I. Ethical Issues Related to the Use of Technology

A. General Issues

Lawyers today face numerous ethical issues regarding their use of technology.

1. Lawyers’ general duty of competence in using technology
2. Email use and risks
3. Electronic document transmission (metadata)
4. Cloud computing
5. Electronic storage devices (from computers to copiers)
6. Websites, blogging, and internet advertising
7. Virtual practices in unauthorized jurisdictions
8. Social media (Twitter, Facebook, LinkedIn) and privacy
9. E-discovery
10. E-filing
11. Bitcoin and digital currency
12. Use of artificial intelligence (also known as cognitive computing)

B. The ABA and Virginia Rules of Professional Conduct expressly provide that lawyers’ general duties of competence and confidentiality extend to their use of technology.

1. ABA Model Rule 1.1: Competence

   Client-Lawyer Relationship

   Rule 1.1 Competence
   A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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

2. Virginia Rule 1.1: Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. . . . (emphasis added).

3. ABA Model Rule 1.6: Confidentiality of Information

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

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons 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. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may
warrant special precautions. Factors to be considered in
determining the reasonableness of the lawyer's expectation of
confidentiality include the sensitivity of the information and the
extent to which the privacy of the communication is protected by
law or by a confidentiality agreement. A client may require the
lawyer to implement special security measures not required by this
Rule or may give informed consent to the use of a means of
communication that would otherwise be prohibited by this Rule.
Whether a lawyer may be required to take additional steps in order
to comply with other law, such as state and federal laws that
govern data privacy, is beyond the scope of these Rules.

4. Virginia Rule 1.6: Confidentiality of Information
(d) A lawyer shall make reasonable efforts to prevent the
inadvertent or unauthorized disclosure of, or unauthorized access
to, information protected under this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to
discipline under this Rule if the lawyer has made reasonable efforts
to protect electronic data, even if there is a data breach, cyber-
attack or other incident resulting in the loss, destruction,
misdelivery or theft of confidential client information. Perfect
online security and data protection is not attainable. Even large
businesses and government organizations with sophisticated data
security systems have suffered data breaches. Nevertheless,
security and data breaches have become so prevalent that some
security measures must be reasonably expected of all businesses,
including lawyers and law firms. Lawyers have an ethical
obligation to implement reasonable information security practices
to protect the confidentiality of client data. What is “reasonable”
will be determined in part by the size of the firm. See Rules 5.1(a)-
(b) and 5.3(a)-(b). The sheer amount of personal, medical and
financial information of clients kept by lawyers and law firms
requires reasonable care in the communication and storage of such
information. A lawyer or law firm complies with paragraph (d) if
they have acted reasonably to safeguard client information by
employing appropriate data protection measures for any devices
used to communicate or store client confidential information.
To comply with this Rule, a lawyer does not need to have all the
required technology competencies. The lawyer can and more
likely must turn to the expertise of staff or an outside technology
professional. Because threats and technology both change, lawyers
should periodically review both and enhance their security as
needed; steps that are reasonable measures when adopted may
become outdated as well.

[21] Because of evolving technology, and associated evolving
risks, law firms should keep abreast on an ongoing basis of
reasonable methods for protecting client confidential information,
addressing such practices as:
(a) Periodic staff security training and evaluation programs,
including precautions and procedures regarding data security;
(b) Policies to address departing employee’s future access to confidential firm data and return of electronically stored confidential data;
(c) Procedures addressing security measures for access of third parties to stored information;
(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;
(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

C. The “Cloud” as an Illustration of Many Basic but Underappreciated Risks of New Technology

1. What is the “cloud”?
   a) “Cloud” computing, despite its ethereal sound, is simple: electronic data is stored and managed off site by a third-party vendor. Dean B. McCorry, With Cloud Technology, Who Owns Your Data?, 8 FED. CTLS. L. REV. 125, 129 (2014).
   b) Third-party providers, such as Google, can be thought of as virtual warehouses that have multiple computer servers spread around the world. See NICOLE BLACK, CLOUD COMPUTING FOR LAWYERS 2 (2012).
   c) A user saves money by storing data to the cloud and the data can be accessed anyplace, anywhere that an Internet connection can be found. See id.

