PROFESSIONALISM AND ELECTRONICALLY STORED INFORMATION
Supplementary Resources[1]

"At the hearing, Sklar's counsel stated, 'I don't even know what 'native format' means.' The [trial] court responded: 'You'll have to find out. I know. Apparently [Toshiba's counsel] knows. You're going to have to get educated in the world of ... electronic discovery. E.S.I. [electronically stored information] is here to stay, and these are terms you're just going to have to learn.'"[2]

"Due to his lack of experience in electronic discovery, the respondent failed to appreciate that the order of April 13, 2007, required the entire hard drive to be preserved for the NSA expert, not just documents obtained from NSA. . . . On May 8, 2007, the day before the expert's examination of the computer, the employee scrubbed additional files from the ASI computer. . . . The respondent's advice to his client scrub certain files from the hard drive of a laptop in contravention of a court order constituted unlawful obstruction of another party's access to evidence, in violation of Mass. R. Prof. C. 3.4(a)."[3]

"I don't know about technology and I don't know about finance and accounting."[4]

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1. Ethics of Viewing and/or Using Metadata, Md. State Bar Assoc., Committee on Ethics, Docket No. 2007-09.

2. Review and Use of Metadata, ABA[5] Formal Ethics Op. 06-442; see also ABA, Metadata Ethics Opinions Around the U.S.[6]; The Sedona Conference® Commentary on Ethics & Metadata, 14 Sed.Conf.L.J. 169 (2012) (available free online); ABA Model Rule 4.4 – Comment: "Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer."; ABA Model Rule 1.1 – keep abreast of changes and, per comment, "the benefits and risks associated with technology."

3. San Diego County Bar Assoc., Legal Ethics Opin. 2011-2 (friending).

4. N.Y.S.B.A. Ethics Op. 843 (access to social networking site).

[1] Michael D. Berman, Rifkin, Weiner, Livingston, Levitan & Silver, LLC, May 6, 2014. The opinions expressed herein are solely those of the presenter. This supplement does not constitute providing legal advice.

[2] *Ellis v. Toshiba Am. Info. Sys., Inc.*, 218 Cal. App. 4th 853, 859, 160 Cal. Rptr. 3d 557, 563 (2013), *as modified* (Aug. 14, 2013), *as modified on denial of reh'g*, (Sept. 10, 2013), *review denied,* (Nov. 26, 2013).

[3] Kenneth Paul Reisman, Public Reprimand No. 2013-21 (Mass.).

[4] Bernard J. Ebbers, Former CEO of WorldCom, at his trial in connection with accounting issues, quotation courtesy of William A. McComas, Esq., Bowie & Jensen, LLC.

[5] American Bar Association.

[6] www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html

5. Oregon Formal Op. 2013-189 (Accessing Information about Third Parties Through a Social Networking Website).

6. NYCLA Ethics Opin. 745 (Advising a Client Regarding Posts on Social Media Sites).

7. CA Formal Op. INTERIM 11-0004 ("What are an attorney's ethical duties in the handling of discovery of electronically stored information?").

8. Kenneth Paul Reisman, Public Reprimand No. 2013-21 (Mass.).

9. New Hampshire Ethics Opin. 2102-13/05 ("Social Media Contact with Witnesses in the Course of Litigation").

10. The Sedona Conference® Cooperation Proclamation.

11. Phil. Bar Assoc. Opin. 2009-02 (friending witness).[7]

12. Civility Oath Rule Adopted by [California] Supreme Court.[8]

13. ABA Formal Op. 466 (Lawyer Reviewing Jurors' Internet Presence); *see also* NCYLA Ethics Opin. 743 (Lawyer investigation of juror internet and social networking postings during conduct of trial)[9]; NYC Bar Assoc. Op. 2012-2 (Jury Research and Social Media).[10]

14. ABA Cloud Ethics Opinions Around the U.S.[11]; New Hampshire Ethics Op. 2012-13/4 ("The Use of Cloud Computing in the Practice of Law").[12]

15. The Sedona Conference® Primer on Social Media, 14 Sed.Conf.L.J. 191 (2012) (available free online); Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the N.Y. State Bar Ass'n., Mar. 18, 2014.[13]

[7] www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

[8] http://www.courts.ca.gov/25857.htm

[9] http://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf

[10] http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02

[11] http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html

[12] http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_04.asp

[13] www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html

MARYLAND STATE BAR ASSOCIATION, INC.

COMMITTEE ON ETHICS

ETHICS DOCKET NO. 2007-09

Ethics of Viewing and/or Using Metadata

You have raised several questions, in the context of litigation, concerning the ethics of viewing and/or using metadata under The Maryland Lawyers' Rules of Professional Conduct ("Maryland Rules of Professional Conduct" or "Maryland Rule"). For purposes of this Opinion, the Ethics Committee adopts your definition of "metadata" as being information within programs (e.g., Microsoft Word/Excel/Power Point, Corel Word Perfect/Quattro Pro, Adobe Acrobat, etc.) which is not readily visible but which is accessible and which may include data such as author, dates of creation/printing, number of revisions, content of those revisions/previous versions, editing time, etc.

You raise three questions in your inquiry: first, whether it is ethical for the attorney recipient to view or use metadata in documents produced by another party; second, whether the attorney sender has any duty to remove metadata from the files prior to sending them; and third, whether the attorney recipient has any ethical duty not to view or otherwise use the metadata without first ascertaining whether the sender intended to include such metadata in the produced documents. By referring to "attorney," we include non-lawyer assistants over whom the attorney has supervisory responsibility. See Maryland Rule 5.3.

The questions you raise have not previously been considered by the Ethics Committee. Because of the relatively recent growth of electronic discovery, technology associated therewith, and developing rules of procedure and case law, there is not a lot of precedent and, furthermore, it is impossible to cover every conceivable situation which may arise with respect to the issues raised by your inquiries. Accordingly, the scope of this Opinion will be general in nature, recognizing that some of the general principles discussed below may be subject to modification depending upon specific factual situations and/or legal requirements.

The Committee believes that your first and third inquiries can be discussed together, namely whether the recipient attorney of electronic discovery containing metadata may view or use that metadata without first ascertaining whether the sender attorney inadvertently or intentionally included the metadata in the production of the electronic discovery. Subject to any legal standards or requirements (case law, statutes, rules of procedure, administrative rules, etc.), this Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney's direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata. The Committee's opinion in this regard is heavily influenced by the difference between the Maryland Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. In February 2002, the ABA Model Rules of Professional Conduct were amended to add Rule 4.4(b), which states that "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." In Formal Opinion 05-437, the ABA Standing Committee on Ethics and Professional Responsibility pointed out that while Rule 4.4(b) obligated the receiving lawyer to notify the sender of the inadvertent transmission promptly, the Rule did "not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." Comment 2 to Model Rule 4.4 explains that "whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived."

The Maryland Rules of Professional Conduct, however, have not been amended to include Model Rule 4.4(b). Accordingly, the Maryland Rules of Professional Conduct do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged (or, for that matter, work product) materials. Of course, the receiving lawyer can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate. See generally Rule 1.4 (communications with client concerning certain matters involving the representation).[1]

Although this Committee does not opine on legal issues, the Committee believes it is appropriate in this instance to point out how the lack of an ethical obligation to notify the sender or to return the privileged or work-product documents to the sender may be impacted, at least in terms of federal court litigation, by certain amendments to the Federal Rules of Civil Procedure which go into effect on December 1, 2006 and which pertain to electronic discovery. Recognizing the complexity of electronic discovery and, perhaps, anticipating that inadvertent production of privileged or work product material may well be an ongoing problem, proposed Federal Rule 16(b)(5) and (6) as part of the requirement that the parties confer and work out an initial scheduling order, encourages the parties to meet and discuss possible provisions for disclosure or discovery of electronically stored information, and try to reach agreements concerning the assertion of claims of privilege or protection as to trial-preparation materials even after production of such documents. Any such agreements would supersede the ethical standard described above because the parties, and their counsel, would be obligated to conduct themselves in accordance with the terms of any such agreement; otherwise, the attorney could well be in violation of Rule 8.4(b) by engaging in conduct that is prejudicial to the administration of justice.

Proposed Federal Rule 26(b)(5) provides as follows:

> "**Information produced**. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved."

Accordingly, the lack of any ethical prohibition concerning the review and/or use of metadata discussed earlier in this Opinion would, at least in the arena of federal litigation, be superseded by the legal requirements set forth in the Federal Rules which go into effect on December 1, 2006, and any violation of those Federal Rules would in all likelihood constitute a violation of Rule 8.4(d) as being prejudicial to the administration of justice.[2]

Finally, you inquire as to whether the attorney sending the electronic discovery has a duty to remove metadata from the files prior to production thereof. The Committee believes that, absent an agreement with the other parties (such as is contemplated in proposed Federal Ruls 16(b)(5) and (6), the sending attorney has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery. The Committee believes that this ethical obligation arises out of a combination of Rule 1.1, which provides that a lawyer shall provide competent representation to a client, together with Rule 1.6, which obligates the lawyer not to reveal confidential information relating to the representation of a client. See generally, New York State Bar Association Committee on Professional Ethics Opinion 782 (2004), concluding that attorneys have an obligation to "stay abreast of technological advances" and to behave reasonably in accordance with the risks involved in the technology they use. This is not to say, however, that every inadvertent disclosure of privileged or work product material would constitute a violation of Rules 1.1 and/or 1.6 since each case would have to be evaluated based on the facts and circumstances applicable thereto.

We thank you for your inquiry and hope that the foregoing is responsive thereto. Opinions of the Committee may be obtained from the MSBA web site: www.msba.org.

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[1] Comment 3 to ABA Model Rule 4.4 states that where an attorney is not required by applicable law to return an inadvertently produced document, "the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4."

[2] For a detailed discussion of problems and suggested solutions concerning electronic discovery, the inadvertent disclosure of privileged or work-product materials, and the legal standards for waiver under federal law and Maryland law, see the excellent opinion of Magistrate Judge Grimm in Hopson v. Mayor & City Council of Baltimore, 232

F.R.D. 228 (2005).

American Bar Association

REVIEW AND USE OF METADATA

August 5, 2006

The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by "scrubbing" metadata from documents or by sending a different version of the document without the embedded information.

In modern legal practice, lawyers regularly receive e-mail, sometimes with attachments such as proposed contracts, from opposing counsel and other parties. Lawyers also routinely receive electronic documents that have been made available by opponents, such as archived e-mail and other documents relevant to potential transactions or to past events. Receipt may occur in the course of negotiation, due diligence review, litigation, investigations, and other circumstances.

E-mail and other electronic documents often contain "embedded" information. Such embedded information is commonly referred to as "metadata." [FN1] This opinion [FN2] addresses whether the ABA Model Rules of Professional Conduct permit a lawyer to review and use embedded information contained in e-mail and other electronic documents, whether received from opposing counsel, an adverse party [FN3] or an agent of an adverse party. The Committee concludes that the Rules generally permit a lawyer to do so. [FN4]

Metadata is ubiquitous in electronic documents. For example:

• Electronic documents routinely contain as embedded information the last date and time that a document was saved, and data on when it last was accessed. Anyone who has an electronic copy of such a document usually can "right click" on it with a computer mouse (or equivalent) to see that information.

• Many computer programs automatically embed in an electronic document the name of the owner of the computer that created the document, the date and time of its creation, and the name of the person who last saved the document. [FN5] Again, that information might simply be a "right click" away.

• Some word processing programs allow users, when they review and edit a document, to "redline" the changes they make in the document to identify what they added and deleted. The redlined changes might be readily visible, or they might be hidden, but even in the latter case, they often will be revealed simply by clicking on a software icon in the program.

• Some programs also allow users to embed comments in a document. The comments may or may not be flagged in some manner, and they may or may not "pop up" as a cursor is moved over their locations.

Other types of metadata may or may not be as well known and easily understandable as the foregoing examples. Moreover, more thorough or extraordinary investigative measures sometimes might permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted.

