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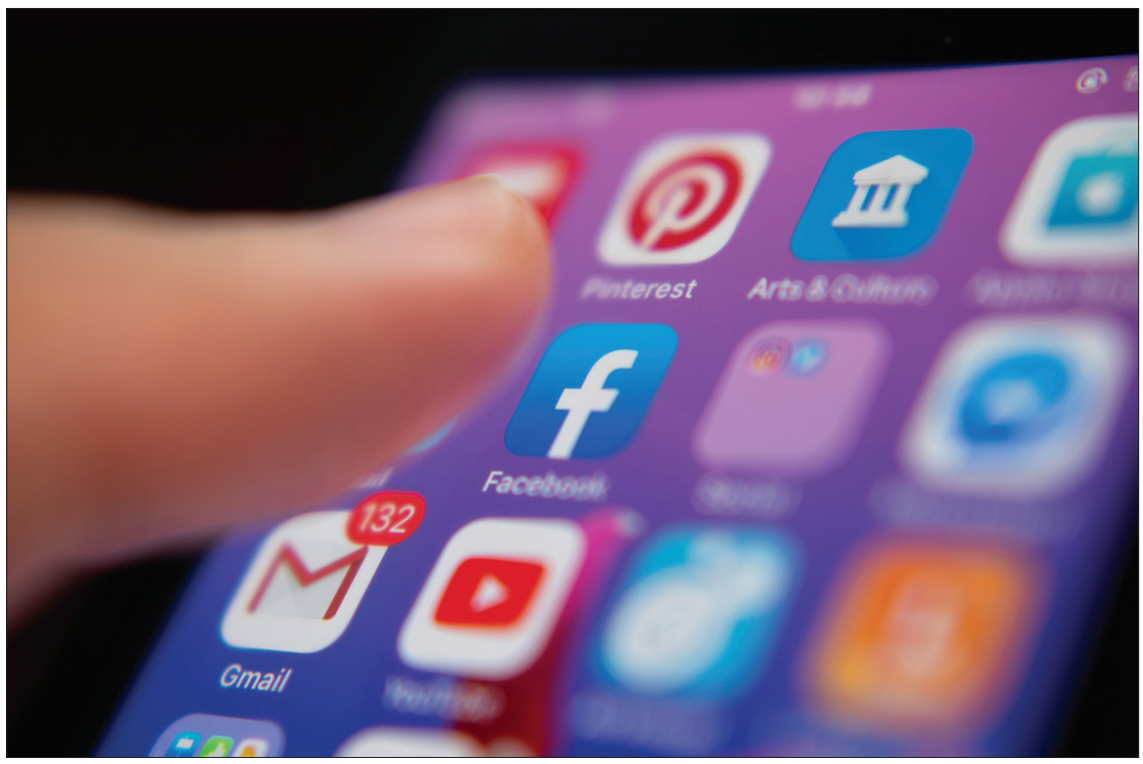
Ethics Committee Advisory Opinion #2019-20/03

Juror Investigation Using Social Media

ABSTRACT:

Under Rule 3.5, a New Hampshire lawyer may review a juror's public social media presence online but may not contact the juror and must avoid any notification that the juror's social media platform has been accessed by the lawyer. While a lawyer must exercise care, a review of a juror's social media presence may be ethically required in providing competent representation under Rule 1.1.



ANNOTATIONS:

Under Rule 3.5, a lawyer may review the social media platforms of jurors before and during trial but may not reach out to make contact with the juror.

A lawyer must avoid any communication with the juror, including any automatic notification that his or her social media page is being accessed by a lawyer on the case.

The practice of reviewing a juror's online presence is an important part of current day trial work and in many instances could be required in providing competent representation. *See* NH Rule of Professional Conduct Rule 1.1.

Juror Investigation Using Social Media

A competent lawyer in today's culture of over-sharing on social media will rightly consider when and how to research jurors online. This research can be vital both before jury selection and throughout the duration of trial. This opinion addresses the ethical considerations in this area.

Our starting point in analyzing the issue is Rule 3.5. The Rule prohibits *ex parte* contact with a juror during a proceeding unless specifically authorized by law or a court order. *See* Rule 3.5 (a) and (b).1 Note that this prohibition is distinguished from contact with a juror after the proceeding. *See* Rule 3.5 (c). An access request through social media (friend request, request to connect, etc.) sent by a lawyer to a juror is considered a "communication" prohibited by the rule. *See* "Lawyer Reviewing Jurors' Internet Presence", ABA Formal Opinion 466. Finally, Rule 8.4 (a) extends these limitations to anyone acting on the lawyer's behalf, such as an investigator.

While proactive communication, including a request for access to a social media page, is prohibited, a lawyer is not prevented from viewing online information regarding a juror that is publicly available. *See* ABA Formal Opinion 466 at pg. 4. By analogy, while driving past a juror's house to gather publicly available information about the juror is permissible, knocking on the door and asking to look into the house is not. *Id.*

The question of what constitutes a "communication" is more complicated. Jurisdictions are conflicted as to whether automatically generated notifications from a social media platform to a juror constitute communication and therefore objectionable contact with the juror. *See* NYSBA "Social Media Ethics Guidelines", pg. 34 (June 2019).