2. The ethical risks of using the cloud.
   a) The risk of breaches of attorneys’ ethical duty of confidentiality and of the waiver of the attorney-client privilege.
   b) When information protected by the attorney-client privilege is voluntarily exposed to a third party, the privilege is waived.
   c) A third party can be hired as part of the lawyer team to preserve data, and it is generally accepted that using the cloud to store privileged information maintains the privilege so long as the attorneys exercise reasonable care. See, e.g., Elijah Yip & Martine E. Hsia, Confidentiality in the Cloud: The Ethics of Using Cloud Services in the Practice of Law, 18 HAW. B. J. 4-5 (Aug. 2014).
   d) The American Bar Association’s Commission on Ethics 20/20 addressed issues related to the manner in which lawyers can use the cloud. The Commission offered additions to ABA Model Rule 1.6, including that lawyers take “reasonable precautions” to protect confidentiality “when utilizing the increasingly popular technological innovations, such as social media and document storage data clouds.” ABA Commission on Ethics 20/20, available at https://www.americanbar.org/groups/professional_responsibility/c
In the 2012 amendments to Model Rule 1.6(c), the ABA adopted the recommendations of the Commission on Ethics 20/20. The rule as noted above provides: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Model R. Prof’l Conduct r. 1.6(c) (Am. Bar. Ass’n 2013).

The real question, of course, is what constitutes “reasonable efforts.” As one observer commented wryly, “Lawyers’ views of ‘reasonable’ depends on their awareness of the risks, which is still doubtful, and their awareness of the easily available security options.” Carol B. Preston, Lawyers’ Abuse of Technology, 103 Cornell L. Rev. 879, 925 (May 2018).

a) Although there are some ethics opinions that provide guidance, they are also not terribly specific and there is no guarantee lawyers will consult them. See id.

b) The lack of concrete standards for “reasonable care” is indeed a problem. See id.

c) Nevertheless, there are indeed a number of steps a lawyer can take to make “reasonable efforts” to ensure confidentiality and protection of data. These include taking advantage of “secure internet access methods to communicate, access and store client information . . . using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/AntiSpyware/Antivirus software on all devices upon which the client confidential information is transmitted and stored, and apply all necessary security patches and updates to operational and communications software.” See id. at 926

d) That such measures are easily accessible and free make the reasonableness even clearer. See id.

e) Another step that would show “reasonable efforts” would be to have lawyers protect against “technoblunders” by learning about and using “platforms and services of online platforms and then avoid those [i.e., those third-party providers] whose policies allow the provider wide powers to access information and relieve the provider from liability for giving the information to others or mishandling of information.” See id. at 928.

Such measures protect against another ethical violation lawyers face if they do not ensure the client’s data is adequately protected; that issue is spoliation. If a hack occurs and data is lost or stolen, the client may suffer by having the spoliation of evidence doctrine imposed against it at trial. The measures described above would protect against that happening.

ABA Formal Opinion 483 (2018) addresses lawyers’ ethical obligations after an electronic data breach or cyberattack.
a) The opinion discusses several specific ethical rules that might apply to shape a lawyer’s response to such an incident.
b) “When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach,” Formal Opinion 483 provides. “How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach. The decision whether to adopt a plan, the content of any plan and actions taken to train and prepare for implementation of the plan should be made before a lawyer is swept up in an actual breach.”

c) Lawyers should be mindful that this opinion addresses only their ethical obligations and not other law that may impose post-breach obligations, such as privacy laws or other statutes. Lawyers should consider all potentially applicable data breach laws to develop their incident response plan.

D. Social Media

1. Social media use has increased generally considerably since 2005.

   “Today around seven-in-ten Americans use social media to connect with one another, engage with news content, share information and entertain themselves. . . . When Pew Research Center began tracking social media adoption in 2005, just 5% of American adults used at least one of these platforms. By 2011 that share had risen to half of all Americans, and today [2019] 72% of the public uses some type of social media.”

2. Lawyers increasingly use social media.

   In a 2017 ABA survey of lawyers, only 23% of respondents report that their firms do not maintain a presence on any social networks.

