness and even severity, and that the difficult legal or factual determinations they make might produce a demeaning or humiliating effect on a participant in the judicial process.

3. Judges will not disparage the integrity, motives, intelligence, morals, ethics, or personal behavior of an attorney, litigant, witness or another judge except in circumstances where such matters are in furtherance of a judge's responsibilities or are otherwise relevant under the governing law or rules of procedure. Judges will not impugn the integrity or professionalism of any lawyer on the basis of the client or cause which the lawyer represents.

4. Judges will avoid impermissible ex parte communications.

5. Judges will not adopt procedures aimed at delaying the resolution of proceedings before them or at compounding litigation expenses unnecessarily.

6. Judges will endeavor to begin judicial proceedings on time and to provide reasonable notice if necessary to apprise the parties, recognizing that circumstances beyond the judge's control may impact the goal of punctuality.

7. Judges will give issues of controversy thoughtful and impartial analysis and consideration, recognizing the corresponding prerogative and responsibility to promote their just, speedy, and inexpensive resolution.

8. Judges will recognize that a party has a right to a fair and impartial hearing and a right to present its cause within the limits established by law. Judges will allow lawyers or parties, with reasonable time limits, to present proper arguments and to make a complete and accurate record.

9. In all legal proceedings, judges will direct parties, attorneys, and other participants to refrain from uncivil conduct. Judges who observe uncivil conduct or receive a reliable report of uncivil conduct will take corrective action as the judge deems appropriate.

10. Judges will cooperate with other judges to ensure the successful management of the court as a system as well as the judge's individual docket.

Rule 11-301, Utah Standards of Judicial Professionalism and Civility, *available at* http://www.utcourts.gov/resources/rules/ucja/ch11/11-301.htm.

As the world changes and becomes less civil, there is a stark need for the legal profession to become more civil. Attorneys and educators have been working for many years to bring civility to our profession, with the expansion of civility rules across the country, as well as in Canada. *See* Canadian Bar Association Code of Conduct, Appendix: Principles of Civility for Advocates, *available at* www.cba.org/cba/activities/pdf/codeof conduct.pdf. The Utah State Bar continues to champion this cause and welcomes the efforts to develop and implement similar civility rules for the judiciary as a necessary and complementary step for the continued recognition and respect of the legal profession.

# Section 9:
# Malpractice Insurance Application

# Endurance Application for Lawyers Professional Liability Insurance

29. Over the past five years, has the Firm experienced a security breach that required notification of customers or other third parties? ☐ Yes ☐ No

## Client Intake and Conflict Avoidance

30. Does the Firm use a centralized computerized system to maintain client lists and check conflicts of interest? ☐ Yes ☐ No
    (If no, indicate method used to check conflicts within your firm _____)
31. Do you have a common process applicable to all lawyers and practice groups regarding client intake procedures? ☐ Yes ☐ No
    Does this process include approval of at least one non-interested partner, the management committees or other committee before the client is accepted? ☐ Yes ☐ No
32. Is a background check performed on every new client prior to acceptance? ☐ Yes ☐ No
33. Does the approval process for new clients include a check on:
    a. Creditworthiness and reputation of payment of legal or other bills? ☐ Yes ☐ No
    b. Reputation for changing law firms? ☐ Yes ☐ No
34. If a conflict of interest is identified, does the Firm require the approval of the management committee to proceed? ☐ Yes ☐ No
35. Does the Firm require an engagement letter before each new matter is accepted? ☐ Yes ☐ No
    a. Are payment terms clearly set forth in the engagement letters? ☐ Yes ☐ No
    b. Does the Firm require a non-engagement letter for each matter that is declined? ☐ Yes ☐ No
    c. Are disengagement letters required upon terminating or completing legal services? ☐ Yes ☐ No

## Docket System

36. Please check each box that describes the method used by the Firm for docket and scheduling requirements:
    - ☐ Computer
    - ☐ Individual attorney diaries
    - ☐ Docket clerk/administrator
    - ☐ Other _____