The ABA, the Colorado Bar Association and the DC Bar hold the view that the automatic notification is triggered by the social media platform and therefore is not a communication from the lawyer to the juror. *Id*.

Instead, it is a communication between the platform and the juror and therefore not prohibited under the rule. *Id*.

In contrast, the NY City Bar concluded that even an automatic notification sent by a social media platform *could* be a communication particularly if the lawyer knew that the automatic notice was going to be sent. *See* NYCBA, Formal Op. 2012-2 (2012). At least one federal jurisdiction has concluded that there is no recognized right to view the social media platform of a juror and doing so could threaten a juror's willingness to participate in the democratic process. *See* "*Voir Dire* Becomes *Voir Google*: Ethical Concerns of 21st Century Jury Selection", (ABA February 18, 2016)

The Committee adopts the latter position. In the Committee's view, any notification of a lawyer's access to a juror social media platform, even if it is sent via an automated website notification, is a violation of the Rules. It is a lawyer's obligation to understand what "footprint" the lawyer's access is leaving behind for the juror, particularly in light of the risk to a juror's sense of security when participating in the trial process. For example, if a lawyer is using LinkedIn to view publicly available information about a juror, the LinkedIn service will automatically send a notice to the juror that someone has viewed the page. Whether or not the identity of the viewer is visible to the juror depends on the settings of the viewer's account. A competent lawyer will be familiar with the notification settings of a social media platform before researching a juror. See Rule 1.1, ABA comment 8 (a competent lawyer should remain "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology").

Notably, there is elevated risk presented by inadvertent contact with a juror *during* trial versus contact with a juror *before* the juror is seated. While objectionable contact during the selection process could cause disqualification of one juror, objectionable contact during the trial could cause a mistrial. *See* NYCBA Formal Opinion 2012-2 (2012). It is advisable to speak to the client about the risks and benefits of juror investigation at each stage in the case. Depending on the case, particularly if the jury is seated and the evidence has begun, it may be strategically prudent to not engage in any jury investigation through social media.

A lawyer viewing jurors' online presence should also be aware of the requirement to report fraud by a juror if discovered. NH Rule of Professional Conduct Rule 3.3 (b)) states:

> *A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.*

Significantly, Rule 3.3 (b) does not include an exception in situations where disclosure of the information you encounter is to the disadvantage of your client. For example, defense counsel may find that a juror seated on a domestic violence case has written lengthy columns on a public social media platform regarding his belief that victims in domestic violence cases typically exaggerate abuse. This information was not disclosed during *voir dir*e. While clearly indicative of a juror favorable to the client, the information would need to be turned over to the court and could risk a mistrial. The current language of Rule 3.3 (b) also supersedes prior guidance from this Committee relating to a lawyer's obligation to report fraud committed by third party non-clients. *See* Rule 3.3 (b), comment 3.

Conclusion:

The Committee stresses that vigorous juror research can be an important element of trial strategy. However, a careful balance must be struck that avoids unethical contact with the juror while still providing appropriate access to the wealth of public information available. This information not only educates the lawyer on the jury generally, it could lead to discovery of juror misconduct. *See Sluss v. Commonwealth*, 381 S. W. 3d 215 (KY. 2012)(where post trial, it was revealed that two of the jurors were Facebook "friends" with the victim's mother and did not provide this information during *voir dire*.); *see generally* "*Voir Dire* Becomes *Voir Google*: Ethical Concerns of 21st Century Jury Selection." (ABA February 18, 2016)

A lawyer should consider the following practical points when deciding how or whether to investigate the public online presence of a juror:

- Familiarize yourself with the notification system of the specific online platform you intend to use. Does the online platform provide an automatic notification of public "views" to the juror? If so, consider whether it is possible to block the viewer's identity to prevent the risk of a report of intimidation if the juror recognized the person viewing the public page.
- Speak to your client about the risks and benefits of investigation via social media. Explaining the risk of a mistrial at certain stages of litigation may convince the client that the risk is not worth the benefit.
- Consider whether you should ask the judge to notify the jurors that the lawyers are permitted to view public facing information on social media. This would help reduce the damage to your client if a juror did find out that you had viewed their information.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 3.5
Rule 3.3
Rule 1.1

SUBJECTS:

Competence
Impartiality and Decorum of the Tribunal
Juror Contact

Duty to Report Fraud

BY THE NHBA ETHICS COMMITTEE

- *This opinion was submitted for publication to the NHBA Board of Governors at its June19, 2020 meeting.*

1. This ethical rule is consistent with the procedural rules that limit contact with jurors. See NH Rules of Civil Procedure 38 (e), NH rules of Criminal Procedure 28 (a) and Superior Court Administrative Order 2016-006 (requiring a motion to obtain juror contact information). Note that the procedural rules specifically authorize the Court to issue sanctions and protective orders as necessary for violations.

Ethics Committee Advisory Opinion #2005-06/03
Obligation to Provide Electronic Material

ABSTRACT:
Lawyers are obligated to transfer the client's complete file, including all electronic communications and documents, to successor counsel upon the client's request.

ANNOTATIONS:
The client file is the client's property.

The client's file includes all tangible materials, including writings, photographs, video recordings, and electronic communications.