3. Ethical Concerns about Using Social Media

   a) Lawyers’ use of social media, if used to communicate information about the lawyers’ services as a way to attract clients, is considered advertising and is subject to the same general standards as more traditional forms of advertising and communication. See Virginia LEO 1750 (2018). For instance, in

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1 Social Media Fact Sheet, Pew Research Center Internet & Technology (June 12, 2019), at https://www.pewinternet.org/fact-sheet/social-media/ (last visited June 27, 2019).

Hunter v. Virginia State Bar, 285 Va. 485, 744 S.E.2d 611 (2013), the Virginia Supreme Court held that an attorney’s blog, which primarily discussed the attorneys’ successes in the area of criminal defense law, constituted advertising and therefore was subject to the ethics rules on advertising. The court concluded, “the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product.” Id. at 499, 618. Similarly, YouTube videos can constitute advertisements just as traditional television advertisements.

The California Bar’s Standing Committee on Professional Responsibility and Conduct addressed in Formal Opinion No. 2012-186 what is considered advertising in the social media context. The committee defined advertisements as a “communication . . . directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for, or on the behalf of, an attorney.”

Note that this definition can include communications made on lawyers’ “personal” social media accounts. Lawyers simply cannot immunize themselves from ethics rules by using “personal” accounts (note that lawyers can be disciplined for behavior in other nonlegal contexts, such as committing crimes or deception outside a specific legal context). If the purpose of the communication is to promote the lawyer’s services to others, the advertising and solicitation rules still apply regardless of whether the lawyer considers the account “personal.” Therefore, lawyers can be disciplined for violating the advertising rules for posts on platforms like Facebook or LinkedIn.

On this issue, the California opinion considered several specific statements posted on social media sites (which were available to be seen by the attorney’s friends, connections or followers, but not the public).

(1) “Case finally over. Unanimous verdict! Celebrating tonight.” The Committee found this statement was not an advertisement because it contained no information concerning the availability for professional employment.

(2) “Another great victory in court today! My client is delighted. Who wants to be next?” Here, the last sentence is what troubled the Committee, and it found that the statement was concerning the availability for professional employment and therefore was advertising (in addition to other ethical violations).

As to the distinction between advertising and solicitation, which is subject to additional restrictions, Comment 1 to Virginia Rule 7.3 provides: “A lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.”
(3) “Won a million dollar verdict. Tell your friends to check out my website.” The Committee found this post concerned the availability for professional employment and therefore constituted advertising.
(4) “Won another personal injury case. Call me for a free consultation.” The Committee found the second sentence of this post concerned the availability for professional employment and concluded the post constituted advertising.
(5) “Just published an article on wage and hour breaks. Let me know if you would like a copy.” The Committee reasoned that this statement was not related to the availability for professional employment and was not an advertisement.

b) As communications subject to the advertising rules, such social media communications therefore must not be “false or misleading” as determined from a reasonable client’s perspective. See ABA and Virginia Rule 7.1.

ABA Model Rule 7.1: Communications Concerning a Lawyer’s Services
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

Virginia Rule 7.1. Communications Concerning a Lawyer’s Services
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.
[2] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to
form an unjustified expectation that the same results could be
obtained for other clients in similar matters without reference to
the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s
services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

c) One particular issue with social media platforms like LinkedIn is the ramifications of listing oneself as a “specialist” or “expert.” For instance, note the LinkedIn “Profinder” capability and the “Skills and Endorsements” section.

(1) Lawyers are generally permitted to state they are a “specialist,” practice a “specialty,” or “specialize in” particular fields, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services and therefore must be able to be factually substantiated. See ABA Rule 7.2[9], Virginia Rule 7.1[4].

ABA Model Rule 7.2[9]
[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

Virginia Rule 7.1[4]
A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training, or education, or is certified by a named professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

(2) ABA and Virginia Rules, however, do place noteworthy limitations on lawyer’s ability to state they are certified as a specialist:
First, ABA Model Rule 7.2(c) provides:

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
   (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
   (2) the name of the certifying organization is clearly identified in the communication.