Not all metadata, it should be noted, is of any consequence; most is probably of no import. In ordinary day-to-day circumstances, the embedded information that is found in most documents, such as when they were saved, or who

the authors were, is unlikely to be of any interest, much less material to a matter. In some instances, however, such as when a party to a lawsuit is attempting to establish "who knew what when," the date and time that a critical document was created or who drafted it may be a critical piece of information. If a payment amount is being negotiated, then a redlined change or a comment in a draft agreement that suggests how much more the opposing party is willing to pay or how much less they might take likely is of the highest importance.

The Committee first notes that the Rules do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents. [FN6] The most closely applicable rule, Rule 4.4(b), relates to a lawyer's receipt of inadvertently sent information. Even if transmission of "metadata" were to be regarded as inadvertent, [FN7] Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of such information. The Rule provides only that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." [FN8] Comment [3] to Model Rule 4.4 indicates that, unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment. [FN9]

Some authorities have addressed questions related to a lawyer's search for, or use of, metadata under the rubric of a lawyer's honesty, and have found such conduct ethically impermissible. [FN10] The Committee does not share such a view, but instead reads the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct found in other Rules. [FN11] Whether the receiving lawyer knows or reasonably should know that opposing counsel's sending, producing, or otherwise making available an electronic document that contains metadata was "inadvertent" within the meaning of Rule 4.4(b), and is thereby obligated to provide notice of its receipt to the sender, is a subject that is outside the scope of this opinion. [FN12]

The Committee observes that counsel sending or producing electronic documents may be able to limit the likelihood of transmitting metadata in electronic documents. Computer users can avoid creating some kinds of metadata in electronic documents in the first place. For example, they often can choose not to use the redlining function of a word processing program or not to embed comments in a document. Simply deleting comments might be effective to eliminate them. Computer users also can eliminate or "scrub" some kinds of embedded information in an electronic document before sending, producing, or providing it to others. [FN13] Methods to avoid or eliminate embedded information have been, and no doubt will continue to be, discussed in many legal programs, practice guides, and articles, [FN14] as well as in general office software publications and support web sites. The specifics of any such software are beyond the scope of this opinion.

A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata also may be able to send a different version of the document without the embedded information. For example, she might send it in hard copy, create an image of the document and send only the image (this can be done by printing and scanning), or print it out and send it via facsimile.

Finally, if a lawyer is concerned about risks relating to metadata and wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, then before sending, producing, or otherwise making available any electronic documents, she may seek to negotiate a confidentiality agreement or, if in litigation, a protective order, that will allow her or her client to "pull back," or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself. [FN15] Of course, if the embedded information is on a subject such as her client's willingness to settle at a particular price, then there might be no way to "pull back" that information.

> FN1. Creation of metadata is not a new phenomenon. For example, for decades, documents saved on personal computers typically have contained embedded information recording the last date and time that the documents were saved.

FN2. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

FN3. This opinion assumes that the receiving lawyer did not obtain the electronic documents in a manner that was criminal, fraudulent, deceitful, or otherwise improper, for example, by making a false statement of material fact to opposing counsel or to any other third person (Model Rule 4.1(a)), using a method of obtaining evidence that violated the legal rights of a third person (Model Rule 4.4(a)), or otherwise engaging in misconduct (Model Rule 8.4). Such scenarios are beyond the scope of this opinion.

FN4. Comment [16] to Model Rule 1.6 states, "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3." Addressing whether the sending or producing lawyer acted competently in any given factual scenario is beyond the scope of this opinion. See also New York State Bar Ass'n Committee on Prof'l Eth. Op. 782 (Dec. 8, 2004), (E-mailing documents that may contain hidden data reflecting client confidences and secrets), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_ Opinions/Opinion_782.htm (last visited Sep. 15, 2006) (under New York's Code of Professional Responsibility, New York's version of predecessor ABA Model Code of Professional Responsibility, lawyers must exercise reasonable care to prevent inappropriate disclosure of client confidences and secrets contained in metadata).

FN5. The names generally are automatically derived from the name of the owner of the computer on which the document is created or from the name associated with the user identification of the person who accessed the computer program. If a document is copied and altered, it still might contain the name of the creator of the original document. Thus, the embedded information about the creator of a document or who last saved it might or might not identify the person(s) who actually created or saved it.

FN6. As stated earlier, this opinion assumes that the receiving lawyer acted lawfully and ethically in obtaining the electronic documents.

FN7. The Committee does not characterize the transmittal of metadata either as inadvertent or as advertent, but observes that the subject may be fact specific. As noted in Formal Opinion 06-440 (May 13, 2006) (Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382 (July 5, 1994)), there is no Model Rule that addresses the duty of a recipient of advertently transmitted information.

FN8. Comment [2] to Rule 4.4 confirms that the word "document" includes e-mail and other electronic documents. The Comment also indicates that the notification requirement exists "in order to permit [the sender] to take protective measures," and includes a recognition that applicable other law (outside of the applicable rules of professional conduct) may require the lawyer to take additional steps beyond notification.

FN9. Rule 4.4(b) was added to the Model Rules in 2002. The clarity of its requirements provided the basis for the Committee to withdraw two of its past formal ethics opinions. First, the Committee, in Formal Opinion 05-437 (Oct. 1, 2005) (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (Nov. 10, 1992)), withdrew its Formal Opinion 92-368 (Nov. 10, 1992) (Inadvertent Disclosure of Confidential Materials). Formal Opinion 92-368 opined that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential under Model Rule 1.6, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the sending lawyer. Second, the Committee, in Formal Opinion 06-440 (May 13, 2006) (Unsolicited Receipt of

Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382 (July 5, 1994)), withdrew its Formal Opinion 94-382 (July 5, 1994) (Unsolicited Receipt of Privileged or Confidential Materials). Formal Opinion 94-382 addressed the obligations under the Rules of a lawyer who is offered, or is provided, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or on their face appear to be, subject to the attorney-client privilege or otherwise confidential under Rule 1.6.

FN10. The Committee notes that New York State Bar Ass'n Committee on Prof'l Eth. Op. 749 (Dec. 14, 2001) (Use of computer software to surreptitiously examine and trace e-mail and other electronic documents), available at http:// www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_ Opinions/Committee_on_Professional_Ethics_Opinion_749.htm (last visited Sept. 15, 2006) took the position that under New York's Code of Professional Responsibility, a lawyer may not "intentional[ly] use ... computer technology to surreptitiously obtain privileged or otherwise confidential information" of an opposing party. The New York committee reaffirmed that view in the opinion cited in footnote 4, supra. The Committee recognizes that Opinion 749 relies in part on language contained in present Rule 8.4(c) and (d) that prohibits engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" or "that is prejudicial to the administration of justice." However, the Committee does not believe that a lawyer, by acting within the circumstances assumed by the instant opinion, would violate either of those paragraphs of Rule 8.4. The Committee views similarly an opinion issued for comment at the request of the Florida Bar Board of Governors by the Florida Bar Professional Ethics Committee. See Proposed Adv. Op. 06-02 (June 23, 2006), available at http:// www.floridabar.org/TFB/TFBResources.nsf/Attachments/53EDEDC5599019138525719A006DCE1B/ $FILE/062pao.pdf?OpenElement#search=Florida%2Bopinion%2Bmetadata (last visited Sept. 15, 2006).

FN11. We note that this interpretation was intended by the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), as reported in the Reporter's Explanation of Changes, available at http:// www.abanet.org/cpr/e2k/e2krule44rem.html (last visited Sept. 15, 2006), regarding this amendment.

FN12. One of the facts that might be relevant is whether the metadata is a privileged communication.

FN13. Of course, when responding to discovery, a lawyer must not alter a document when it would be unlawful or unethical to do so, e.g., Rule 3.4(a) ("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. A lawyer shall not counsel or assist another person to do any such act[.]")

FN14. For example, the 2006 ABA Techshow included a roundtable program on metadata, and a number of publications and items available on ABA web site pages of the ABA General Practice, Solo & Small Firm Division and the ABA Law Practice Management Section have addressed metadata from practical and ethical perspectives.

FN15. On April 12, 2006, the Supreme Court of the United States approved extensive amendments to the Federal Rules of Civil Procedure relating to discovery of electronic documents, available at http:// www.uscourts.gov/rules/newrules6.html#cv0804 (last visited September 15, 2006). Among other provisions, certain of the amendments allow a producing party to pull back privileged information and work product under certain circumstances. The amendments will be effective on December 1, 2006, unless Congress enacts legislation to reject, modify, or defer them.

ABA Formal Op. 06-442

END OF DOCUMENT

SDCBA Legal Ethics Opinion 2011-2

(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)

I. FACTUAL SCENARIO

Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer's answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client's former employer's employees. Attorney sends out a "friending"[1] request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.

II. QUESTION PRESENTED

Has Attorney violated his ethical obligations under the California Rules of Professional Conduct, the State Bar Act, or case law addressing the ethical obligations of attorneys?

III. DISCUSSION

A. Applicability of Rule 2-100

California Rule of Professional Conduct 2-100 says, in pertinent part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an. . . employee of a . . .corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." "Rule 2-100 is intended to control communication between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Rule 2-100 Discussion Note.)

Similarly, ABA Model Rule 4.2 says: **"**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." Comment 7 to ABA Model Rule 4.2 adds: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

1. Are the High-ranking Employees Represented Parties?

The threshold question is whether the high-ranking employees of the represented corporate adversary are "parties" for purposes of this rule.
In *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 (2003), a trade secrets action, the Court of Appeal reversed an order disqualifying counsel for the defendant-former sales manager for ex parte contact with plaintiff-event management company's current sales manager and productions director. The contacted employees were not "managing agents" for purposes of the rule because neither "exercise[d] substantial discretionary authority over decisions that determine organizational policy." Supervisory status and the power to enforce corporate policy are not enough. (*Id*. at 1209.) There also was no evidence that either employee had authority from the company to speak concerning the dispute or that their actions could bind or be imputed to the company concerning the subject matter of the litigation. (*Id*. at 1211.)

The term "high-ranking employee" suggests that these employees "exercise substantial discretionary authority over decisions that determine organizational policy" and therefore should be treated as part of the represented corporate party for purposes of Rule 2-100. At minimum, the attorney should probe his client closely about the functions these employees actually perform for the company-adversary before treating those high-ranking employees as unrepresented persons.

2. Does a Friend request Constitute Unethical Ex Parte Contact with the High-Ranking Employees?

Assuming these employees are represented for purposes of Rule 2-100, the critical next question is whether a friend request is a direct or indirect communication by the attorney to the represented party "about the subject of the representation." When a Facebook user clicks on the "Add as Friend" button next to a person's name without adding a personal message, Facebook sends a message to the would-be friend that reads: "[Name] wants to be friends with you on Facebook." The requester may edit this form request to friend to include additional information, such as information about how the requester knows the recipient or why the request is being made. The recipient, in turn, my send a message to the requester asking for further information about him or her before deciding whether to accept the sender as a friend.

A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party to the attorney's friend request is a communication "about the subject of the representation." We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: "[Name] wants to have access to the information you are sharing on your Facebook page." If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of that representation.

This becomes clearer when the request to friend, with all it entails, is transferred from the virtual world to the real world. Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "Yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently."

A recent federal trial court ruling addressing Rule 2-100 supports this textual analysis. In *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, the question before the District Court was whether counsel for a corporation in an action brought by the government alleging corporate responsibility for a forest fire violated Rule 2-100 when counsel, while attending a Forest Service sponsored field trip to a fuel reduction project site that was open to the public, questioned Forest Service employees about fuel breaks, fire severity, and the contract provisions the Forest Service requires for fire prevention in timber sale projects without disclosing to the employees that he was seeking the information for use in the pending litigation and that he was representing a party opposing the government in the litigation. The Court concluded that counsel had violated the Rule and its reasoning is instructive. It was undisputed that defense counsel communicated directly with the Forest Service employees, knew they were represented by counsel, and did not have the consent of opposing counsel to question them. (2010 WL 4778051, *5.) Defense counsel claimed, however, that his questioning of the Forest Service employees fell within the exception found in Rule 2-100(C)(1), permitting "[c]ommunications with a public officer. . .," and within his First Amendment right to petition the government for redress of grievances because he indisputably had the right to attend the publicly open Forest Service excursion.