The client's file must be transferred to successor counsel upon the client's request so as to avoid prejudice to the client's interests.

NH RULES OF PROFESSIONAL CONDUCT:
NHRPC 1.0(n)
NHRPC 1.15 NHRPC 1.16

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:
2015-16/05 – Client File Retention

OPINION

I. QUESTION PRESENTED:

Does a law firm have the obligation to relinquish all electronic communications and electronic documents maintained in the firm's computer network concerning its representation of former clients to an attorney who has left the firm and who will continue to represent the clients in a different law firm?

II. FACTUAL BACKGROUND:

An attorney is leaving the present law firm for another firm and will continue to represent certain clients whose paper and electronic files are held by the present law firm. The present law firm is turning over all of the paper files pertaining to its former clients, including paper copies of emails that had been placed in the files. The attorney has requested copies of all e-mail communications and electronic documents on the firm network that pertain to those clients, as well.

III. ANALYSIS:

This inquiry concerns whether a law firm has the obligation to relinquish all electronic communications and documents concerning a client in its representation of that client to an attorney who is leaving the law firm and who will continue to represent the client. The firm is already in the process of turning over all hard copy files for those clients and asks whether it can avoid organizing thousands of electronic items in the lawyer's "inbox" and "sent items" folders and whether any prejudice to the client would result if only hard copy items are provided.

The New Hampshire Supreme Court has held that the contents of a client's file belongs to the client and that, upon request, an attorney must provide the client with the file. *Averill v. Cox*, 145 N.H. 328, 339 (2000). Moreover, Rule 1.16(d) of the New Hampshire Rules of Professional Conduct provides among other things that, upon termination of representation, a lawyer must "take steps to the extent reasonably practicable to protect a client's interests," such as "surrendering papers and property to which the client is entitled." *See also* Rule 1.15 (Safekeeping Property).

Assuming that the attorney has requested the client's file for and on behalf of the client, there are two issues that should be addressed: (1) does the client's file include electronic communications and documents within the law firm's computer network and (2) is the law firm obligated to provide all of the electronic communications and documents that exist on the computer network at the time of the request without regard to factors other than the client's request that they be provided.

With regard to the first issue, the contents of a client's file would necessarily include both paper and electronic forms of communications, documents and other records pertaining to the client. The *New Hampshire Rules of Professional Conduct* define "writing" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communication." *N.H. R. Prof. Cond.* 1.0(n). This rule reflects that, with increased reliance on electronic communications and records in the practice of law, it is reasonable to assume that a client's file can include electronic communications, such as emails, as well as electronic versions of documents filed on behalf of a client. Thus, the mere existence of a paper file does not necessarily allow a firm to automatically exclude from the client's file electronic communications and other computer-based writings.

Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. *See Averill* at 339-40. That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.

Similarly, the firm should take into account whether it has adequately notified this or other former clients of any file destruction policies followed by the firm with regard to both electronic and paper files.

SUBJECTS:
Client file
Document retention
Successor counsel

• **By the NHBA Ethics Committee** *This opinion was submitted for publication to the NHBA Board of Governors at its January 19, 2006.*

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

ABSTRACT:

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. 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.

ANNOTATIONS:

Merely viewing a Facebook's user's unrestricted Facebook page or following a Twitter user's public feed is not a "communication" as contemplated by Rules 4.2 and 4.3, and is, therefore, permissible.

It is not permissible under Rules 4.1, 4.2, and 4.3 for a lawyer to ask a witness's permission to view non-public, restricted social media information unless the witness is unrepresented and such request correctly identifies the lawyer and informs the witness of the lawyer's involvement in the disputed or litigated matter.

It is not permissible under Rules 4.1, 4.2, 4.3, 5.3, and 8.4(a) for a lawyer's investigator or other non-lawyer to send a Facebook friend request or ask an unrepresented witness's permission to follow a restricted Twitter feed unless the non-lawyer assistant identifies the assistant, the lawyer, the client, and the cause in litigation.

Under Rule 4.1, a lawyer may not send a Facebook or Twitter request to access restricted information by using a false name or by logging into someone else's account and pretending to be that person.

Under Rules 8.4(a) and 5.3, a lawyer may not direct a client to send a Facebook friend request or request to follow a restricted Twitter feed in order for the lawyer to view the information therein.

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.

Deceit is improper, whether it is accomplished by providing information or by deliberately withholding it. Rule 4.1

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

SOCIAL MEDIA *continued on page IV*

Social Media from page III

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, using the 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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Strutin, Social Media and the Vanishing Points of Ethical and Constitutional Boundaries, 31 Pace Law Review 228 (Winter 2011)

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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," https://www.cnet.com/news/facebook-by-the-numbers-1-06-billion-monthly-active-users/.

[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.

NH RULES OF PROFESSIONAL CONDUCT:

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

By the NHBA Ethics Committee

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

Ethics Corners

Lawyers & Texting: Part I

Competence and Communication Rules

Dear Ethics Committee,

I have been asked by several clients to use text messaging as my main method to communicate with them. My cell phone has texting ability and it is not a huge issue for me to communicate in this way with my clients if that is what they want. However, is this a permissible method of communication under the NH Rules of Professional Conduct?