Regarding Virginia, in 2017 Virginia removed the longstanding requirement that a lawyer who claims to be certified as a specialist include a disclaimer stating that the Supreme Court of Virginia has not recognized any certifying organizations. Virginia LEO 1750, however, reasons that lawyers indicating “certification” must “identify the name of the organization that purportedly conferred the certification, so that a prospective client or other member of the public can verify the validity of the certification and the criteria for conferring the certification.” The opinion adds, “Any claim of certification as a specialist is still subject to the requirement that it is not false or misleading – the certifying organization must undertake some bona fide evaluation of lawyers rather than just awarding the certification to anyone who pays a required fee or joins an organization.”

(3) What about Twitter and lawyer advertising?

A traditional problem with legal advertising on Twitter is that lawyers are not able to include any necessary disclaimers within the 280-character Twitter limit. As the advertising rules have loosened in the last two years, however, it appears that attorneys are now able to use Twitter more freely without running afoul of the rules. A big issue is that when lawyers tweet about specific results, they still generally must obtain client consent if any tweeted information is confidential and they must include disclaimers so as not to lead reasonable viewers into believing they could obtain similar results.

Another issue under the ABA rules is that ABA Rule 7.2(d) provides that every advertisement must include the “name and contact information” of at least one lawyer responsible for the content. Lawyer advertising tweets subject to this ABA language must therefore comply with this requirement.
d) Lawyers’ general duty of competence under Rule 1.1 and their duty of communication under Rule 1.4 require lawyers to:

(1) Know properly how to use social networking sites as investigative tools.
(2) Advise their clients on how best to use or not use social media so as not to compromise their case.

ABA Model Rule 1.4: Communications
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status 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 when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Virginia Rule 1.4, Communication
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

e) Sending messages or creating content that appear to be legal advice can create an unintended attorney-client relationship.

What is legal advice?
Legal information of general application about a particular topic is not “legal advice,” and a disclaimer that underscores this principle will prevent the reasonable consumer from interpreting such general information as legal advice. However, applying the law to specific factual scenarios (think the “A” in IRAC), including providing
substantive assistance in preparing legal documents, is legal advice, and a disclaimer likely will not prevent a consumer from reasonably construing such fact-specific information as advice.

A 2010 ABA ethics opinion presents helpful guidance on the issue. The opinion explains that attorneys “who answer fact-specific legal questions may be characterized as offering personal legal advice,” while a lawyer who simply “poses and answers a hypothetical question usually will not be characterized as offering legal advice.” See ABA Formal Ethics Op. 10-457 (2010). “To avoid misunderstanding,” the ABA's ethics committee advised, “lawyers who provide general legal information [should] include statements that characterize the information as general in nature.” The opinion adds that any disclaimer, to be effective, must be “reasonably understandable, properly placed, and not misleading.”

f) Practicing law in a jurisdiction in which you are not admitted

Offering legal advice to a client in a jurisdiction in which you are not admitted might also result in the unauthorized practice of law in that jurisdiction. See ABA and Virginia Rules 5.5.

g) Revealing privileged or confidential information

(1) Lawyers’ duty of confidentiality is owed to current, former, and prospective clients. See ABA and Virginia Rules 1.6, 1.9, and 1.18 (1.18 is included below).

(2) Lawyers must take the same level of care with social media as with other forms to communication; they must use “reasonable efforts” to ensure that confidential client information is not disclosed. See ABA and Virginia Rules 1.6.

(3) If lawyers receive confidential information from a prospective client via social media, they are conflicted from representing an adverse client if the information received is “significantly harmful” to that prospective client. See ABA and Virginia Rules 1.18 (which are nearly identical).

(4) Also, at least in Virginia, circumstances may exist in which the prospective client revealed information to the lawyer in a setting where the client had no reasonable expectation of privacy and therefore the information would not be confidential. See Virginia LEO 1842, “an examination of the totality of the circumstances on a case-by-case basis is necessary to determine whether it is reasonable for a prospective client to believe that the
information he/she provides will be maintained as confidential.”

(5) Thus, in Virginia, lawyers can avoid creating such a reasonable expectation by imposing a “click-through” disclaimer that requires website visitors to agree to disclaimer terms before being able to submit any information through an online form. In the disclaimer, the lawyer should clearly inform online visitors that the communication does not create an attorney-client relationship and that the lawyer cannot guarantee that information shared via the website will be kept confidential.