While acknowledging defense counsel's First Amendment right to attend the tour (*id*. at *5), the Court found no evidence that defense counsel's questioning of the litigation related questioning of the employees, who had no "authority to change a policy or grant some specific request for redress that [counsel] was presenting," was an exercise of his right to petition the government for redress of grievances. (*Id*. at *6.) "Rather, the facts show and the court finds that he was *attempting to obtain information for use in the litigation* that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." (*Ibid*., emphasis added.) Defense counsel's interviews of the Forest Service employees on matters his corporate client considered part of the litigation without notice to, or the consent of, government counsel "strikes at . . . the very policy purpose for the no contact rule." (*Ibid*.) In other words, counsel's motive for making the contact with the represented party was at the heart of why the contact was prohibited by Rule 2-100, that is, he was "attempting to obtain information for use in the litigation," a motive shared by the attorney making a friend request to a represented party opponent.

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel's ex parte contacts violated that rule as well. "Unconsented questioning of an opposing party's employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 *unless the sole purpose of the communication* is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government's counsel is required." (*Id*. at *7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney's ex parte communication is at the heart of the offense.
The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and "nothing in the rule precludes the attorney from advising the client that such a communication can be made." (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

3. Response to Objections

a. Objection 1: The friend request is not about the subject of the representation because the request does not refer to the issues raised by the representation.

   It may be argued that a friend request cannot be "about the subject of the representation" because it makes no reference to the issues in the representation. Indeed, the friend request makes no reference to anything at all other than the name of the sender. Such a request is a far cry from the vigorous ex parte questioning to which the government employees were subjected by opposing counsel in *U.S. v. Sierra Pacific Industries*.[2]

The answer to this objection is that as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation. The extensive ex parte questioning of the represented party in *Sierra Pacific Industries* is different in degree, not in kind, from an ex parte friend request to a represented opposing party. It is not uncommon in the course of litigation or transactional negotiations for open-ended, generic questions to impel the other side to disclose information that is richly relevant to the matter. The motive for an otherwise anodyne inquiry establishes its connection to the subject matter of the representation.

It is important to underscore at this point that a communication "about the subject of the representation" has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) In litigation, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ. Proc. § 2017.010.) Discovery casts a wide net. "For discovery purposes, information should be regarded as 'relevant to the subject matter' if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney's duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party's response to a friend request at least "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (*Ibid*.) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.* (8th Cir. 2003) 347 F.3d 693, Franchisee A of South Dakota sued Franchisor of Minnesota for wrongfully terminating its franchise and for installing Franchisee B, also named as a defendant, in Franchisee A's place. A "critical portion" of this litigation was Franchisee A's expert's opinion that Franchisee A had sustained one million dollars in damages as a result of the termination. (*Id*. at 697.) Franchisor's attorney sent a private investigator into both Franchisee A's and Franchisee B's showroom to speak to, and surreptitiously tape record, their employees about their sales volumes and sales practices. Among others to whom the investigator spoke and tape-recorded was Franchisee B's president.

The Eighth Circuit affirmed the trial court's order issuing evidentiary sanctions against Franchisor for engaging in unethical ex parte contact with represented parties. The Court held that the investigator's inquiry about Franchisee B's sales volumes of Franchisor's machines was impermissible ex parte communication about the subject of the representation for purposes of Model Rule 4.2, adopted by South Dakota. "Because every [Franchisor machine] sold by [Franchisee B] was a machine not sold by [Franchisee A], the damages estimate [by Franchisee A's expert] could have been challenged in part by how much [Franchisor machine] business [Franchisee B] was actually doing." (*Id*. at 697-698.) It was enough to offend the rule that the inquiry was designed to elicit information about the subject of the representation; it was not necessary that the inquiry directly refer to that subject.

Similarly, in the hypothetical case that frames the issue in this opinion, defense counsel may be expected to ask plaintiff former employee general questions in a deposition about her recent activities to obtain evidence relevant to whether plaintiff failed to mitigate her damages. (BAJI 10.16.) That is the same information, among other things, counsel may hope to obtain by asking the represented party to friend him and give him access to her recent postings. An open-ended inquiry to a represented party in a deposition seeking information about the matter in the presence of opposing counsel is qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel. Yet one is sanctioned and the other, as *Midwest Motors* demonstrated, is sanctionable.

b. Objection 2: Friending an represented opposing party is the same as accessing the public website of an opposing party

The second objection to this analysis is that there is no difference between an attorney who makes a friend request to an opposing party and an attorney suing a corporation who accesses the corporation's website or who hires an investigator to uncover information about a party adversary from online and other sources of information.

Not so. The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user, such as a corporation but not limited to one, may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a represented party's public Facebook page. Such access requires no communication to, or permission from, the represented party, even though the attorney's motive for reviewing the page is the same as his motive in making a friend request. Without ex parte communication with the represented party, an attorney's motivated action to uncover information about a represented party does not offend Rule 2-100. But to obtain access to *restricted* information on a Facebook page, the attorney must make a request to a represented party outside of the actual or virtual presence of defense counsel. And for purposes of Rule 2-100, that motivated communication with the represented party makes all the difference.[3]

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York's prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as "the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network." That, said the New York Bar, is "because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing

deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."

c. Objection 3: The attorney-client privilege does not protect anything a party posts on a Facebook page, even a page accessible to only a limited circle of people.

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user's circle, those communications reach beyond "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the [Facebook user's] lawyer is consulted. . . ." (Evid. Code §952, defining "confidential communication between client and lawyer." Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in "getting their teeth" into the opposing party, a major music company.)

That observation may be true as far as it goes[4], but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure. "[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

The rule barring ex parte communication with a represented party is designed to avoid disrupting the trust essential to the attorney-client relationship. "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." (*U.S. v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1459.) The same could be said where a client is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request.

d. Objection 4: A recent Ninth Circuit ruling appears to hold that Rule 2-100 is not violated by engaging in deceptive tactics to obtain damaging information from a represented party.

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9th Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. "There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor." (*Id*. at *5.) The Court ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. "The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary, (Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation.
suggest support for our conclusion that there was no ethical violation to begin with." (*Id*. at *6.)

There are several responses to this final objection. First, *Carona* was a ruling on the appropriateness of excluding evidence, not a disciplinary ruling as such. The same is true, however, of *U.S. v. Sierra Pacific Industries*, which addressed a party's entitlement to a protective order as a result of a Rule 2-100 violation. Second, the Court ruled that the exclusion of the evidence was unnecessary because of the availability of state bar discipline if the prosecutor had offended Rule 2-100. The Court of Appeals' discussion of Rule 2-100 therefore was dicta. Third, the primary reason the Court of Appeals found no violation of Rule 2-100 was because there was no direct contact between the prosecutor and the represented criminal defendant. The same cannot be said of an attorney who makes a direct ex parte friend request to a represented party.

4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney. The evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-

100(A): Opinions of ethics committees in California are not binding, but "should be consulted by members for guidance on proper professional guidance." See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee's opinion, "the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court." But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: "Some federal courts have imposed sanctions for violation of applicable rules of professional conduct." (citing *Midwest Motor Sports*, *supra*.))

B. Attorney Duty Not To Deceive

We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not.

ABA Model Rule 4.1(a) says: "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. . ." ABA Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." In *Midwest Motor Sports*, *supra*, the Eighth Circuit found that the violations of the rule against ex parte contact with a represented party alone would have justified the evidentiary sanctions that the district court imposed. (*Midwest Motor Sports*, *supra*, 347 F.3d at 698.) The Court of Appeals also concluded, however, that Franchisor's attorney had violated 8.4(c) by sending a private investigator to interview Franchisees' employees "under false and misleading pretenses, which [the investigator] made no effort to correct. Not only did [the investigator] pose as a customer, he wore a hidden device that secretly recorded his conversations with" the Franchisees' employees. (*Id*., at 698-699.)[5]

Unlike many jurisdictions, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. The provision coming closest to imposing a generalized duty not to deceive is Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." This provision is typically applied to allegations that an attorney misled a judge, suggesting that the second clause in the provision merely amplifies the first. (See e.g., *Griffith v. State Bar of Cal.* (1953) 40 Cal.2d 470.) But while no authority was found applying the provision to attorney deception of anyone other than a judicial officer, its language is not necessarily so limited. The provision is phrased in the conjunctive, arguably setting forth a general duty not to deceive *anyone* and a more specific duty not to mislead a judge by any false statement or fact or law. We could find no authority addressing the question one way or the other.

There is substantial case law authority for the proposition that the duty of an attorney under the State Bar Act not to deceive extends beyond the courtroom. The State Bar, for example, may impose discipline on an attorney for intentionally deceiving opposing counsel. "It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown." (*Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65. See also *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152; *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628.) "[U]nder CRPC 5-200 and 5-220, and BP 6068(d), as officers of the court, attorneys have a duty of candor and not to mislead the judge by any false statement of fact or law. These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel." (*In re Central European Industrial Development Co.* (Bkrtcy. N.D. Cal. 2009) 2009 WL 779807, *6, citing *Hallinan v. State Bar of Cal.* (1948) 33 Cal.2d 246, 249.)

Regardless of whether the ethical duty under the State Bar Act and the Rules of Professional Conduct not to deceive extends to misrepresentation to those other than judges, the *common law* duty not to deceive indisputably applies to an attorney and a breach of that duty may subject an attorney to liability for fraud. "[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 74, the Court of Appeal ruled that insured's judgment creditors had the right to sue insurer's coverage counsel for misrepresenting the scope of coverage under the insurance policy. The *Shafer* Court cited as authority, *inter alia*, *Fire Ins. Exchange v. Bell by Bell* (Ind. 1994) 643 N.E.2d 310, holding that insured had a viable claim against counsel for insurer for falsely stating that the policy limits were $100,000 when he knew they were $300,000.

Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the Court of Appeal held that an attorney, negotiating at arm's length with an adversary in a merger transaction was not immune from liability to opposing party for fraud for not disclosing "toxic stock" provision. "A fraud claim against a lawyer is no different from a fraud claim against anyone else." (*Id*. at 291.) "Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient." (*Ibid*., citation omitted.) While a "casual expression of belief" that the form of financing was "standard" was not actionable, active concealment of material facts, such as the existence of a "toxic stock" provision, is actionable fraud. (*Id*. at 291-294.)

If there is a duty not to deceive opposing counsel, who is far better equipped by training than lay witnesses to protect himself against the deception of his adversary, the duty surely precludes an attorney from deceiving a lay witness. But is it impermissible deception to seek to friend a witness without disclosing the purpose of the friend request, even if the witness is not a represented party and thus, as set forth above, subject to the prohibition on ex parte contact? We believe that it is.

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York's Committee on Professional and Judicial Ethics considered whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation." (*Id*., emphasis added.) Consistent with New York's high court's policy favoring informal discovery in litigation, the Committee concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an

unrepresented person's social networking website without also disclosing the reasons for making the request." In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York's rules prohibiting acts of deception are violated "whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website." (*Id*.)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, "someone whose name the witness will not recognize," to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. "The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer's duty under Pennsylvania Rule of Professional Conduct 8.4 not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." The planned communication by the third party

> omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the [attorney] and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

(*Id*. at p. 2.) The Philadelphia opinion was cited approvingly in an April 2011 California Lawyer article on the ethical and other implications of juror use of social media. (P. McLean, "Jurors Gone Wild," p. 22 at 26, California Lawyer, April 2011.)

We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion, notwithstanding the value in informal discovery on which the City of New York Bar Association focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request.

Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.

IV. CONCLUSION

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

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1 Quotation marks are dropped in the balance of this opinion for this now widely used verb form of the term "friend" in the context of Facebook.

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2 *Sierra Pacific Industries* also is factually distinguishable from the scenario addressed here because it involved ex parte communication with a represented *government* party opponent rather than a private employer. But that distinction made it harder to establish a Rule 2-100 violation, not easier. That is because a finding of a violation of the rule had to overcome the attorney's constitutional right to petition government representatives. Those rights are not implicated where an attorney makes ex parte contact with a private represented party in an analogous setting, such as a corporate – or residential – open house.

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3 The Oregon Bar reached the same conclusion, but with limited analysis. Oregon State Bar Formal Opinion No. 2005-164 concluded that a lawyer's ex parte communications with represented adversary via adversary's website would be ethically prohibited. "[W]ritten communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to" Oregon's rule against ex parte contact with a represented *person*. If the lawyer knows that the person with whom he is communicating is a represented person, "the Internet communication would be prohibited." (*Id*. at pp. 453454.)