Answer: You are correct to consult the rules regarding client communication. Rule 1.4 deals specifically with Client Communications, and requires that a lawyer (1) promptly inform the client of any decision or circumstances that requires the client's informed consent, (2) reasonably consult the client about the means by which their objectives are to be accomplished, (3) keep the client reasonably informed of the matter, (4) promptly comply with reasonable requests for information, and (5) consult with the client about any relevant limitation on the lawyer's conduct. The second part of rule 1.4 focuses on the attorney's obligation to explain the legal and practical aspects of a matter and, as necessary, to explain the alternative courses of action available to the client. The purpose of this section of the rule is to allow the client to make informed decisions regarding the representation. However, the rule specifies no particular method of communication.

The methods of communication implicate Rule 1.6, which requires that all information relating to the representation of the client be kept confidential, subject to limited exceptions. In addition, the Ethics Committee Comment to Rule 1.1, requires that a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer, and benefits and risks of technology lawyers are similarly using. Finally, the attorney should consider the possibility that privilege might be waived if third parties have access to the text messages on the client's device. For example, text message notifications that include the names of the sender (if accepting text messages from clients) or notification messages that preview the content of messages should be disabled to ensure that inadvertent disclosure does not occur.

The thrust of these rules is that the attorney should use means of communication consistent with their obligation to maintain the confidentiality of client information, and to ensure the client is reasonably informed of the risks of the various modes of communication the attorney might employ. In the case of text messaging, the attorney may wish to confirm that the client, and only the client, has access to the device. The attorney might also encourage the client to use text messages for only limited purposes, such as scheduling and confirming appointments, in order to avoid risks of disclosure.

Text messaging also implicates issues related to file retention and spoliation. A lawyer must retain client communications as part of the client's file and text messages are part of the client's file. Issues related to file retention were discussed in *Ethics Committee Advisory Opinion #2015-16/05* (See also an additional 2015 Ethics Corner on Texting and File Retention at: https://www.nhbar.org/resources/ethics/ethics-corner-practical-ethics-articles/2015-12). File retention and spoliation and the application of the rules to text messages will be addressed in additional separate upcoming Ethics Corner articles.

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Lawyers & Texting: Part II

Confidentiality and Privilege (Waivers)

Dear Ethics Committee,

I recently started representing a young woman who was arrested on a DUI charge. She texted me and asked me when her arraignment was and what she could expect at that hearing. I sent her an email back reminding her of the time and briefly explained what would happen. Later that day, she called me at my office very distraught. She said that her mother had seen my response because they share a computer and had read the email. I think I have straightened things out with my client, but what should I do to avoid this in the future?

Answer: You have to balance many things when being responsive to clients: your obligations to promptly communicate with them (N.H. R. of Prof. Cond. R. 1.4), your obligation to maintain confidentiality (N.H. R. of Prof. Cond. R. 1.6), your obligation to stay abreast of the risks and benefits of technology (N.H. R. of Prof. Cond. R. 1.1) and the importance of maintaining the attorney-client privilege.

In recent years, there has been an explosion of new ways to communicate with clients. These include conference calls, emails, video conferencing, and text messaging. Regardless of the form of communication, you should always focus on maintaining the confidentiality of your client's information and the communication.

You should carefully consider how you communicate with your clients and how they communicate with you. At your initial client consultation, you might consider discussing how to communicate with a new client and what type of information will be shared in what forms of communication. For instance, some information might be best communicated in an email, other information in a letter, and some information might be appropriate for a text message. You should discuss and be aware of your client's circumstances and how those circumstances might impact your ability to confidentially communicate. You should discuss the risks and benefits of the various forms of communication so that the client can make informed choices in how the communications will occur.

One thing to remember is that certain devices have settings which may increase or decrease the likelihood of a confidential communication being disclosed to a third party. Competence and Communication Rules, a recent Ethics Corner, has a discussion of this issue.

If you plan on using email in your communications, you might want to discuss who might have access to your client's email and what devices can access those email accounts. Some people share devices with stored login information so that they do not have to enter that information each time they want to access their email. You should discuss what this might mean for the confidentiality of your communications.

Depending on the circumstances, you might suggest that the client create a new email account to ensure that no third party has access to your communications and that the client be careful with that login information. Sometimes family members or significant others want to be involved in communications and kept informed as a matters progress.

You should always remind clients that involving a third party puts the attorney-client privilege at risk, destroying it if that third party is not necessary for the communications between you and your client. *See Prof. Fire Fighters of N.H. v. N.H. Local Gov't Ctr.,* 163 N.H. 613, 615 (2012)(discussing when reasonable precautions must be taken to maintain attorney-client privilege); N.H. R. of Evid. R. 502(a)(5).

Lastly, you might remind clients to be careful with their devices, as the client in your question might inadvertently waive privilege by not exercising the appropriate care. Technology has enabled you to better serve your clients' needs and keep them informed. But, you should always remember the risks that go along with those benefits.

— The NHBA Ethics Committee

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Lawyers & Texting: Part III

Part III: Texting and File Retention

Dear Ethics Committee,

About two years ago, I began using text messaging as a convenient way to communicate with my clients. I am about to replace my cell phone; do I have a professional obligation to preserve the client-related text messages stored on my old phone?