37. Does this system track statutes of limitation? ☐ Yes ☐ No
38. Is the data updated at least daily and backed up or stored off-site? ☐ Yes ☐ No

## Training and Supervision

39. Are all new hires required to participate in training? ☐ Yes ☐ No
    If Yes, check all that apply:
    - ☐ Firm procedures
    - ☐ Local practice rules
    - ☐ Rules of professional conduct

40. Does the Firm verify that all attorneys are current with CLE requirements? ☐ Yes ☐ No
41. Does the Firm require an annual review of the performance of all practicing attorneys? ☐ Yes ☐ No
42. Does the Firm have a written policy requiring that a notice of claim or potential claim be reported to the appropriate individual/committee as soon as the employee or attorney is made aware of the claim or potential claim? ☐ Yes ☐ No

## Outside Interests

43. Do any of the Firm's attorneys:
    a. Serve as a director or officer of any client of the Firm? ☐ Yes ☐ No
    b. Hold an equity or debt interest in any client business or organization? ☐ Yes ☐ No
    c. Serve as an employee of any business or organization other than your Firm? ☐ Yes ☐ No

If Yes to any of the above, please complete the **Outside Interests Supplement.**

## Fees/Billing Procedures

44. What percentage of the Firm's billings are overdue by 180 days or more? _____%

# Section 10:
# Retainer Letter

# Excerpt from Winder & Counsel, P.C. Retainer Letter (August 2016)

We advise you not to talk about your case or matter with anyone other than your attorneys. Further, we advise you not to put documents, pictures, or any other information about your case or matter on Facebook, LinkedIn, MySpace, a blog, an email, Twitter, or anywhere else on the Internet.

# Section 11:
# Foolish Plaintiff

# Section 12:
# Pennsylvania & New York Ethics Opinions


**FORMAL OPINION 2014-300**

**ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA**

## I. Introduction and Summary

"Social media" or "social networking" websites permit users to join online communities where they can share information, ideas, messages, and other content using words, photographs, videos and other methods of communication. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, LinkedIn, and Twitter, are designed to permit users to share information about their personal and professional activities and interests. As of January 2014, an estimated 74 percent of adults age 18 and over use these sites.[1]

Attorneys and clients use these websites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys use the sites and in the advice attorneys provide to clients who use them. The Rules of Professional Conduct apply to all of these uses.

The issues raised by the use of social networking websites are highly fact-specific, although certain general principles apply. This Opinion reiterates the guidance provided in several previous ethics opinions in this developing area and provides a broad overview of the ethical concerns raised by social media, including the following:

1. Whether attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.
5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror's Internet presence.

[1] http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/

10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror's Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

This Opinion addresses social media profiles and websites used by lawyers for business purposes, but does not address the issues relating to attorney advertising and marketing on social networking websites. While a social media profile that is used exclusively for personal purposes (*i.e.,* to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, the Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.

## II. Background

A social networking website provides a virtual community for people to share their daily activities with family, friends and the public, to share their interest in a particular topic, or to increase their circle of acquaintances. There are dating sites, friendship sites, sites with business purposes, and hybrids that offer numerous combinations of these characteristics. Facebook is currently the leading personal site, and LinkedIn is currently the leading business site. Other social networking sites include, but are not limited to, Twitter, Myspace, Google+, Instagram, AVVO, Vine, YouTube, Pinterest, BlogSpot, and Foursquare. On these sites, members create their own online "profiles," which may include biographical data, pictures and any other information they choose to post.

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to "friend" them) as well as to invite friends of friends or others.

Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the "public," "friends," and "others." For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows "friends of friends" to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person's posts and other items.

These are just a few of the main features of social networking websites. This Opinion does not address every feature of every social networking website, which change frequently. Instead, this Opinion gives a broad overview of the main ethical issues that lawyers may face when using social media and when advising clients who use social media.