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4 There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be

waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

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5 The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id*. at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id*. at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id*. at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id*. at p. 5), the opinion has no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

ETHICS OPINION 843

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion # 843 (09/10/2010)

Topic: Lawyer's access to public pages of another party's social networking site for the purpose of gathering information for client in pending litigation.

Digest: A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation.

Rules: 4.1; 4.2; 4.3; 5.3(b)(1); 8.4(c)

QUESTION

1. May a lawyer view and access the Facebook or MySpace pages of a party other than his or her client in pending litigation in order to secure information about that party for use in the lawsuit, including impeachment material, if the lawyer does not "friend" the party and instead relies on public pages posted by the party that are accessible to all members in the network?

OPINION

2. Social networking services such as Facebook and MySpace allow users to create an online profile that may be accessed by other network members. Facebook and MySpace are examples of external social networks that are available to all web users. An external social network may be generic (like MySpace and Facebook) or may be formed around a specific profession or area of interest. Users are able to upload pictures and create profiles of themselves. Users may also link with other users, which is called "friending." Typically, these social networks have privacy controls that allow users to choose who can view their profiles or contact them; both users must confirm that they wish to "friend" before they are linked and can view one another's profiles. However, some social networking sites and/or users do not require pre-approval to gain access to member profiles.

3. The question posed here has not been addressed previously by an ethics committee interpreting New York's Rules of Professional Conduct (the "Rules") or the former New York Lawyers Code of

Professional Responsibility, but some guidance is available from outside New York. The Philadelphia Bar Association's Professional Guidance Committee recently analyzed the propriety of "friending" an unrepresented adverse witness in a pending lawsuit to obtain potential impeachment material. See Philadelphia Bar Op. 2009-02 (March 2009). In that opinion, a lawyer asked whether she could cause a third party to access the Facebook and MySpace pages maintained by a witness to obtain information that might be useful for impeaching the witness at trial. The witness's Facebook and MySpace pages were not generally accessible to the public, but rather were accessible only with the witness's permission (*i.e.,* only when the witness allowed someone to "friend" her). The inquiring lawyer proposed to have the third party "friend" the witness to access the witness's Facebook and MySpace accounts and provide truthful information about the third party, but conceal the association with the lawyer and the real purpose behind "friending" the witness (obtaining potential impeachment material).

4. The Philadelphia Professional Guidance Committee, applying the Pennsylvania Rules of Professional Conduct, concluded that the inquiring lawyer could not ethically engage in the proposed conduct. The lawyer's intention to have a third party "friend" the unrepresented witness implicated Pennsylvania Rule 8.4(c) (which, like New York's Rule 8.4(c), prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"); Pennsylvania Rule 5.3(c)(1) (which, like New York's Rule 5.3(b)(1), holds a lawyer responsible for the conduct of a nonlawyer employed by the lawyer if the lawyer directs, or with knowledge ratifies, conduct that would violate the Rules if engaged in by the lawyer); and Pennsylvania Rule 4.1 (which, similar to New York's Rule 4.1, prohibits a lawyer from making a false statement of fact or law to a third person). Specifically, the Philadelphia Committee determined that the proposed "friending" by a third party would constitute deception in violation of Rules 8.4 and 4.1, and would constitute a supervisory violation under Rule 5.3 because the third party would omit a material fact (*i.e.,* that the third party would be seeking access to the witness's social networking pages solely to obtain information for the lawyer to use in the pending lawsuit).

5. Here, in contrast, the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rule 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.[1] Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so.

CONCLUSION

6. A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).

[1]One of several key distinctions between the scenario discussed in the Philadelphia opinion and this opinion is that the Philadelphia opinion concerned an unrepresented *witness*, whereas our opinion concerns a *party* - and this party may or may not be represented by counsel in the litigation. If a lawyer attempts to "friend" a *represented*party in a pending litigation, then the lawyer's conduct is governed by Rule 4.2 (the "no-contact" rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's lawyer. If the lawyer attempts to "friend" an *unrepresented*party, then the lawyer's conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer's role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party's interests are likely to conflict with those of the lawyer's client. Our opinion does not address these scenarios.

Related Files

Lawyers access to public pages of another partys social networking site for the purpose of gathering information for client in pending litigation.(PDF File)

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OREGON

FORMAL OPINION NO. 2013-189

Accessing Information about Third Parties Through a Social Networking Website

Facts:

Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

Questions:

1. May Lawyer review a person's publicly available information on a social networking website?

2. May Lawyer, or an agent on behalf of Lawyer, request access to a person's non-public information?

3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view non-public information?

Conclusions:

1. Yes.

2. Yes, qualified.

3. No, qualified.

Discussion:

1. Lawyer may access publicly available information on a social networking website.[1]

Oregon RPC 4.2 provides:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
>
> (a) the lawyer has the prior consent of a lawyer representing such other person;
>
> (b) the lawyer is authorized by law or by court order to do so; or
>
> (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Accessing the publicly available information on a person's social networking website is not a "communication" prohibited by Oregon RPC 4.2. OSB Formal Ethics Op No 2005-164 discusses the propriety of a lawyer accessing the public portions of an adversary's website and concludes that doing so is not "communicating" with the site owner within the meaning of Oregon RPC 4.2. The Opinion compared accessing a website to reading a magazine article or purchasing a book written by an adversary. The same analysis applies to publicly available information on a person's social networking web pages.[2]

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[1] Although Facebook, MySpace, and Twitter are current popular social networking websites, this opinion is meant to apply to any similar social networking websites.

[2] This analysis is not limited to adversaries in litigation or transactional matters; it applies to a lawyer who is accessing the publicly available information of any person. However, caution must be exercised with regard to jurors. Although a lawyer may review a juror's publicly available information on social networking websites, communication with jurors before, during, and after a proceeding is generally prohibited. Accordingly, a lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent do to do so. *See* Oregon RPC 3.5(b) (prohibiting ex parte communications with a juror during the proceeding unless authorized to do so by law or court order); Oregon RPC 3.5(c) (prohibiting communication with a juror

2. **Lawyer may request access to non-public information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by Lawyer.**

To access non-public information on a social networking website, a lawyer may need to make a specific request to the holder of the account.[3] Typically that is done by clicking a box on the public portion of a person's social networking website, which triggers an automated notification to the holder of the account asking whether he or she would like to accept the request. Absent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible. OSB Formal Ethics Op No 2005-164.[4]

In doing so, however, Lawyer must be mindful of Oregon RPC 4.3, which regulates communications with unrepresented persons. Oregon RPC 4.3 provides, in pertinent part:

> In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The purpose of the rule is to avoid the possibility that a nonlawyer will believe lawyers "carry special authority" and that a nonlawyer will be "inappropriately deferential" to someone else's

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after discharge 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, or harassment); Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice). *See*, *generally*, §61:808, ABA/BNA Lawyers' Manual on Professional Conduct and cases cited therein.

[3] This is sometimes called "friending," although it may go by different names on different services, including "following" and "subscribing."

[4] *See, e.g.*, New York City Bar Formal Opinion 2010-2, which concludes that a lawyer "can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties . . . ."

lawyer. *Apple Corps Ltd. v. International Collectors Soc.*, 15 F Supp2d 456 (DNJ 1998) (finding no violation of New Jersey RPC 4.3 by lawyers and lawyers' investigators posing as customers to monitor compliance with a consent order).[5] A simple request to access non-public information does not imply that Lawyer is "disinterested" in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person's social networking information, although for an unidentified purpose.

Similarly, Lawyer's request for access to non-public information does not in and of itself make a representation about the Lawyer's role. In the context of social networking websites, the holder of the account has full control over who views the information available on his or her pages. The holder of the account may allow access to his or her social network to the general public or may decide to place some, or all, of that information behind "privacy settings," which restrict who has access to that information. The account holder can accept or reject requests for access. Accordingly, the holder's failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding Lawyer's role in the matter.[6] By contrast, if the holder of the account asks for additional information to identify Lawyer, or if Lawyer has some other reason to believe that the person misunderstands her role, Lawyer must provide the additional information or withdraw the request.

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[5] *See also* ABA Model Rule 4.3, Cmt. [1] ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client."). *Cf. In re Gatti*, 330 Or 517, 8 P3d 966 (2000), in which the court declined to find an "investigatory exception" and disciplined a lawyer who used false identities to investigate an alleged insurance scheme. ORPC 8.4(b), discussed infra, was adopted to address concerns about the *Gatti* decision.

[6] *Cf. Murphy v. Perger* [2007] O.J. No. 5511, (S.C.J.) (Ontario, Canada) (requiring personal injury plaintiff to produce contents of Facebook pages, noting that "[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.")

If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent.[7] *See* OSB Formal Ethics Op No 2005-80 (discussing the extent to which certain employees of organizations are deemed represented for purposes of Oregon RPC 4.2).

3. **Lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless Oregon RPC 8.4(b) applies.**

Oregon RPC 8.4(a)(3) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."[8] *See also* Oregon RPC 4.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a third person in the course of representing a client). Accordingly, Lawyer may not engage in subterfuge designed to shield Lawyer's identity from the person when making the request.[9]

As an exception to Oregon RPC 8.4(a)(3), Oregon RPC 8.4(b) allows a lawyer "to advise clients and others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct." For purposes of the rule "covert activity" means:

> [A]n effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or

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[7] *In re Newell*, 348 Or 396, 409, 234 P3d 967 (2010) (reprimanding lawyer who communicated on "subject of the representation").

[8] *See In re Carpenter*, 337 Or 226, 95 P3d 203 (2004) (lawyer received public reprimand after assuming false identity on social media website).

[9] See Oregon RPC 8.4(a), which prohibits a lawyer from violating the RPCs, from assisting or inducing another to do so, or from violating the RPCs "through the acts of another").

> supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

In the limited instances allowed by Oregon RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another's deception to access a person's nonpublic information on a social networking website.

Approved by Board of Governors, February 2013.

NYCLA ETHICS OPINION 745
JULY 2, 2013

ADVISING A CLIENT REGARDING POSTS ON SOCIAL MEDIA SITES

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

DIGEST: It is the Committee's opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4.[1]

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

OPINION:

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

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

[1] This opinion is limited to conduct of attorneys in connection with civil matters. Attorneys involved in criminal cases may have different ethical responsibilities.

That information posted on social media may undermine a litigant's position has not been lost on attorneys. Rather than hire investigators to follow claimants with video cameras, personal injury defendants may seek to locate YouTube videos or Facebook photos that depict a "disabled" plaintiff engaging in activities that are inconsistent with the claimed injuries. It is now common for attorneys and their investigators to seek to scour litigants' social media pages for information and photographs. Demands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine.

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

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

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

A number of recent cases have considered the extent to which courts may direct litigants to authorize adverse counsel to access the "private" portions of their social media postings. While a comprehensive review of this evolving body of law is beyond the scope of this opinion, the premise behind such cases is that social media websites may contain materials inconsistent with a party's litigation posture, and thus may be used for impeachment. The newest cases turn on whether the party seeking such disclosure has laid a sufficient foundation that such impeachment material likely exists or whether the party is engaging in a "fishing expedition" and an invasion of privacy in the hopes of stumbling onto something that may be useful.[2]

[2] In Tapp v. N.Y.S. Urban Dev. Corp., 102 A.D.3d 620, 958 N.Y.S. 2d 392 (1st Dep't 2013), the First Department held that a defendant's contention that Facebook activities "may reveal daily activities that contradict or conflict with

Given the growing volume of litigation regarding social media discovery, the question arises whether an attorney may instruct a client who does not have a social media site not to create one: May an attorney pre-screen what a client posts on a social media site? May an attorney properly instruct a client to "take down" certain materials from an existing social media site?

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

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

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

plaintiff's" claim isn't enough. "Mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.'" Also, see, Kregg v. Maldonado, 98 A.D.3d 1289, 951 N.Y.S. 2d 301 (4th Dep't 2012); Patterson v. Turner Constr. Co., 88 A.D.3d 617, 931 N.Y.S. 2d 311 (1st Dep't 2011); McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 910 N.Y.S. 2d 614 (4th Dep't 2010).