Answer: Client communications transmitted via text message are likely to be considered documents[1] relating to a client representation that must be safeguarded and included in the client file. Restatement (Third) of The Law Governing Lawyers § 46(1) (2000) (hereinafter "Restatement"). The Restatement view further provides that for as "long as a lawyer has custody of [client] documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them." *Id*. § 46 cmt. (b). Additionally, clients may, at any time, request to inspect their client file or take delivery of originals and copies of documents related to their representation. *Id*. § 46(3); *see also* N.H. R. Prof. Cond. 1.4(a)(4); 1.15(a); and 1.16(d). Indeed, should a client request information from counsel that is only available in a series of text messages stored on the attorney's mobile phone, the client is, nevertheless, entitled to that information and the attorney must promptly produce it. *E.g.*, N.H. R. Prof. Cond. 1.4(a)(4); Restatement § 46(2); and *Richmond's Case*, 153 N.H. 729, 740 (2006) (Discipline appropriate where attorney failed to promptly comply with the client's requests for information and documents related to the client's representation).

Model Rule 1.15 imposes upon attorneys a duty to safeguard client property. Importantly, the client file may be regarded as part of the client's property, and subject to Rule 1.15(a), which provides in part that "[a]ll client and third party property shall be identified as such and appropriately safeguarded."

In addition, Rule 1.16(d) provides that upon termination of representation, an attorney must take steps to the extent reasonably practicable to protect the client's interests, including surrendering papers and property to which the client is entitled. It is generally understood that the client's file belongs to the client and that the client is entitled to obtain the file upon request. *E.g.*, *Averill v. Cox*, 145 N.H. 328 (2000); N.H. Ethics Committee, Advisory Op. 2015-16/5 (2015). Although the Model Rules do not define the terms "client file" and "papers and property to which the client is entitled" materials maintained in electronic format are generally considered to be part of the client file, and subject to retention and turnover requirements to the same extent as hard-copy documents. N.H. Ethics Committee, Advisory Op. 2005-06/3 (2005).

Due to their transient and temporary nature, text messages pose special challenges to file retention. Attorneys using or planning to use text messaging for client communication should consider developing formal policies and procedures governing the content, use, and retention of those text messages. When developing policies and procedures, attorneys should keep in mind their professional obligations under Rule 1.1, to maintain sufficient knowledge and skill with the mobile telephone and texting technologies they choose to use to communicate with their clients. *See* N.H. R. Prof. Cond. 1.1 cmt. (8). Policies and procedures governing text messaging should also provide for the protection of confidential client information, the security of the mobile telephones and software platforms used to send, receive, and store client text messages, and the extent to which those messages may communicate significant information. *See*, N.H. R. Prof. Cond. 1.6 cmt. (18) and cmt. (19). Attorneys should also consider updating their communication response policies to include guidelines for promptly responding to all client text messages. *See* N.H. R. Prof. Cond. 1.4 cmt. (4).

Attorneys may wish to consider investing in technology for the easy retrieval of text messages from their mobile telephones and the conversion of those retrieved text messages into a form easily includable in their clients' files. There exist several applications and third-party computer programs that can be utilized to convert text messages into a useable format. Also, it is possible, although cumbersome, to take a screenshot of a text message that can be transmitted and saved as a distinct document in the client file. Another alternative may be to prepare a memo summarizing a group of text messages and saving that summary to the file.

Similar to client communications transmitted via traditional methods (*e.g.*, email, facsimile, mail, and courier service), text message communications with clients are likely to be considered documents relating to a client's representation and to be the property of the client. As such, New Hampshire attorneys must safeguard and include client text messages in the client's file and be prepared to produce them in a usable form promptly upon a client's request.

— By the NHBA Ethics Committee

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[1]. The Restatement defines a document to be safeguarded as any "writing, drawing…, photograph…, or other form of data compilation." Restatement § 46 cmt. (a).

Lawyers and Texting: Part IV

Text Messages and Spoliation

Dear Ethics Committee,

I understand that many of my clients use texting as a primary source of communication in their day-to-day lives. What concerns, if any, should I have relative to the preservation of these text communications under the NH Rules of Professional Conduct when civil litigation is pending or reasonably foreseeable?

Answer: Texting is popular and widespread among individuals and businesses alike. Although these communications are often informal and easily discarded, when civil litigation is pending or foreseeable, to avoid sanction and other issues relative to the destruction of evidence, it is important for attorneys to instruct their client to preserve these communications. Please note that this opinion does not address the application of the NH Rules of Professional Conduct as applied in the criminal law context, as that analysis must be considered in conjunction with a defendant's Fifth Amendment rights.

Rule 3.4 of the Rules of Professional Conduct addresses an attorney's obligation to preserve evidence. Rule 3.4(a) states a lawyer shall not "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." The ABA comment to the rule provides further guidance in understanding its scope. It states that:

"The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

An attorney's obligations under Professional Conduct Rules 3.4 are straightforward with respect to the unlawful conduct referenced in the rule. However, in our world of ever-advancing technology, it is important for attorneys to recognize that all electronically stored information ("ESI"), which includes text messages, is subject to Rule 3.4. In addition, attorneys should likewise be mindful of Rule 1.1 relative to competence. Under this Rule, attorneys should note that when evidence is not preserved, they may also be subject to discipline under Rule 1.1.