## III. Discussion

### A. Pennsylvania Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, and other parties. Although no Pennsylvania Rule of Professional Conduct specifically addresses social networking websites, this Committee's conclusions are based upon the existing rules. The Rules implicated by these issues include:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 3.3 ("Candor Toward the Tribunal")
- Rule 3.4 ("Fairness to Opposing Party and Counsel")
- Rule 3.5 ("Impartiality and Decorum of the Tribunal")
- Rule 3.6 ("Trial Publicity")
- Rule 4.1 ("Truthfulness in Statements to Others")
- Rule 4.2 ("Communication with Person Represented by Counsel")
- Rule 4.3 ("Dealing with Unrepresented Person")
- Rule 8.2 ("Statements Concerning Judges and Other Adjudicatory Officers")
- Rule 8.4 ("Misconduct")

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

### B. General Rules for Attorneys Using Social Media and Advising Clients About Social Media

Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. A few Rules of

Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

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

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients' obligation to preserve information that may be relevant to their legal disputes.

Comment [8] to Rule 1.1 further explains that, "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…." Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

Another Rule applicable in almost every context, and particularly relevant when social media is involved, is Rule 8.4 ("Misconduct"), which states in relevant part:

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

This Rule prohibits "dishonesty, fraud, deceit or misrepresentation." Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated. This Opinion frequently refers to Rule 8.4, because its basic premise permeates much of the discussion surrounding a lawyer's ethical use of social media.

### C. Advising Clients on the Content of their Social Media Accounts

As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client's social media profile, an attorney may and often should advise a client about the content on the client's profile.

Against this background, this Opinion now addresses the series of questions raised above.

#### 1. Attorneys May, Subject to Certain Limitations, Advise Clients About The Content Of Their Social Networking Websites

Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client's social media account.

For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer.[2] However, he forfeited that settlement after his daughter posted on her Facebook page "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

The Virginia State Bar Disciplinary Board[3] suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.[4]

While these may appear to be extreme cases, they are indicative of the activity that occur involving social media. As a result, lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client's social media account.

Three Rules of Professional Conduct are particularly important when addressing a lawyer's duties relating to a client's use of social media.

Rule 3.3 states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal

[2] "Girl costs father $80,000 with 'SUCK IT' Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

[3] *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

[4] *Lester v. Allied Concrete Co.,* Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)

or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

Rule 3.4 states:

> 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 assist another person to do any such act;

Rule 4.1 states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Rules do not prohibit an attorney from advising clients about their social networking websites. In fact, and to the contrary, a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute.

The Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-5, concluding that a lawyer may advise a client to change the privacy settings on the client's social media page but may not instruct a client to destroy any relevant content on the page. Additionally, a lawyer must respond to a discovery request with any relevant social media content posted by the client. The Committee found that changing a client's profile to "private" simply restricts access to the content of the page but does not completely prevent the opposing party from accessing the information. This Committee agrees with and adopts the guidance provided in the Philadelphia Bar Association Opinion.

The Philadelphia Committee also cited the Commercial and Federal Litigation Section of the New York State Bar Association and its "Social Media Guidelines," which concluded that a lawyer may advise a client about the content of the client's social media page, to wit:

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

> to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises [5]

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.[6]

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)'s prohibition against "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information, regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter.

Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making "a false statement of material fact or law." If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

### 2. Attorneys May Ethically Connect with Clients or Former Clients on Social Media

Social media provides many opportunities for attorneys to contact and connect with clients and other relevant persons. While the mode of communication has changed, the Rules that generally address an attorney's communications with others still apply.

There is no *per se* prohibition on an attorney connecting with a client or former client on social media. However, an attorney must continue to adhere to the Rules and maintain a professional relationship with clients. If an attorney connects with clients or former clients on social networking sites, the attorney should be aware that his posts may be viewed by clients and former clients.

Although this Committee does not recommend doing so, if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice. As outlined below, an attorney must not reveal confidential client information on social media. While the Rules do not prohibit connecting with clients on social media, social media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

---

[5] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted).

[6] http://www.ncbar.com/ethics/printopinion.asp?id=894

### 3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited,[7] it would also be prohibited while using social networking websites.

Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party's lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02,[8] that an attorney may not use an intermediary to access a witness' social media profiles. The inquirer sought access to a witness' social media account for impeachment purposes. The inquirer wanted to ask a third person, *i.e.*, "someone whose name the witness will not recognize," to go to Facebook and Myspace and attempt to "friend" the witness to gain access to the information on the pages. The Committee found that this type of pretextual "friending" violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2,[9] concluding that an attorney is prohibited from making an *ex parte* "friend" request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that "friending" a represented party violates Rule 4.2.

While it would be forbidden for a lawyer to "friend" a represented party, it would be permissible for the lawyer to access the public portions of the represented person's social networking site, just as it would be permissible to review any other public statements the person makes. The New York State

---

[7] *See, e.g.,* Formal Opinion 90-142 (updated by 2005-200), in which this Committee concluded that, unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct ex parte communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.

[8] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).

[9] San Diego County Bar Assn., Legal Ethics Comm., Op. 2011-2 (2011).

Bar Association Committee on Professional Ethics issued Opinion 843,[10] concluded that lawyers may access the public portions of other parties' social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

This Committee agrees that accessing the public portion of a represented party's social media site does not involve an improper contact with the represented party because the page is publicly accessible under Rule 4.2. However, a request to access the represented party's private page is a prohibited communication under Rule 4.2

### 4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information[11]

Communication with an unrepresented party through a social networking website is governed by the same general rule that, if the contact is prohibited using other forms of communication, then it is also prohibited using social media.

Rule 4.3 states in relevant part:

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

Connecting with an unrepresented person through a social networking website may be ethical if the attorney clearly identifies his or her identity and purpose. Particularly when using social networking websites, an attorney may not use a pretextual basis when attempting to contact the unrepresented person. Rule 4.3(a) instructs that "a lawyer shall not state or imply that the lawyer is disinterested." Additionally, Rule 8.4(c) (discussed above) prohibits a lawyer from using deception. For example, an attorney may not use another person's name or online identity to contact an unrepresented person; rather, the attorney must use his or her own name and state the purpose for contacting the individual.

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony[12]. He was fired for "unethical behavior," which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

---

[10] New York State Bar Assn., Comm. on Prof'l Ethics, Op. 843 (2010).

[11] Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

[12] "Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook," June 7, 2013. http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee[13] concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, "[t]he underlying principles of fairness and honesty are the same, regardless of context."[14] The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02,[15] the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness' social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05,[16] concluding that a lawyer may not use deception to access the private portions of an unrepresented person's social networking account. The Committee noted, "A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge."

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189,[17] concluding that a lawyer may request access to an unrepresented party's social networking website if the lawyer is truthful and does not employ deception.

These Committees consistently conclude that a lawyer may not use deception to gain access to an unrepresented party's page, but a lawyer may request access using his or her real name. There is, however, a split of authority among these Committees. The Philadelphia and New Hampshire Committees would further require the lawyer to state the purpose for the request, a conclusion with which this Committee agrees. These Committees found that omitting the purpose of the contact implies that the lawyer is disinterested, in violation of Rule 4.3(a).

This Committee agrees with the Philadelphia Opinion (2009-02) and concludes that a lawyer may not use deception to gain access to an unrepresented person's social networking site. A lawyer may ethically request access to the site, however, by using the lawyer's real name and by stating the lawyer's purpose for the request. Omitting the purpose would imply that the lawyer is disinterested, contrary to Rule 4.3(a).

### 5. Attorneys May Use Information Discovered on a Social Networking Website in a Dispute

If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of

[13] Kentucky Bar Assn., Ethics Comm., Formal Op. KBA E-434 (2012).
[14] *Id.* at 2.
[15] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).
[16] New Hampshire Bar Assn., Ethics Comm., Op. 2012-13/05 (2012).
[17] Oregon State Bar, Legal Ethics Comm., Op. 2013-189 (2013).

this Opinion. As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client's postings on social media may potentially be used against the client's interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

For example, in 2011, a New York[18] court ruled against a wife's claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife's postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

Courts have, with increasing frequency, permitted information from social media sites to be used in litigation, and have granted motions to compel discovery of information on private social networking websites when the public profile shows relevant evidence may be found.