RPC 3.1(a). Frivolous conduct includes the knowing assertion of "material factual statements that are false." RPC 3.1(b)(3). Therefore, if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements. See, also, RPC 3.3; 4.1 ("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.")

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

We further conclude that it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication, to guide the client appropriately, including formulating a corporate policy on social media usage. Again, the above ethical rules and principles apply: An attorney may not direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim; an attorney may not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false. RPC 3.4(a)(4).[3] However, a lawyer may counsel the witness to publish truthful information favorable to the lawyer's client; discuss the significance and implications of social media posts (including their content and advisability); advise the client how social media posts may be received and/or presented by the client's legal adversaries and advise the client to consider the posts in that light; discuss the possibility that the legal adversary may obtain access to "private" social media pages through court orders or compulsory process; review how the factual context of the posts may affect their perception; review the posts that may be published and those that have already been published; and discuss possible lines of cross-examination.

CONCLUSION:

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

[3] We do not suggest that all information on Facebook pages would constitute admissible evidence; such determinations must be made as a matter of substantive law on a case by case basis.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 11-0004

ISSUES: What are an attorney's ethical duties in the handling of discovery of electronically stored information?

DIGEST: An attorney's obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law. Attorney competence related to litigation generally requires, at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, i.e., the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI. An attorney lacking the required competence for the e-discovery issues in the case at issue has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney's duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.

AUTHORITIES INTERPRETED: Rules 3-100, 3-110, 3-210, 5-200, and 5-220 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6068.

STATEMENT OF FACTS

Attorney defends Client in litigation brought by Client's Chief Competitor ("Plaintiff") in a judicial district that addresses e-discovery[2/] in its formal case management. Opposing Counsel wants e-discovery. Attorney refuses. They are unable to reach an agreement by the time of the initial case management conference. At that conference, an annoyed Judge informs both attorneys that they must reach a compromise and orders them to return in 2 hours with a joint proposal.

Opposing Counsel offers to do a joint search of Client's network, using her chosen vendor, but based upon a jointly agreed search term list. She further offers a clawback agreement that would permit Client to claw back any inadvertently produced ESI that was otherwise "protected by law" ("protected ESI").

Attorney mistakenly thinks that the clawback agreement is broader than it is, and will allow him to pull back *anything*, not just protected ESI, so long as he asserts it was "inadvertently" produced. Attorney then erroneously concludes there is *no* risk to Client in Opposing Counsel's proposal, and after so advising Client, Attorney agrees to the proposal. The Judge thereafter approves the attorneys' agreement, and incorporates it into a Case Management

[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

[2/] Electronic Stored Information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. See, e.g., Code of Civil Procedure section 2016.020, subdivisions (d) & (e).) Electronic Discovery, also known as e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes.

Order, including the provision for the clawback of inadvertently produced protected ESI. The Court sets a deadline three months later for the network search to occur, and a case management conference a month after that, to monitor the status of discovery and the case.

Back in his office, Attorney prepares a list of keywords he thinks would be relevant to the case and then emails those notes to Opposing Counsel as Client's agreed upon search terms. Attorney then reviews Opposing Counsel's additional facially neutral proposed search terms and agrees to include them as well. A joint search term list is created, and upon Attorney's instructions to Client to provide access, the court ordered network search proceeds on Client's network, with the vendor running the search using the joint search term list. Other than instructing Client to provide the vendor access to Client's network, Attorney does not take any other action. Attorney mistakenly reasons that he will simply claw back anything he does not like, asserting "inadvertent" production under the clawback agreement.

Subsequently, Attorney receives a copy of the data retrieved by the vendor search and puts it in the file without review. The parties return to Court for the continued Case Management Conference, during which, in response to the Judge's questions, Attorney assures the Judge that he has reviewed everything and the e-discovery is in full compliance with the Court Order, and Client's discovery obligations. Two weeks after that hearing, Attorney receives a letter from Opposing Counsel accusing Client of destroying evidence/spoliation. Opposing Counsel threatens motions for monetary and evidentiary sanctions. Only after Attorney receives this letter does he, for the first time, attempt to open his copy of the data retrieved by the vendor search, but finds he can make no sense of it. Attorney finally hires an e-discovery expert ("Expert"), who accesses the data, conducts a forensic search, and tells Attorney it appears that potentially responsive ESI has been routinely deleted off of company computers as part of Client's normal document retention policy, resulting in gaps in the document production. Expert also advises Attorney that due to the breadth of the jointly agreed search terms, it appears both privileged information, as well as highly proprietary information about Client's upcoming revolutionary product, was provided to Plaintiff in the data retrieval, even though such proprietary information was not relevant to the issues in the lawsuit.[3/] What ethical issues face Attorney relating to the e-discovery issues in this hypothetical?

DISCUSSION

Attorney Duties Concerning Electronically Stored Information ("ESI")

1. Duty of Competence

While the requirements and standards of e-discovery may be relatively new to the legal profession, an attorney's core ethical duty of competence remains constant. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Under subdivision (B) of that rule, "competence" includes the learning and skill necessary for performing legal services.

Legal rules and procedures, when placed in conjunction with ever changing technology, produce professional challenges that attorneys must meet in order to remain competent. Maintaining learning and skill consistent with an attorney's duty of competence includes "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." (ABA Model Rule 1.1, Comment [8].)[4/] Rule 3-110(C) provides: "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Another permissible choice would be to decline the representation. In

[3/] This opinion is not intended to discuss what disclosure obligations Attorney may owe to Client as a result of the release of proprietary information and the allegations of spoliation.

[4/] In the absence of on-point California authority and conflicting state public policy, the ABA Model Rules may provide guidance. *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852 [43 Cal.Rptr.3d 771].

an e-discovery setting, association or consultation may be with a non-lawyer technical expert, if appropriate under the circumstances. Cal. State Bar Formal Opn. No. 2010-179.

Not every litigated case ultimately involves e-discovery; however, in today's technological world, almost every litigation matter *potentially* does. The chances are significant that a party or a witness in the matter has used email or other electronic communications, stores information digitally, and/or has other forms of ESI related to the dispute. Under this backdrop, the law governing e-discovery is still evolving. In 2009, the California Legislature passed California's Electronic Discovery Act adding or amending several California discovery statutes to make specific provisions for electronic discovery and ESI. See, e.g., Code of Civil Procedure section 2031.010, subdivision (a) (now expressly providing for "copying, testing, or sampling" of "electronically stored information in the possession, custody, or control of any other party to the action").[5/] However, there remains little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena. Thus, to analyze a California attorney's current ethical obligations relating to e-discovery, we look to federal jurisprudence for guidance, as well as applicable Model Rules, and apply those principals based upon the California ethical rules[6/] and California's existing discovery law outside the e-discovery setting.

We start with the premise that "competent" handling of e-discovery has many dimensions, depending upon the complexity of e-discovery in a particular case. The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues, if any, might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If it is likely that e-discovery will be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation. If an attorney lacks such skills and/or resources, the attorney must take steps to acquire sufficient learning and skill, or associate or consult with someone with appropriate expertise to assist. Rule 3-110(C). Taken together generally, and under current technological standards, attorneys handling e-discovery should have the requisite level of familiarity and skill to, among other things, be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

1. initially assess e-discovery needs and issues, if any;
2. implement appropriate ESI preservation procedures, including the obligation to advise a client of the legal requirement to take actions to preserve evidence, like electronic information, potentially relevant to the issues raised in the litigation;
3. analyze and understand a client's ESI systems and storage;
4. identify custodians of relevant ESI;
5. perform appropriate searches;
6. collect responsive ESI in a manner that preserves the integrity of that ESI;
7. advise the client as to available options for collection and preservation of ESI;
8. engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan; and
9. produce responsive ESI in a recognized and appropriate manner.

See, e.g., *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. 2010) 685 F.Supp.2d 456, 462-465.

In our hypothetical, Attorney had a general obligation to make an e-discovery evaluation early in his handling of the case, and certainly prior to the initial case management conference. The fact that it was the standard practice of the judicial district in which the case was pending to address e-discovery issues in formal case management only

[5/] In 2006, revisions were made to the Federal Rules of Civil Procedure, Rules 16, 26, 33, 34, 37 and 45, to address e-discovery issues in federal litigation. California modeled its Electronic Discovery Act to conform with mostly parallel provisions in the 2006 federal rules amendments. See Evans, *Analysis of the Assembly Committee on Judiciary regarding AB 5* (March 3, 2009).

[6/] Federal decisions are compelling where the California law is based upon a federal statute or the federal rules. *Toshiba America Electronic Components, Inc. v. Superior Court (Lexar Media, Inc.*) (2004) 124 Cal.App.4th 762, 770 [21 Cal.Rptr.3d 532].

highlighted Attorney's obligation to conduct an early initial e-discovery evaluation. At the very least, Attorney's obligation to make an e-discovery evaluation should have been obvious even to him when he became aware that Opposing Counsel intended to pursue e-discovery in this particular case.

Notwithstanding the above, Attorney made *no* assessment of the case's e-discovery needs or of his own capabilities. Attorney exacerbated the situation when he took no steps to consult with an e-discovery expert prior to the initial case management conference. He agreed to Opposing Counsel's proposed e-discovery plan under a mistaken belief as to its scope, and thereafter allowed that proposal to be transformed into a Court Order, again without any expert consultation, and in the face of his lack of expertise in the area. Attorney participated in preparing joint e-discovery search terms without expert consultation, and was so inexperienced in ESI that he did not recognize the danger of overbreadth in the agreed upon search terms.

After the Court ordered a search of his Client's network, Attorney took no action other than to instruct Client to allow vendor to have access to Client's network. Attorney allowed the network search to move forward on Client's network without taking any steps to review it, relying on the parties' clawback agreement, the scope of which he misunderstood. After the search, Attorney took no action to review the gathered data until after Plaintiff's attorney asserted spoliation and threatened sanctions. Attorney then attempted to review the search results, only to discover he could make no sense of it. It was only then, at the end of this long line of events, that Attorney finally consulted an e-discovery expert and learned of the e-discovery problems facing Client. By this point, the potential prejudice facing Client was significant, and much of the damage was already done.

Once Opposing Counsel insisted on e-discovery, it became certain that e-discovery would be implicated in the case, and the previously *potential* risk of a breach of the duty of competence became an *actual* risk, which should have resulted in Attorney taking immediate steps to comply with rule 3-110(C), such as consulting an e-discovery expert. Had the expert been consulted at the beginning of the case, or at the latest once Attorney realized e-discovery would absolutely occur in the case, the expert could have helped to structure the search differently, and could have controlled the agreed upon search terms to be less overbroad and less likely to turn over privileged and/or irrelevant but highly proprietary material.

Rule 3-110(A) addresses intentional, reckless, or repeated failures to perform legal services with competence. In our hypothetical, while not intentional, Attorney's failures in this instance were arguably reckless and/or at the very least repeated. Attorney has breached his duty of competence.[7/]

2. <u>The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege</u>

A fundamental duty of an attorney is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Business and Professions Code section 6068, subdivision (e)(1). "Secrets" includes "information, other than that protected by the attorney-client privilege, that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Cal. State Bar Formal Opn. No. 1988-96. Both "secrets" and "confidences" are protected communications. Cal. State Bar Formal Opn. No. 1981-58. "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." Rule 3-100(A).

Similarly, an attorney has a duty to assert the attorney-client privilege to protect confidential communications between the attorney and client which are sought in discovery. Evidence Code sections 952, 954, 955. In a civil discovery setting, while the holder of the privilege is not required to take strenuous or "Herculean efforts" to resist disclosure in order to preserve the privilege, the attorney-client privilege will protect confidential communications between the attorney and client in cases of inadvertent disclosure *only if* the attorney and client act reasonably to protect that privilege in the first instance. *Regents of University of California v. Superior Court (Aquila Merchant Services, Inc.)* (2008) 165 Cal.App.4th 672, 683 [81 Cal.Rptr.3d 186]. This approach also echoes federal law. See Federal Rules of

[7/] This Opinion does not intend to set or to define a standard of care of lawyers with respect to any of the issues discussed herein, as standards of care can be highly dependent on the factual scenario in any given situation.