In the civil context, the common law rule in New Hampshire is that "all parties are under an obligation to preserve documents and records from the time that the party is reasonably on notice that a document or record may become evidence or be subject to discovery in a lawsuit." *N.H. Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 428 (2009). The duty to preserve extends to "any documents or tangible things . . . likely to have discoverable information that the disclosing party may use to support its claims or defenses." *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (citations omitted).

Where destruction of evidence in a civil case occurs, spoliation may come into play. Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *see e.g. N.H. Ball Bearings, Inc.*, 158 N.H. at 433. If spoliation is found to have occurred, the court may instruct that an adverse inference be issued against your client's interests. *Id.*

In a recent civil case involving spoliation of text communications, a Federal District Court in New York granted a party's motion for an adverse inference due to the opposing party's failure to preserve text messages. *Ronnie Van Zant, Inc. v. Pyle*, 270 F.Supp.3d 656 (SDNY 2017). In *Ronnie Van Zant, Inc.*, the opposing party primarily communicated by sending text messages about the issue subject to litigation. The party failed to preserve those communications upon purchasing a new phone after litigation ensued, and the court ruled that this "evince[d] the kind of deliberate behavior that sanctions are intended to prevent and weigh in favor of an adverse inference." *Id*. at 670.

In addition, attorneys should be mindful that under New Hampshire's criminal code, a person "commits a class B felony if, believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted [the][person] . . . [a]lters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation. . . ." RSA 641:6. Both clients and attorneys engaging in this conduct could be subject to prosecution, and, attorneys could be further subjected to sanctions under Rule 3.4.

In an effort to avoid sanctions under Rules 3.4 or 1.1, civil attorneys should notify their clients in writing by sending a preservation letter upon engagement in any matter where litigation is pending or reasonably foreseeable, or where investigation is pending or about to be instituted. The letter should state the client's obligation to preserve all records, documents, other information, and all ESI, which includes text messages. Clients should also be cautioned not to alter, delete, destroy, conceal, or otherwise remove any records and documents, including ESI, which the client may have in their possession regarding such matters.

By the NHBA Ethics Committee

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Can Lawyers Respond to False Accusations Online?

New Hampshire Bar News – February 19, 2014

Dear Ethics Committee,

Every two weeks, my administrative assistant searches my name online. Yesterday, she discovered a troubling post on the lawyer review site, Avvo. A client I represented at an administrative hearing posted a scathing review. The client wrote that I took her money ($2,500) for a hearing that I knew I could not win. This is simply not true. In fact, the client lied to me when we met.

Based on her statements and the tight time limit, I filed the appeal. After reviewing the file, I concluded that she had virtually no chance of winning the appeal and informed her of my opinion. She requested that I go forward anyway. I did not put on certain testimony that was not accurate, but still made the best case I could. Not surprisingly, we lost. I refused her demand that I return the fee, told her that I had done an effective job at the hearing in light of the facts, and pointed out that I had put in many more hours than I billed.

I want to post a reply with the facts above, but my partner says this might violate my duty of confidentiality. I can't believe that he is correct, but told him I would contact the Ethics Committee to find out. I recall from law school that I have a right to defend myself. Please advise.

Answer: Given the increasing importance of online rating services to prospective clients, this is a timely question. However, the Committee urges extreme caution should you decide to respond. For example, earlier this year, Illinois disciplinary counsel filed a complaint claiming that a lawyer's response to a negative website posting violated Illinois' version of Rule 1.9(c)(2) by disclosing confidential information without meeting one of the exceptions in Rule 1.6. The Illinois lawyer asserted that his conduct was authorized by the self-defense exception of Rule 1.6.

New Hampshire Rule of Professional Conduct 1.6(b)(3) provides that a lawyer may reveal confidential information to the extent that he or she reasonably believes necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client." The New Hampshire Rule and your questions raise two significant issues. First, there is a difference of opinion over whether there must be a pending or foreseeable formal "proceeding" before a lawyer may reveal confidential information to defend against public allegations made by a client, such as those posted on the lawyer rating website. Many leading legal ethicists read Rule 1.6 strictly in light of the importance of client confidentiality and suggest that a proceeding must have been commenced or foreseeable before confidences may be disclosed. See **www.legalethicsforum.com** (last visited Sept. 23, 2013).

The ABA has also issued an opinion, in the context of ineffective assistance of counsel, which strictly limits permitted defensive disclosures by the lawyer to those that are made in a judicial proceeding. ABA Formal Opinion 10-456 (July 14, 2010).

In *Louima v. City of New York*, 2004 US Dist. LEXIS 13707 (2004) (which was decided under rules that were based on the prior Code of Professional Responsibility and not the Model Rules), the court stated, "mere press reports regarding an attorney's conduct do not justify disclosure of a client's confidences and secrets, even if the reports are false and the accusations unfounded."

On the other hand, Section 64(e) of the Restatement (Third) of the Law Governing Lawyers takes the opposite position and states that "[w]hen a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response."