For example, in *McMillen v. Hummingbird Speedway, Inc.,*[19] the Court of Common Pleas of Jefferson County, Pennsylvania granted a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.,*[20] the Court similarly granted a defendant's request for access to a plaintiff's social media accounts because the Court believed, based on the public portions of plaintiff's account, that the information may be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In *Largent v. Reed,*[21] a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff's social media accounts. The Court engaged in a lengthy discussion of Facebook's privacy policy and Facebook's ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in *McCann v. Harleysville Insurance Co.,*[22] a New York court denied a defendant access to a plaintiff's social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a "fishing expedition" that was too broad to be granted. Similarly, in *Trail v. Lesko,*[23] Judge R. Stanton Wettick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a

[18] *B.M. v D.M.,* 31 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).
[19] *McMillen v. Hummingbird Speedway, Inc.,* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).
[20] *Romano v Steelcase Inc.,* 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).
[21] *Largent v. Reed*, No. 2009-1823 (Pa.Ct.Com.Pl. Franklin Cty. 2011).
[22] *McCann v. Harleysville Ins. Co. of N.Y.,* 78 A.D.3d 1524 (N.Y. App. Div. 4th Dep't 2010).
[23] *Trail v. Lesko,* 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Pa. County Ct. 2012).

plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant did not produce any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook account would have been needlessly intrusive.

### 6. Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy

Some social networking websites permit a member or other person, including clients and former clients, to recommend or endorse a fellow member's skills or accomplishments. For example, LinkedIn allows a user to "endorse" the skills another user has listed (or for skills created by the user). A user may also request that others endorse him or her for specified skills. LinkedIn also allows a user to remove or limit endorsements. Other sites allow clients to submit reviews of an attorney's performance during representation. Some legal-specific social networking sites focus exclusively on endorsements or recommendations, while other sites with broader purposes can incorporate recommendations and endorsements into their more relaxed format. Thus, the range of sites and the manner in which information is posted varies greatly.

Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney's social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. For example, if a lawyer limits his or her practice to criminal law, and is "endorsed" for his or her expertise on appellate litigation on the attorney's LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.

Similarly, the Rules do not prohibit an attorney from soliciting reviews from clients about the attorney's services on an attorney's social networking site, nor do they prohibit an attorney from posting comments by others.[24] Although requests such as these are permissible, the attorney should monitor the information so as to verify its accuracy.

Rule 7.2 states, in relevant part:

> (d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.
> (e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

Rule 7.2(d) prohibits any endorsement by a celebrity or public figure. A lawyer may not solicit an endorsement nor accept an unsolicited endorsement from a celebrity or public figure on social

[24] In *Dwyer v. Cappell*, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.

media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

Even if the endorsement is not made by a celebrity or a paid endorser, the post must still be accurate. Rule 8.4(c) is again relevant in this context. This Rule prohibits lawyers from dishonest conduct and making misrepresentations. If a client or former client writes a review of a lawyer that the lawyer knows is false or misleading, then the lawyer has an obligation to correct or remove the dishonest information within a reasonable amount of time. If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item.

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8,[25] concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted.[26] Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer's services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client's level of satisfaction with the lawyer-client relationship.

This Committee agrees with the North Carolina Committee's findings. Attorneys may request or permit clients to post positive reviews, subject to the limitations of Rule 7.2, but must monitor those reviews to ensure they are truthful and accurate.

### 7. Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information

Attorneys may not disclose confidential client information without the client's consent. This obligation of confidentiality applies regardless of the context. While the issue of disclosure of confidential client information extends beyond this Opinion, the Committee emphasizes that attorneys may not reveal such information absent client approval under Rule 1.6. Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege. Consequently, a lawyer's comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client's informed consent.

This Committee has opined, in Formal Opinion 2014-200,[27] that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as "information relating to representation," which is generally very broad. While there are

[25] North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

[26] Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.