Evidence, rule 502(b).[8/] A lack of reasonable care to protect against the disclosure of privileged and protected information when producing ESI can be deemed a waiver of the attorney-client privilege. See *Kilopass Technology Inc. v. Sidense Corp.* (N.D. Cal. 2012) 2012 WL 1534065 at *2-3 (attorney-client privilege deemed waived as to privileged documents released through e-discovery because screening procedures employed were unreasonable); see also *Victor Stanley, Inc. v. Creative Pipe, Inc.* (D. Md. 2008) 250 F.R.D. 251, 259-260, 262.

Accordingly, the reasonableness of an attorney's actions to ensure *both* that secrets and confidences, *as well as* privileged information, of a client remain confidential and that the attorney's handling of a client's information does not result in a waiver of any confidence, privilege, or protection, is a fundamental part of an attorney's duty of competence. Cal. State Bar Formal Opn. No. 2010-179.

In our hypothetical, as a result of the actions taken by Attorney prior to consulting with any e-discovery expert, Client's privileged information has been disclosed, and such disclosure may be found not to have been "inadvertent" and thus, may constitute a waiver. Further, non-privileged but highly confidential proprietary information about Client's upcoming revolutionary new product has been released into the hands of Client's chief competitor, all as a result of search terms Attorney participated in creating. All of this happened completely unbeknownst to Attorney, and only came to light after Plaintiff accused Client of evidence spoliation. In the absence of Plaintiff's accusation, it is not clear when the "inadvertent" disclosure would have come to Attorney's attention, if ever.

The clawback agreement, heavily relied upon by Attorney under a mistaken understanding of its breadth, may or may not work to retrieve the information. By its terms, the clawback agreement was limited to inadvertently produced, protected ESI. Both privileged information and non-privileged confidential and proprietary information have been released to Plaintiff.

Under these facts, Client may have to litigate the issue of whether Client (through Attorney) acted diligently enough to protect its attorney-client privilege. Attorney took no acts whatsoever to review Client's network prior to allowing the network search, Attorney participated in drafting the overbroad search terms, and Attorney waited until after Client was accused of evidence spoliation to even look at the data – all of which would permit Opposing Counsel to viably argue either that (a) Client failed to exercise due care to protect the privilege in the first instance, such that the disclosure at issue was not inadvertent, and/or (b) at the very least, the Parties' clawback agreement does not apply to protect the proprietary, but non-privileged, produced information.[9/] Client may further have to litigate its rights to return of non-privileged but confidential proprietary information.

Whether a waiver has occurred under these circumstances, and what Client's rights are to return of the non-privileged/confidential proprietary information, are legal questions beyond the scope of this opinion. The salient point is that Attorney did not take reasonable steps to minimize the risks and was directly responsible for the release of

[8/] "(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B)."

[9/] While statutes, rules, and/or case law provide some limited authority for the legal clawback of certain inadvertently produce materials, those provisions may not work to mitigate the damage caused by the production in this hypothetical. Such "default" clawback provisions typically only apply to privilege and work product information, and require both that the disclosure at issue was truly inadvertent, and that the holder of the privilege took reasonable steps to prevent disclosure in the first instance. See, Federal Rules of Evidence, rule 502; see also, generally, *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657 [82 Cal.Rptr.2d 799]; *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817-818 [68 Cal.Rptr.3d 758]. As noted above, the effect of Attorney's acts on the question of "inadvertence" are at issue in our hypothetical.

Similarly, Attorney finds even less assistance from California's discovery clawback statute, which deals merely with the procedure for litigating a dispute on a claim of inadvertent production, and not with the legal issue of waiver at all. See, Code of Civil Procedure section 2031.285.

Client's confidential and privileged information to Plaintiff. Even if Client is able to retrieve all such information, Client may never be able to un-ring the bell.

While the law does not require perfection by attorneys in acting to protect privileged or confidential information, it does require the exercise of some level of reasonable care. Cal. State Bar Formal Opn. No. 2010-179. Here, Attorney took minimal, if any, reasonable steps to protect Client's ESI, and instead chose to release everything without prior review, relying on a clawback agreement the scope of which he mistakenly interpreted. Client's secrets are now in Plaintiff's hands and a waiver of Client's attorney-client privilege may be claimed by Plaintiff. Client has been exposed to a potential dispute as the direct result of Attorney's actions. Attorney has breached his duty of confidentiality to Client.

3. The Duty of Confidentiality Includes But Is Not Limited to Protecting The Attorney-Client Privilege

A. Duty Not to Suppress Evidence

In addition to protecting their clients' interests, attorneys, as members of the profession, have a general duty "to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." *Kirsch et al. v. Duryea* (1978) 21 Cal.3d 303, 309 [146 Cal.Rptr. 218].

Rule 5-220 states, "A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."

Thus, while the legal ramifications for failure to preserve evidence are consequences imposed by law, the duty not to suppress evidence is an ethical one imposed by the rules of professional conduct. The close relationship between the duty not to suppress evidence and the duty of candor (discussed below) mandates that an attorney pay particular attention to how these ethical duties manifest themselves in e-discovery:

> . . . [T]he risk that a client's act of spoliation may suggest that the lawyer was also somehow involved encourages lawyers to take steps to protect against the spoliation of evidence. Lawyers are subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence. (Bus. & Prof. Code, § 6106 ["The commission of any act involving moral turpitude, dishonesty or corruption ... constitutes a cause for disbarment or suspension."]; *id.*, § 6077 [attorneys subject to discipline for breach of Rules of Professional Conduct]; Rules Prof. Conduct, rule 5–220 ["A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."].) The purposeful destruction of evidence by a client while represented by a lawyer may raise suspicions that the lawyer participated as well. Even if these suspicions are incorrect, a prudent lawyer will wish to avoid them and the burden of disciplinary proceedings to which they may give rise and will take affirmative steps to preserve and safeguard relevant evidence.

Cedars-Sinai Medical Center v. Superior Court (Bowyer) (1998) 18 Cal.4th 1, 13 [74 Cal.Rptr.2d 248].

None of these duties are new. However, where ESI is concerned, the interface between legal and ethical duties manifests in a unique way, and strongly urges that an attorney assist the client in implementing a "litigation hold" at the outset. A litigation hold is a directive issued by or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such ESI, pending further direction.[10/] See generally The Sedona Conference® WG1, *Sedona Conference® Commentary on Legal Holds: the Trigger and the Process* (Fall 2010) The Sedona Conference Journal, Vol. 11 at pp. 260-270, 277-279.

The developing federal case law governing litigation holds finds that it is the client's obligation to issue an immediate and appropriate litigation hold whenever litigation becomes reasonably foreseeable. See *Hynix Semiconductor, Inc. v.*

[10/] Of course, whether or not ESI exists or is relevant, clients and attorneys should consider issuing litigation holds to avoid destruction of relevant paper files.

Rambus, Inc. (C.A. Fed. Cir. 2011) 645 F.3d 1336, 1344-1345. Cases also have held that the obligation to ensure litigation holds or similar directions are timely issued falls on both the party and on outside counsel working on the matter.[11/] This Committee notes that litigation holds are legal duties, and not ethical ones. Nevertheless, the distinction between a legal duty to preserve evidence and an ethical duty not to suppress evidence can be very narrow when the failure to request immediate preservation of electronic information can result in a significant potential for its loss or mutation, as electronic data can easily be deleted or altered, either inadvertently through routine document retention policies, or even intentionally. Counsel would be prudent to consider the proper use and monitoring of litigation holds to assist him or her in complying with the duty not to suppress evidence.

In our hypothetical, Attorney did not discuss a litigation hold with Client. Attorney further failed to advise Client about the potentially significant harm to Client and Client's case that could result from the improper deletion of relevant ESI after the obligation to preserve evidence had commenced. Client's actions in deleting ESI after the litigation hold obligation was triggered could provide the basis for sanctions, either monetary, evidentiary, or terminating. Due to Attorney's inaction, Client may not have been aware of the need to preserve its ESI, and may not have knowingly caused the subsequent deletion of responsive ESI. The significant consequences Client now faces may have been avoided altogether had Client been timely advised of its ESI risks and obligations. Here, the ethical issue is not the lack of a litigation hold instruction itself. Rather, the ethical issue is the duty not to suppress evidence. Here, Attorney's failures in counseling his client relating to e-discovery has resulted in potential suppression of evidence.

B. The Duty of Candor

Business and Professions Code section 6068 also addresses a number of ethical duties an attorney owes the court, in addition to the duties owed to the client. Significant to the facts of this opinion, an attorney owes a tribunal a duty of candor, and must "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Business and Professions Code section 6068, subdivision (d); *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 219-220.

The Rules of Professional Conduct establish similar requirements. "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with the truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice of false statement of facts or law; . . . and (D) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness." Rule 5-200(A), (B), and (D).

These provisions "unqualifiedly require an attorney to refrain from acts which mislead or deceive the court." *Sullins v. State Bar* (1975) 15 Cal.3d 609, 620-621 [125 Cal.Rptr. 471]. "The presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of" Business and Professions Code section 6068, subdivision (d). *In the Matter of Chestnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174-175, citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144. It also is "settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline." *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162-163 [162 Cal.Rptr. 458], citing *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [46 Cal.Rptr. 513]; *Sullins v. State Bar*, 15 Cal.3d 609, 622; and *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574 [131 Cal.Rptr. 379].

In our hypothetical, in response to the Judge's questions, Attorney assured the Judge that he reviewed the ESI and that it was in full compliance with the Court Order and Client's discovery obligations. He made such assurances even though he had not reviewed the data retrieved by the search, and had no reasonable basis to make such assurances. Attorney turned out to be wrong, a fact he learned after the hearing. In the subsequent sanctions

[11/] See, e.g., *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 218 ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.") and *Zubulake v. UBS Warburg LLC.* (S.D.N.Y. 2003) 229 F.R.D. 422, 432 ("Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.").

motions threatened by Plaintiff, Attorney likely will be faced with the uncomfortable situation in which he will have to explain to the Judge why his earlier misrepresentation was not a willful violation of the duty of candor.

CONCLUSION

Electronic document creation and/or storage and electronic communications have become standard practice in modern life. Attorneys who handle litigation may not simply ignore the potential impact of evidentiary information existing in electronic form. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced. It may also result in violations of the duty of confidentiality, the duty not to suppress evidence, and/or the duty of candor to the Court, notwithstanding a lack of bad faith conduct.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

KENNETH PAUL REISMAN

Public Reprimand No. 2013-21

Order (public reprimand) entered by the Board on October 9, 2013.

SUMMARY[1]

The respondent received a public reprimand with conditions for the conduct described below.

In November of 2006, the respondent was retained to represent a company (ASI) and an employee of ASI in defending civil claims brought in superior court by the former employer of the employee and a competitor of ASI (hereafter NSA). The employee had resigned from NSA effective September 29, 2006, and begun employment with ASI on October 1, 2006. Without NSA's permission, the employee brought to ASI a NSA laptop computer that he had used in his employment at NSA. Between October 1 and October 23, 2006, the employee transferred some files from the NSA laptop to an ASI laptop. He then used a scrubbing program to delete all files from the NSA laptop and returned it to NSA on October 23, 2006.

On November 15, 2006, the superior court entered a temporary restraining order in part barring the employee from disposing of or using NSA trade secrets or confidential information. Also, he was ordered to return to NSA all information that he deleted from the NSA laptop and transferred to any other device. The employee denied to the respondent that he had transferred any NSA information to any other device. On December 6, 2006, the respondent filed an answer and counterclaims to the litigation, and he denied that any proprietary or other confidential information of NSA was uploaded and given to ASI.

On November 17, 2006, unbeknownst to the respondent, the employee executed a scrubbing program to delete some NSA files from the ASI computer. On March 7, 2007, NSA's counsel advised the respondent by e-mail that NSA would be filing a motion to gain access to his clients' computers and that the respondent was obligated to inform the employee and ASI to preserve any documents "that relate to the case," including any on the employee's ASI laptop. Following receipt of this e-mail, the respondent took no action and did not advise employee or his employer not to delete relevant files from the ASI laptop.