Arizona Ethics Op. 93-02 (1993) agreed that a client established a controversy with a lawyer, sufficient to trigger the self-defense exception, by telling an author writing a book about the client's murder conviction that counsel was incompetent and conspired with prosecution. In addition, the ABA Comment [10] to Model Rule 1.6 states that a lawyer may respond "to the extent the lawyer reasonably believes necessary to establish a defense" to a "legal claim or charge" that "alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer" and that the "lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5)[New Hampshire's section (b)(3)] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."

We have no guidance as to how our New Hampshire Supreme Court would interpret the scope of the actions or proceedings that are necessary to justify a lawyer's disclosure of confidential information in self-defense. Regardless of how one resolves that issue, however, there is a second issue that you must address.

Rule 1.6 only allows disclosure of confidential information that is necessary to such a defense. Disclosure of much of the information that you suggest, while effective in rebutting the allegations, is not absolutely necessary. The response of Avvo's General Counsel to the question of how far an attorney is authorized to go to defend herself is helpful. He wrote: "As I often tell attorneys, there are very effective ways to respond to negative reviews that don't involve saying anything about the case and risking disclosure of client confidences. It's less important to 'set the record straight' than it is to communicate that the lawyer is responsive, professional and takes client feedback seriously." **www.legalethicsforum.com** (last visited Sept. 23, 2013). In light of the uncertainty over whether there must be a formal proceeding before a lawyer may disclose confidential information in self-defense, this advice seems particularly insightful.

One possibility to address what you feel is an injustice would be to file an action for defamation against your client. This would bring the matter clearly within the exception to the Model Rules. However, the standards of proof, cost, and other concerns may make this an unrealistic option.

The Committee notes that, while your inquiry relates to a web posting, the analysis in this response applies equally to other forms of public communication, such as newspapers, books, or oral comments. The Committee also observes that the issues raised by your inquiry would not be avoided by replying to your client's allegations anonymously.

In light of the above, the Committee believes that, while you may be permitted to make some sort of limited response to your client's postings, you are not authorized to make the disclosures that you propose. We urge you to consider the advice offered by Avvo's counsel prior to making any responsive disclosures.

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Listing 'Skills and Expertise' on LinkedIn

New Hampshire Bar News – June 21, 2013

Dear Ethics Committee,

I understand that LinkedIn is the leading social networking website for professionals. When I created my profile, and when I updated it, I had the option of identifying "Skills and Expertise" (up to 50 skill areas, using my own words). My law practice is limited to banking and insurance issues. Am I allowed to list "banking law" and "insurance law" under Skills and Expertise?

Answer: Yes, you may list your areas of practice under Skills and Expertise, so long as you are careful not to identify yourself as a specialist. Also, be mindful that LinkedIn sometimes changes its headings. The profile section now identified as "Skills and Expertise" used to be "Specialties," and listing your areas of practice as "Specialties" could be problematic.

Two of the New Hampshire Rules of Professional Conduct apply to this situation: Rule 7.1, Communications Concerning a Lawyer's Services, and Rule 7.4, Communications of Fields of Practice. Rule 7.1 prohibits a lawyer from making "a false or misleading communication about the lawyer or the lawyer's services." By way of explanation, and without limiting the generality of the prohibition, Rule 7.1 states that "a communication is false or misleading if it:

1. contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement, considered in light of all of the circumstances, not materially misleading;
2. is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
3. compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated."

Rule 7.4 allows a lawyer to "communicate the fact that the lawyer does or does not practice in particular fields of law." However, this rule prohibits a lawyer from stating or implying that the lawyer is a specialist, with three exceptions:

1. A lawyer admitted to engage in patent practice before the U.S. Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;
2. A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and
3. A lawyer who is certified as a specialist in a particular field of law by an organization that has been accredited by the American Bar Association may hold himself or herself out as a specialist certified by such organization.

In the context of LinkedIn, listing "banking law" and "insurance law" under Skills and Expertise – or better yet, including a statement in your summary description that you practice banking and insurance law – would fall within the communications allowed by Rules 7.1 and 7.4. You must be careful not to make a statement that creates unjustified expectations, and you must not state or imply that you are a specialist in either field unless you meet the criterion stated in Rule 7.4(c). Finally, you should review your profile periodically, whether on LinkedIn or other sites, to ensure that a change to the website has not caused an innocuous statement to become misleading.

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Guidance Offered on Posting to Listservs

New Hampshire Bar News – September 20, 2013

Dear Ethics Committee,

I am a solo practitioner who currently is representing one of several beneficiaries in a contentious, litigated estate administration involving a very prominent family in New Hampshire. I would like to seek assistance from fellow lawyers who may have expertise and knowledge of the specific issues presented in my case, by posting a hypothetical case scenario on the NHBA Elder Law, Estate Planning & Probate Law (ELEPP) Section Listserv. Can I do this?

Answer: A professional Listserv offers lawyers an economical and efficient forum in which to share and learn information about specialized practice areas. While a Listserv might provide easy access to information concerning case management approaches, professional referrals, and recent developments in the law, the online forum never should be used as a substitute for a lawyer undertaking legal research independently to establish his or her professional competency to handle a particular case.