[27] Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-200 (2014).

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.

As Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
>  (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client
> (d) 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.
> (e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Thus, any information that an attorney posts on social media may not violate attorney/client confidentiality.

An attorney's communications to a client are also confidential. In *Gillard v. AIG Insurance Company,*[28] the Pennsylvania Supreme Court ruled that the attorney-client privilege extends to communications from attorney to client. The Court held that "the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice."[29] The court noted that communications from attorney to client come with a certain expectation of privacy. These communications only originate because of a confidential communication from the client. Therefore, even revealing information that the attorney has said to a client may be considered a confidential communication, and may not be revealed on social media or elsewhere.

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO[30]. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

[28] *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).
[29] *Id.* at 59.
[30] *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

The Illinois disciplinary action is consistent with this Committee's recent Opinion and with the Pennsylvania Rules. A lawyer is not permitted to reveal confidential information about a client even if the client posts a negative review about the lawyer. Rule 1.6(d) instructs a lawyer to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client." This means that a lawyer must be mindful of any information that the lawyer posts pertaining to a client. While a response may not contain confidential client information, an attorney is permitted to respond to reviews or endorsements on social media. These responses must be accurate and truthful representations of the lawyer's services.

Also relevant is Rule 3.6, which states:

> (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 be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This Rule prohibits lawyers from making extrajudicial statements through public communication during an ongoing adjudication. This encompasses a lawyer updating a social media page with information relevant to the proceeding. If a lawyer's social media account is generally accessible publicly then any posts about an ongoing proceeding would be a public communication. Therefore, lawyers should not be posting about ongoing matters on social media when such matters would reveal confidential client information.

For example, the Supreme Court of Illinois suspended an attorney for 60 days[31] for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

### 8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

Some social networking sites allow members to endorse other members' skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. As previously noted, Rule 8.4(c) prohibits an attorney from being dishonest or making

[31] *In Re Peshek*, No. M.R. 23794 (Il. 2010); Compl.., *In Re Peshek*, Comm. No. 09 CH 89 (Il. 2009).

misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

### 9. Attorneys May Review a Juror's Internet Presence

The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror's social media presence but may not attempt to access the private portions of a juror's page.

Rule 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;
> (c) communicate with a juror or prospective juror after discharge of the jury if:
> (1) the communication is prohibited by law or court order;
> (2) the juror has made known to the lawyer a desire not to communicate; or
> (3) the communication involves misrepresentation, coercion, duress of harassment; or
> (d) engage in conduct intended to disrupt a tribunal.

During jury selection and trial, an attorney may access the public portion of a juror's social networking website but may not attempt or request to access the private portions of the website. Requesting access to the private portions of a juror's social networking website would constitute an ex parte communication, which is expressly prohibited by Rule 3.5(b).

Rule 3.5(a) prohibits a lawyer from attempting to influence a juror or potential juror. Additionally, Rule 3.5(b) prohibits *ex parte* communications with those persons. Accessing the public portions of a juror's social media profile is ethical under the Rules as discussed in other portions of this Opinion. However, any attempts to gain additional access to private portions of a juror's social networking site would constitute an ex parte communication. Therefore, a lawyer, or a lawyer's agent, may not request access to the private portions of a juror's social networking site.

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466 concluded that a lawyer may view the public portion of the social networking profile of a juror or potential juror but may not communicate directly with the juror or jury panel member. The Committee determined that a lawyer, or his agent, is not permitted to request access to the private portion of a juror's or potential juror's social networking website because that type of *ex parte* communication would violate Model Rule 3.5(b). There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.

This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5's prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

### 10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.[32]

Various Rules address this concern. For example, Rule 8.2 states:

> (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 or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In addition, Comment [4] to Canon 2.9 of the Code of Judicial Conduct, effective July 1, 2014, states that "A judge shall avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media." Thus, the Supreme Court has implicitly agreed that judges may participate in social media, but must do so with care.