[1] Compiled by the Board of Bar Overseers based on the record of proceedings before the board.

2008: The Year in Ethics and Bar Discipline

by

Constance V. Vecchione, Bar Counsel

This column takes a second look at significant developments in ethics and bar discipline in Massachusetts over the last twelve months.

Disciplinary Decisions

The full bench of the Supreme Judicial Court issued seven disciplinary decisions in 2008. Approximately 170 additional decisions or orders were entered by either the single justices or the Board of Bar Overseers. Several decisions by the Court and the Board were of significant interest to the bar, either factually or legally.

Curry and Crossen

Of the full-bench decisions, the two that perhaps generated the most interest were the companion cases of Matter of Kevin P. Curry, 450 Mass. 503 (2008) and Matter of Gary C. Crossen, 450 Mass. 533 (2008). Curry held that disbarment was the appropriate sanction for an attorney who, without any factual basis, persuaded dissatisfied litigants that a trial court judge had "fixed" their case, and helped and participated in the preparation of false statements by the judge's law clerk intended to be used to discredit that judge in the ongoing high stakes civil case. In Crossen, the Court held that disbarment was also warranted for another attorney's participation in the same scheme by actions including taping of a sham interview of the judge's law clerk; attempting to threaten the law clerk into making statements to discredit the judge; and falsely denying involvement in, or awareness of, surveillance of the law clerk that the attorney had participated in arranging.

These cases are particularly noteworthy for their rejection of the attorneys' arguments that the deception of the law clerk was a permissible tactic akin to those used by government investigators or discrimination testers. The SJC in both cases also reaffirmed that expert testimony is not required in bar disciplinary proceedings to establish a rule violation or a standard of care.

On March 27, 2007, NSA filed a motion to compel production of ASI's computers for forensic examination. On April 12, 2007, again without the respondent's knowledge but on the same day as a hearing on discovery issues, the employee used a scrubbing program to delete files from his ASI computer. After the hearing, the court on April 13 ordered that NSA's forensic expert be given access to the employee's ASI computer. After a further hearing on May 2, 2007, the court amended the order to allow the hard drive to be copied but to limit the expert's examination of the copy to any NSA proprietary or confidential files copied to the computer in September or October 2006.

Following the April 12 order, the employee advised the respondent that there were confidential documents and information of ASI, unrelated to NSA, on his laptop that should not be disclosed to NSA or its expert. Without inquiring further as to the specific nature or content of these documents but believing that ASI confidential information was not relevant to the litigation, the respondent advised the employee that he could scrub such confidential information from his laptop.

Due to his lack of experience in electronic discovery, the respondent failed to appreciate that the order of April 13, 2007, required the entire hard drive to be preserved for the NSA expert, not just documents obtained from NSA. The respondent advised the employee that he should scrub files unrelated to NSA without first conferring with experienced counsel or conducting research as to his client's legal obligations and without any attempt to confirm that the materials to be deleted were as represented.

On May 8, 2007, the day before the expert's examination of the computer, the employee scrubbed additional files from the ASI computer. On December 6, 2007, after the series of deletions came to the attention of NSA and the court, the court issued a memorandum and order finding that the employee had engaged in spoliation of evidence. The court declined to enter a default judgment against the employee as requested, but granted the plaintiff additional discovery and access to the ASI computer for whatever additional analysis that the plaintiff could perform. In October 2010, the respondent withdrew from the representation of the employee and his employer, and successor counsel entered an appearance.

The respondent's advice to his client scrub certain files from the hard drive of a laptop in contravention of a court order constituted unlawful obstruction of another party's access to evidence, in violation of Mass. R. Prof. C. 3.4(a). The respondent's failure to adequately communicate to his client his obligations under the court order and the potential prejudice of altering property subject to the court order was conduct in violation of Mass. R. Prof. C. 1.4. Finally, the respondent's conduct of handling a matter that he was not competent to handle without adequate research or associating with or conferring with experienced counsel, and without any attempt to confirm the nature and content of the proposed deletions, was conduct in violation of Mass. R. Prof. C. 1.1.

In aggravation, the respondent's condoning the alteration of the hard drive had the potential to prejudice the plaintiff's pursuit of discovery, and the client was found to have engaged in spoliation. Much of the spoliation, however, took place prior to the respondent's advice, and the trial court ultimately found that even assuming that client transferred confidential information to ACI, the plaintiff did not prove that the client's conduct caused any damages to NSA. In mitigation, the respondent was relatively inexperienced in the relevant area of discovery practice.

This matter came before the board on a stipulation of facts and disciplinary violations and a joint recommendation for discipline by public reprimand with attendance within one year at two CLE programs, one on electronic discovery and one on ethics and law office management. On September 23, 2013, the board accepted the parties' recommendation and imposed a public reprimand subject to the conditions.

Ethics Committee Advisory Opinion #2012-13/05
Social Media Contact with Witnesses in the Course of Litigation

By the NHBA Ethics Committee

This opinion was submitted for publication by the NHBA Board of Governors at its June 20, 2013 meeting.

RULE REFERENCES:

1.1(b) and (c) Competence
1.3 Diligence
3.4 Fairness to opposing party and counsel
4.1(a) Truthfulness in statements to others
4.2 Communications with others represented by counsel
4.3 Dealing with the unrepresented person
4.4 Respect for the rights of third persons
5.3 Non-lawyer assistants
8.4(a) Unethical conduct through an agent

SUBJECTS:

Competence and Diligence
Truthfulness
Fairness to Opposing Parties, Counsel, and Third Parties
Contact with Witnesses
Agents of Lawyers; Acting Through Others

ANNOTATION

The Rules of Professional Conduct do not forbid use of social media to investigate a non-party witness. However, the lawyer must follow the same rules which would apply in other contexts, including the rules which impose duties of truthfulness, fairness, and respect for the rights of third parties. The lawyer must take care to understand both the value and the risk of using social media sites, as their ease of access on the internet is accompanied by a risk of unintended or misleading communications with the witness. The Committee notes a split of authority on the issue of whether a lawyer may send a social media request which discloses the lawyer's name - but not the lawyer's identity and role in pending litigation - to a witness who might not recognize the name and who might otherwise deny the request.[1] The Committee finds that such a request is improper because it omits material information. The likely purpose is to deceive the witness into accepting the request and providing information which the witness would not provide if the full identity and role of the lawyer were known.

QUESTION PRESENTED

What measures may a lawyer take to investigate a witness through the witness's social media accounts, such as Facebook or Twitter, regarding a matter which is, or is likely to be, in litigation?

FACTS

The lawyer discovers that a witness for the opposing party in the client's upcoming trial has Facebook and Twitter accounts. Based on the information provided, the lawyer believes that statements and information available from the witness's Facebook and Twitter accounts may be relevant to the case and helpful to the client's position.

Some information is available from the witness's social media pages through a simple web search. Further information is available to anyone who has a Facebook account or who signs up to follow the witness on Twitter. Additional information is available by "friending" the witness on Facebook or by making a request to follow the witness's restricted Twitter account. In both of those latter instances, the information is only accessible after the witness has granted a request.

ANALYSIS

General Principles

The New Hampshire Rules of Professional Conduct do not explicitly address the use of social media such as Facebook and Twitter. Nonetheless, the rules offer clear guidance in most situations where a lawyer might use social media to learn information about a witness, to gather evidence, or to have contact with the witness. The guiding principles for such efforts by counsel are the same as for any other investigation of or contact with a witness.

First and foremost, the lawyer has a duty under Rules 1.1 and 1.3 to represent the client competently and diligently. This duty specifically includes the duties to:

- "Gather sufficient facts" about the client's case from "relevant sources," Rule 1.1(c)(1);
- Take steps to ensure "proper preparation," Rule 1.1(b)(4); and
- Acquire the skills and knowledge needed to represent the client competently. Rule 1.1(b)(1) and (b)(2).

In the case of criminal defense counsel, these obligations, including the obligation to investigate, may have a constitutional as well as an ethical dimension.[2] In light of these obligations, counsel has 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.

The duties of competence and diligence are limited, however, by the further duties of truthfulness and fairness when dealing with others. Under Rule 4.1, a lawyer may not "make a false statement of material fact" to the witness. Notably, the ABA Comment to this rule states that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Similarly, under Rule 8.4, it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Also, if the witness is represented by counsel, then under Rule 4.3, a lawyer "shall not communicate" with the witness "about the subject of the representation" unless the witness's lawyer has consented or the communication is permitted by a court order or law. Finally, under Rule 4.4, the lawyer shall not take any action, including conducting an investigation, if it is "obvious that the action has the primary purpose to embarrass, delay, or burden a third person."

The lawyer may not avoid these limitations by conducting the investigation through a third person. With respect to investigators and other non-lawyer assistants, the lawyer must "make reasonable efforts to ensure" that the non-lawyer's conduct "is compatible with the professional obligations of the lawyer." Rule 5.3(b). A lawyer may be responsible for a violation of the rules by a non-lawyer assistant where the lawyer has knowledge of the conduct, ratifies the conduct, or has supervisory authority over the person at a time when the conduct could be avoided or mitigated. Rule 5.3(c). Nor should a lawyer counsel a client to engage in fraudulent or criminal conduct. Rule 1.2(d). Finally, of course, a lawyer is barred from violating the rules through another or knowingly inducing the other to violate the rules. Rule 8.4(a).

Application of the General Principles to the Use of Social Media When Investigating a Witness

Is it a violation of the rules for the lawyer to personally view a witness's unrestricted Facebook page or Twitter feed? In the view of the Committee, simply viewing a Facebook user's page or "following" a Twitter user is not a "communication" with that person, as contemplated by Rules 4.2 and 4.3, *if* the pages and accounts are viewable or otherwise open to all members of the same social media site. Although the lawyer-user may be required to join the same social media group as the witness, unrestricted Facebook pages and Twitter feeds are public for all practical purposes. Almost any person may join either Facebook or Twitter for free, subject to the terms-of-use agreement. Furthermore, membership is more common than not, with Facebook reporting that it topped one billion accounts in 2012.[4]

Other state bars' ethics committees are in agreement that merely viewing an unrestricted Facebook or Twitter account is permissible.[5] If, however, a lawyer asks the witness's permission to access the witness's restricted social media information, the request must not only correctly identify the lawyer, but also inform the witness of the

lawyer's involvement in the disputed or litigated matter. At least two bar associations have adopted the position that sending a Facebook friend request in-name-only constitutes a misrepresentation by omission, given that the witness might not immediately associate the lawyer's name with his or her purpose and that, were the witness to make that association, the witness would in all likelihood deny the request.[6] (This point is discussed in more detail below.)

May the lawyer send a Facebook friend request to the witness or a request to follow a restricted Twitter account, using a false name? The answer here is no. The lawyer may not make a false statement of material fact to a third person. Rule 4.1. Material facts include the lawyer's identity and purpose in contacting the witness. For the same reason, the lawyer may not log into someone else's account and pretend to be that person when communicating with the witness.

May the lawyer's client send a Facebook friend request or request to follow a restricted Twitter feed, and then reveal the information learned to the lawyer? The answer depends on the extent to which the lawyer directs the client who is sending the request. Rule 8.4(a) prohibits a lawyer from accomplishing through another that which would be otherwise barred. Also, while Rule 5.3 is directed at legal assistants rather than clients, to the extent that the client is acting as a non-lawyer assistant to his or her own lawyer, Rule 5.3 requires the lawyer to advise the client to avoid conduct on the lawyer's behalf which would be a violation of the rules.

Subject to these limitations, however, if the client has a Facebook or Twitter account that reasonably reveals the client's identity to the witness, and the witness accepts the friend request or request to follow a restricted Twitter feed, no rule prohibits the client from sharing with the lawyer information gained by that means. In the non-social media context, the American Bar Association has stated that such contact is permitted in similar limitations. See ABA Ethics Opinion 11-461.[7]

May the lawyer's investigator or other non-lawyer agent send a friend request or request to follow a restricted Twitter feed as a means of gathering information about the witness? The non-lawyer assistant is subject to the same restrictions as the lawyer. The lawyer has a duty to make sure the assistant is informed about these restrictions and to take reasonable steps to ensure that the assistant acts in accordance with the restrictions. Thus, if the non-lawyer assistant identifies him- or herself, the lawyer, the client, and the cause in litigation, then the non-lawyer assistant may properly send a social media request to an unrepresented witness.