It is not uncommon for a lawyer to discuss legal issues more specifically with colleagues and in some instances, obtain outside assistance from a fellow lawyer to provide effective client representation. Collaboration with colleagues generally is encouraged under Rule of Professional Conduct (RPC) 1.1(c)(4) (Competence), which states that a lawyer may "undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation."

Regardless of the method of communication the lawyer uses to consult with a colleague under RPC 1.1(c)(4), (e.g., in person versus Listserv), such discussions always raise concerns regarding a lawyer's duties to protect confidential client information under RPC 1.6 (Confidentiality of Information) and avoid potential conflicts of interest under RPC 1.7 (Conflicts of Interest) and 1.9 (Duties to Former Clients).

However, the use of a Listserv to communicate with other lawyers on a client-related matter is particularly fraught with risks, due to the public nature of the conversation. The lawyer simply cannot make information posted on a Listserv secure from unwanted interception or use either by a member of the Listserv or any individual who might receive the information by retransmission. Even if a Listserv is restricted to a private organization or group, you should always treat it as being potentially available to the public.

Posting a "hypothetical" question on a Listserv might seem innocuous and, at first blush, appear not to contain confidential client information protected under RPC 1.6.

However, the posting lawyer neither knows the identity of all prospective readers, nor what information a prospective reader already may have in his or her possession concerning the lawyer's client or the case at issue. Thus, even a Listserv posting that is loosely based on a client matter potentially may disclose, albeit unintentionally, client confidential information in violation of RPC 1.6.

RPC 1.6 mandates that (1) "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent[;]" (2) disclosure is otherwise impliedly authorized (see, RPC 1.6(a)); or (3) a specific exception to disclosure exists under RPC 1.6(b)). It is important to remember that "information relating to the representation of a client" is much more expansive than information received, in confidence, from the client. RPC 1.6 not only protects specific information related to the client representation, but also prohibits a lawyer from making more general statements, if the information disclosed might lead a third party to protected client information. ABA Comment 4 to Rule 1.6 specifically is relevant to the use of a hypothetical based on a client's case, and states:

"Paragraph (a) [to Rule 1.6] prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."

Obviously, the more case-specific facts that are included in a hypothetical inquiry posted on a Listserv, the greater the risk of disclosure of "information relating to the representation of a client," in violation of RPC 1.6. In your situation, the facts are extremely problematic, because your case involves a prominent family embroiled in existing and contentious estate administration litigation.

Should you attempt to craft an effective hypothetical to obtain guidance on your case, the facts posted very well could lead opposing counsel, if a member of the ELEPP Listserv, to discover confidential information pertaining to your client or the litigation. Before even considering posting an inquiry on a public Listserv, particularly one involving ongoing litigation, you should presume that opposing counsel subscribes to the Listserv and can and will use the information to the detriment of your client.

Your conduct in posting such a hypothetical on the Listserv may not only constitute a violation of Rule 1.6 on your part, but also may be extremely prejudicial to your client. Remember, Rule 1.6 is broadly interpreted and clearly covers any published information that could reasonably lead to protected client information.

There certainly are other options to a Listserv posting that you should consider. One would be consulting with your client to obtain his or her consent, as authorized by Rule 1.6(a), if the Listserv posting may contain case-specific facts in a hypothetical format that reasonably could result in the disclosure of confidential client information.

However, this consent only may be obtained from your client after you have communicated "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" necessary to fully comply with the requirements of an "informed consent" under Rule 1.0(e).

Certainly a safer approach to a Listserv posting would be to obtain your client's informed consent to speak directly with another lawyer for assistance, after ascertaining that no potential conflicts of interests exist. This latter option affords you the opportunity to control the recipient of the information and potentially obtain an agreement of confidentiality from the receiving lawyer to ensure that no information could be used to the detriment of your client.

In summary, while the ELEPP Listserv is a valuable and convenient forum in which to quickly and inexpensively share and discover information concerning specific practice areas, a participating lawyer always must weigh its effective use against any possible disclosure of client confidential information. In your situation, posting a hypothetical question on a Listserv, even a question loosely based on existing client litigation, could be extremely risky and is not recommended.

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About the New Hampshire Bar Association Ethics Committee

The Ethics Committee provides guidance to members of the New Hampshire Bar and Judiciary on issues and questions related to the Rules of Professional Conduct (RPC). The Ethics Committee seeks a wide variety of members from different geographic areas, practice areas, firm sizes, as well as attorneys practicing in both the public and private sector. While the Ethics Committee's primary focus is the members of the New Hampshire Bar and Judiciary, the Committee receives inquiries from all over the country, and even the world, on topics of current interest and previous publications. The Ethics Committee focuses on addressing questions from members of the New Hampshire Bar through informal communications like the Helpline, by proposing amendments to the RPC, and by rendering Opinions, Practical Ethics Articles and Ethics Corners on topics of interest relating to the RPC. Even though the Ethics Committee provides guidance, none of the publications are binding on the New Hampshire Supreme Court's Committee on Professional Conduct, and the Committee does not provide legal advice. Learn more: **www.nhbar.org/resources/ethics/**

Note: The Ethics Committee should not be confused with the N.H. Supreme Court Attorney Discipline Office (ADO) or the Professional Conduct Committee (PCC).