Based upon this statement, this Committee believes that attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no ex parte or other prohibited communication. This conclusion is consistent with Rule 3.5(a), which forbids a lawyer to "seek to influence a judge" in an unlawful way.

## IV. Conclusion

Social media is a constantly changing area of technology that lawyers keep abreast of in order to remain competent. As a general rule, any conduct that would not be permissible using other forms of communication would also not be permissible using social media. Any use of a social networking website to further a lawyer's business purpose will be subject to the Rules of Professional Conduct.

Accordingly, this Committee concludes that any information an attorney or law firm places on a social networking website must not reveal confidential client information absent the client's consent. Competent attorneys should also be aware that their clients use social media and that what clients reveal on social media can be used in the course of a dispute. Finally, attorneys are permitted to use social media to research jurors and may connect with judges so long as they do not attempt to

[32] American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462 concluded that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

Social media presents a myriad of ethical issues for attorneys, and attorneys should continually update their knowledge of how social media impacts their practice in order to demonstrate competence and to be able to represent their clients effectively.


# SOCIAL MEDIA ETHICS GUIDELINES

OF THE

## COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

## NEW YORK STATE BAR ASSOCIATION

UPDATED JUNE 9, 2015

James M. Wicks, Section Chair
Mark A. Berman, Co-Chair of the Social Media Committee
Ignatius A. Grande, Co-Chair of the Social Media Committee

***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.***

PREPARED BY

# THE SOCIAL MEDIA COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION

*CO-CHAIRS*

Mark A. Berman
Ganfer & Shore, LLP

Ignatius A. Grande
Hughes Hubbard & Reed LLP

*SECRETARY*

Aaron E. Zerykier
Farrell Fritz, PC

TWITTER ACCOUNT MANAGER
Scott L. Malouf

*MEMBERS*

Craig Brown
Damian R. Cavaleri
Adam I. Cohen
Philip H. Cohen
Tarique N. Collins
Melissa Crane
Joseph V. DeMarco
Jonathan E. DeMay
Dauphine Alexandra Dunlap
Marcy Einhorn
Alfred Fatale
Tom Fini
Jessica Page Fisher
Ronald J. Hedges
David Paul Horowitz
David Jaroslawicz
Jessica L. Jimenez
Shawndra G. Jones
Jessie A. Kuhn
Janelle Lewis
Scott L. Malouf
Marc Melzer
Yitzy Nissenbaum
Jason S. Oliver
Michael Parker
Peter J. Pizzi
Gina M. Sansone
Brendan Schulman
Loree J. Shelko
Maryanne Stanganelli
Dan Toshiki Szajngarten
Deirdre E. Tracey
Michael Weiss
Aaron E. Zerykier

LAW SCHOOL INTERN
Zahava Moedler

## TABLE OF CONTENTS

**Page**

## INTRODUCTION

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

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

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

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

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

---

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

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

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

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

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

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

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

## 1. ATTORNEY COMPETENCE

### Guideline No. 1: Attorneys' Social Media Competence

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

NYRPC 1.1(a) and (b).

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

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

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

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

---

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

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

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

[6] Id.

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

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

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

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

## 2. ATTORNEY ADVERTISING

### Guideline No. 2.A: Applicability of Advertising Rules

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

NYRPC 1.0, 7.1, 7.3.

> *Comment*: In the case of a lawyer's profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.
>
> The nature of the information posted on a lawyer's LinkedIn profile may require that the profile be deemed "attorney advertising." In general, a profile that contains basic biographical information, such as "only one's education and a list of one's current and past employment" does not constitute attorney advertising.[10] According to NYCLA, Formal Op. 748, a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising."[11]
>
> NYCLA, Formal Op. 748 addresses the types of content on LinkedIn that may be considered "attorney advertising" and provides:
>
> > [i]f an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "Attorney Advertising" on the lawyer's LinkedIn profile. *See* RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other

---

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

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

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

[11] Id.

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

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

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

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

---

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

13 NYCLA, Formal Op. 748.

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

15 NYSBA, Op. 1009.

16 Id.

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

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

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

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

NYRPC 7.1, 7.4.