The witness's own predisposition to accept requests has no bearing on the lawyer's ethical obligations. The Committee agrees with the Philadelphia Bar Association's reasoning: "The fact that access to the pages may readily be obtained by others who either are or are not deceiving the witness, and that the witness is perhaps insufficiently wary of deceit by unknown internet users, does not mean that deception at the direction of the inquirer is ethical." Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02.

May the lawyer send a request to the witness to access restricted information, usingthe lawyer's name and disclosing the lawyer's role? The answer depends on whether the witness is represented. If the witness is represented by a lawyer with regard to the same matter in which the lawyer represents the client, the lawyer may not communicate with the witness except as provided in Rule 4.2. If the witness is not represented, the lawyer may send a request to access the witness's restricted social media profile so long as the request identifies the lawyer by name as a lawyer and also identifies the client and the matter in litigation. This information serves to correct any reasonable misimpression the witness might have regarding the role of the lawyer.

May the lawyer send a request to the witness to access restricted information, when the request uses only the lawyer's name or the name of an agent, and when there is a reasonable possibility that the witness may not recognize the name and may not realize the communication is from counsel involved in litigation? There is a split of authority on this issue, but the Committee concludes that such conduct violates the New Hampshire Rules of Professional Conduct. The lawyer may not omit identifying information from a request to access a witness's restricted social media information because doing so may mislead the witness. If a lawyer sends a social media request in-name-only with knowledge that the witness may not recognize the name, the lawyer has engaged in deceitful conduct in violation of Rule 8.4(c). The Committee further concludes omitting from the request information about the lawyer's involvement in the disputed or litigated matter creates an implication that the person making the request is disinterested. Such an implication is a false statement of material fact in violation of Rule 4.1. As noted above, the ABA Comment to this rule states that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Deceit is improper, whether it is accomplished by providing information or by deliberately withholding it. Thus, a

lawyer violates the rules when, in an effort to conceal the lawyer's identity and/or role in the matter, the lawyer requests access to a witness's restricted social media profile in-name-only or through an undisclosed agent. The Committee recognizes the counter-argument that a request in-name-only is not overtly deceptive since it uses the lawyer's or agent's real name and since counsel is not making an explicitly false statement. Nonetheless, the Committee disagrees with this counter-argument. By omitting important information, the lawyer hopes to deceive the witness. In fact, the motivation of the request in-name-only is the lawyer's expectation that the witness will not realize who is making the request and will therefore be more likely to accept the request. The New Hampshire Supreme Court has stated that honesty is the most important guiding principle of the bar in this state and that deceitful conduct by lawyers will not be tolerated. *See generally*, RSA311:6; *Feld's Case*, 149 N.H. 19, 24 (2002); *Kalil's Case*, 146 N.H. 466, 468 (2001); *Nardi's Case*, 142 N.H. 602, 606 (1998). The Committee is guided by those principles here.

The Committee notes that there is a conflict of authority on this issue. For example, the Committee on Professional Ethics for the Bar Association of New York City has stated:

> We conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. [Footnote omitted.]

NY City Bar, Ethic Op. 2010-2. Alternatively, the Philadelphia Bar Association concludes that such conduct would be deceptive. Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02. That opinion finds that a social media request in-name-only "omits a highly material fact" -that the request is aimed at obtaining information which may be used to impeach the witness in litigation.[8] The Philadelphia opinion further recognizes, as does this Committee, that the witness would not likely accept the social media request if the witness knew its true origin and context. An opinion from the San Diego County Bar Association reaches the same conclusion. San Diego Cty. Bar Legal Ethics Op. 2011-2. The Committee finds that the San Diego and Philadelphia opinions are consistent with the New Hampshire Rules of Professional Conduct but that the New York City opinion is not. A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge.

Finally, this situation should be distinguished from the situation where a person, not acting as an agent or at the behest of the lawyer, has obtained information from the witness's social media account. In that instance, the lawyer may receive the information and use it in litigation as any other information. The difference in this latter context is that there was no deception by the lawyer. The witness chose to reveal information to someone who was not acting on behalf of the lawyer. The witness took the risk that the third party might repeat the information to others. Of course, lawyers must be scrupulous and honest, and refrain from expressly directing or impliedly sanctioning someone to act improperly on their behalf. Lawyers are barred from violating the rules "through the acts of another." Rule 8.4(a).

CONCLUSION

As technology changes, it may be necessary to reexamine these conclusions and analyze new situations. However, the basic principles of honesty and fairness in dealing with others will remain the same. When lawyers are faced with new concerns regarding social media and communication with witnesses, they should return to these basic principles and recall the Supreme Court's admonition that honesty is the most important guiding principle of the bar in New Hampshire.

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ENDNOTES

[1] In the remainder of this opinion, the Committee refers to this as a communication “in-name-only.”

[2] *See, e.g., Thomas v. Kuhlman*, 255 F. Supp. 2d 99, 107 (E.D.N.Y.2003); *Williams v. Washington*, 59 F.3d 673, 680-81 (7th Cir. 1995); *People v. Donovan*, 184 A.D.2d 654, 655 (N.Y. App. Div. 1992); *see also* American Bar Association Criminal Justice Standards, Defense Function §4-4.1.

[3] For the purposes of this opinion, an unrestricted page is a page which may be viewed without the owner’s authorization but which may require membership with the same social media service.

[4] “Facebook by the Numbers: 1.06 Billion Monthly Active Users,” available online.

[5] San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion 2011-2; NY Bar Ethics Op. #843 (9/10/2010).

[6] San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion 2011-2; Phil. Bar Assoc., Prof. Guidance Comm., Op. 2009-02.

[7] Pursuant to ABA Ethics Opinion 11-461, a lawyer may advise a client regarding the client’s right to communicate directly with the other party in the legal matter and assist the client in formulating the substance of any proposed communication, so long as the lawyer’s conduct falls short of overreaching. This opinion has engendered significant controversy because, according to some critics, it effectively allowed the lawyer to “script” conversations between the client and a represented opposing party and prepare documents for the client to deliver directly to the represented opponent. For a more complete discussion, see Podgers, On Second Thought: Changes Mulled Re ABA Opinion on Client Communications Issue, ABA Journal (Jan. 1, 2012), available online (last accessed May 22, 2013). The Committee takes no position on this issue and cites the opinion solely to illustrate the point that the client may independently obtain and share information with the lawyer, subject to certain constraints.

[8] In contrast to this opinion, the Philadelphia opinion does not find a violation of Rule 4.3.

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THE SEDONA CONFERENCE® COOPERATION PROCLAMATION

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The Sedona Conference® launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a "just, speedy, and inexpensive determination of every action."

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.

With this Proclamation, The Sedona Conference® launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

Cooperation in Discovery is Consistent with Zealous Advocacy

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests - it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.

The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian.[1] It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.

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[1] Gartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, 1D# G00148170, (April 20, 2007), at http://www.h5technologies.com/pdf/gartner0607.pdf . (While noting that "several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it 'utopian'", one of the "take-away's" from the program identified in the Gartner Report was to "[s]trive for a collaborative environment when it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.").

Cooperative Discovery is Required by the Rules of Civil Procedure

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, "discovery" was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the Federal Rules specifically focused on discovery of "electronically stored information" and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of production, and assertions of privilege. Beyond this, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith.

Courts see these rules as a mandate for counsel to act cooperatively.[2] Methods to accomplish this cooperation may include:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;
2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
3. Jointly developing automated search and retrieval methodologies to cull relevant information;
4. Promoting early identification of form or forms of production;
5. Developing case-long discovery budgets based on proportionality principles; and
6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

The Road to Cooperation

It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly, and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a long-held "hide the ball" mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the best-intentioned to wonder if "playing fair" is worth it.

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[2] See, *e.g., Board of Regents of University of Nebraska v BASF Corp.* No. 4:04-CV-3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. [citations omitted]. If counsel fail in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.").

This "Cooperation Proclamation" calls for a paradigm shift for the discovery process; success will not be instant. The Sedona Conference® views this as a three-part process to be undertaken by The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1):

> Part I: Awareness - Promoting awareness of the need and advantages of cooperation, coupled with a call to action. This process has been initiated by The Sedona Conference® Cooperation Proclamation.
>
> Part II: Commitment - Developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding. This will take the form of a "Case for Cooperation" which will reflect viewpoints of all legal system stakeholders. It will incorporate disciplines outside the law, aiming to understand the separate and sometimes conflicting interests and motivations of judges, mediators and arbitrators, plaintiff and defense counsel, individual and corporate clients, technical consultants and litigation support providers, and the public at large.
>
> Part III: Tools - Developing and distributing practical "toolkits" to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency. Components will include training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; court-annexed e-discovery ADR with qualified counselors and mediators, available to assist parties of limited means; guides for judges faced with motions for sanctions; law school programs to train students in the technical, legal, and cooperative aspects of e-discovery; and programs to assist individuals and businesses with basic e-record management, in an effort to avoid discovery problems altogether.

Conclusion

It is time to build upon modern Rules amendments, state and federal, which address e-discovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our "officer of the court" duties demand no less. This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a "just, speedy, and inexpensive determination of every action" and the fundamental ethical principles governing our profession.

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Oklahoma

Hon. Robert E. Bacharach
U.S. District Court for the Western District of Oklahoma
Oklahoma City

Hon. Robin J. Cauthron
U.S. District Court for the Western District of Oklahoma
Oklahoma City

Hon. Stephen P. Friot
U.S. District Court for the Western District of Oklahoma
Oklahoma City

Oregon

Hon. John V. Acosta
U.S. District Court for the District of Oregon
Portland

Hon. Dennis J. Hubel
U.S. District Court for the District of Oregon
Portland

Hon. Henry Kantor
Multnomah County Circuit Court
Portland

Pennsylvania

Chief Judge Donettta Ambrose
U.S. District Court for the Western District of Pennsylvania
Pittsburgh

Hon. Linda K. Caracappa
U.S. District Court for the Eastern District of Pennsylvania
Philadelphia

Hon. Joy Flowers Conti
U.S. District Court for the Western District of Pennsylvania
Pittsburgh

Judicial Endorsements

as of October 31, 2012 cont.

Hon. Jane Cutler Greenspan
Retired
Philadelphia

Hon. Lisa P. Lenihan
U.S. District Court for the Western District of Pennsylvania
Pittsburgh

Hon. Anthony Scirica
U.S. Court of Appeals for the Third Circuit
Philadelphia

Hon. Christine A. Ward
Allegheny Court of Common Pleas
Pittsburgh

South Carolina

Hon. Clifton Newman
South Carolina Circuit Court, At-Large
Kingstree

Tennessee

Hon. Joe B. Brown
U.S. District Court for the Middle District of Tennessee
Nashville

Hon. Diane K. Vescovo
U.S. District Court for the Western District of Tennessee
Memphis

Texas

Hon. Andrew W. Austin
U.S. District Court for the Western District of Texas
Austin

Hon. Letitia Clark
U.S. Bankruptcy Court for the Southern District of Texas
Houston

Hon. Sidney Fitzwater
U.S. District Court for the Northern District of Texas
Dallas

Hon. Martin Hoffman
68th Civil District Court
Dallas

Hon. Martin L. Lowy
101st Civil District Court
Dallas

Hon. Maryrose Milloy
U.S. District Court for the Southern District of Texas
Houston

Hon. Nancy S. Nowak
Retired
San Antonio

Washington

Hon. James P. Donohue
U.S. District Court for the Western District of Washington
Seattle

Hon. Barbara Jacobs Rothstein
U.S. District Court for the Western District of Washington
Seattle

Hon. Karen L. Strombom
U.S. District Court for the Western District of Washington
Seattle

Judicial Endorsements

as of October 31, 2012 cont.

Wisconsin

Chief Justice Shirley Abrahamson
Wisconsin Supreme Court
Madison

Hon. Aaron E. Goodstein
U.S. District Court for the Eastern District of Wisconsin
Milwaukee

Hon. Richard J. Sankovitz
Milwaukee County Circuit Court
Milwaukee