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

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

---

17 Id.

18 Id.

19 See NYSBA, Op. 972 (2013).

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

21 NYCLA, Formal Op. 748.

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

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

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

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

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

NYRPC 7.1, 7.2, 7.3, 7.4.

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

---

[22] See NYRPC Rule 7.4.

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

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

**Guideline No. 2.D**: **Attorney Endorsements**

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

NYRPC 7.1, 7.2, 7.3, 7.4.

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

---

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

[26] NYCLA, Formal Op. 748.

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

## 3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

### Guideline No. 3.A: Provision of General Information

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

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

[34] See NYSBA, Op. 899.

[35] See id.

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

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

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

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

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

NYRPC 1.1, 1.15.

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

---

[37] Id.

[38] See id.

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

[40] Id.

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

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

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

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

---

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

42 Id.

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

44 Id.

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

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

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

## 4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

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

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

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

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

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

---

[46] See NYSBA, Op. 843 (2010).

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

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

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

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

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

NYRPC 4.1, 4.3, 8.4.

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

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

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

---

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

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

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

53 Id.

54 See id.

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

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

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

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

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

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

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

NYRPC 4.1, 4.2.

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

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

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

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

---

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

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

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

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

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

NYRPC 5.3, 8.4.

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

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

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

## 5. COMMUNICATING WITH CLIENTS

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

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

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

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

---

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

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

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

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

67 NYCLA, Formal Op. 745.

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

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

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

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

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

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

---

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

69 NYCLA, Formal Op. 745.

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

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

**Guideline No. 5.C: False Social Media Statements**

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

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

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

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

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

NYRPC 4.2.

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

---

71 NYCLA, Formal Op. 745.

72 NYRPC 3.1(a).

73 NYRPC 3.1(b)(3).

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

75 Id.

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

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

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

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

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

---

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

77 Id.

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

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

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

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

NYRPC 1.6, 1.9(c).

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

---

79 NYRPC 1.6.

80 Comment 17 to NYRPC Rule 1.6 provides:

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

81 NYSBA Op. 1032 (2014).

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

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

---

82 NYSBA, Opinion 1032.

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

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

85 Pennsylvania Bar Association Ethics Committee Opinion 2014-200.

## 6. RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

> *Comment*: "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."[86]
>
> The ABA issued Formal Opinion 466 noting that "[u]nless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial."[87] There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."[88] However, Opinion 466 does not address "whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."[89]

---

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

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

88 Id.

89 Id.

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

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

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

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

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

---

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

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

92 See ABA, Formal Op. 14-466.

93 Id.

94 Id.

95 See ABA Formal Op. 14-466.

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

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

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

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

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

---

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

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

[98] Id.

[99] Id.

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

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

[102] See Id.

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

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

**Guideline No. 6.C: <u>Deceit Shall Not Be Used to View a Juror's Social Media</u>.**

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

**Guideline No. 6.D: <u>Juror Contact During Trial</u>**

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

NYRPC 3.5, 4.1, 5.3, 8.4.

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

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

[103] <u>See Id.</u>

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

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

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

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

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

---

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

105 See NYCBA, Formal Op. 2012-2.

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

107 Id.

108 ABA, Formal Op. 14-466.

**Guideline No. 6.E**: **Juror Misconduct**

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

NYRPC 3.5, 8.4.

> *Comments*: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, "including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding."[110]
>
> New York, however, provides that "a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge."[111] If a lawyer learns of "juror misconduct" due to social media research, he or she "must" promptly notify the court.[112] "Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror's improper conduct benefits the attorney."[113]

---

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

110 See ABA, Formal Op. 14-466.

111 NYRPC 3.5(d).

112 NYCBA, Op. 2012-2.

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

## 7. USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER

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

NYRPC 3.5, 8.2 and 8.4.

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

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

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

---

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

115 NYRPC 3.5(a)(1).

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

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

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

## APPENDIX

## DEFINITIONS

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

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

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

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

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

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