**ABA Rule 1.18: Duties to Prospective Client**

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

1. both the affected client and the prospective client have given informed consent, confirmed in writing, or:
2. the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
   (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
   (ii) written notice is promptly given to the prospective client.

**Virginia Rule 1.18. Duties to Prospective Client**
(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and
(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

h) Proper use of social media in e-discovery

(1) Lawyers are free to mine the internet for publicly available information, such as information on a public
social media account, but must not engage in deceptive behavior. See MR 8.4(c) & N.Y. State Bar Op. 843 (9/10/10). Specifically, New York State Opinion 843 found that obtaining information about a party available in that party’s Facebook profile is similar to obtaining information that is available in publicly accessible online or print media or through a subscription research service, all of which are permitted. The Committee concluded that the lawyer may ethically view such a Facebook profile as long as the party’s profile is available to all members in the network and the lawyer neither “friends” the other party nor instructs someone else to do so.

(2) Regarding jurors, lawyers may also use publicly available social media information to gain information on prospective jurors but must not engage in direct or inadvertent contact with the jurors. See N.Y. State Bar Op. 2012-2 (2012); ABA and Virginia Rules 3.5(c).

(3) At least one ethics opinion has held that lawyers may “friend” an unrepresented party or witness if they use their real name and profile. N.Y. City Bar Op. 2010-2. Two others have added, however, that lawyers may do so only if they identify additional information: the client and matter in litigation (N.H.B.A. Ethics Op. #2012-12/05) or the lawyer’s “affiliation and the purpose for the request.” (San Diego County Bar Association Legal Ethics Opinion 2011-2). Lawyers cannot set up fake internet profiles to do so because such conduct would be deceptive in violation of ABA and Virginia Rules 8.4(c). Cf. ABA and Virginia Rules 4.2 for represented persons.

(4) Bar ethics opinions similarly are split as to whether lawyers may use their agents, like their nonlawyer assistant, to “friend” another on social networking sites to gain information when the agents use their real name and do not otherwise violate any rules, like Rule 4.2:

(a) N.Y. City Bar Op. 2010-2 (yes)
(b) Philadelphia Bar Op. 2009 (no unless the agent explained the reason for the request and identified him- or herself as working for the attorney)
(c) New Hampshire Bar Associations’ Ethics Advisory Opinion #2012-12/05 (no unless the agent identifies him- or herself, the lawyer, the client, and the cause in litigation).

i) The propriety of lawyers’ responding to negative posts about their practice on social media.

(1) At least one state ethics opinion has concluded that a lawyer “may not disclose client confidential information solely to respond to a former client’s criticism of the lawyer

(2) Relevant Rules:

(a) ABA Model Rule 1.6(b)(5)
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . .
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(b) Virginia Rule 1.6(b)(2)
(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal: . . .
(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

j) Using social media in ways that exposes the lawyer to claims of defamation or harassment or constitutes reckless criticism of judges.

ABA Rule 8.2: Judicial & Legal Officials
(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Virginia Rule 8.2, Judicial Officials
A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

E. Artificial Intelligence (or Cognitive Computing)
1. Lawyers are increasingly using in their practice technologies that employ artificial intelligence (AI), also known as cognitive computing or machine learning.

2. Although the technology is cutting-edge, the same ethical duties of competence, diligence, confidentiality, proper supervision, and independent professional judgment apply as if the lawyer were overseeing another individual.⁴

   a) First, as noted above with technology generally, lawyers who use artificial intelligence must understand the “benefits and risks” associated with such technology. ABA Model Rule 1.1[8]; Virginia Rule 1.1[6].

   b) For AI, an important ethical issue concerns what is known as the “black box” challenge. Specifically, when lawyers submit questions to AI-powered tools, the questions go into a “black box” and the AI tools provide an answer. The question then arises how much do competent lawyers using the technology need to know about what happens inside the “black box.” For instance, such tools may have biases that inhibit their ability to produce good answers.

   c) A related issue concerns how lawyers’ duty of supervision applies to AI-powered tools. Lawyers have duties in ABA and Virginia Rules 5.1 and 5.3 to supervise lawyers and nonlawyers properly. Most notably, lawyers cannot ethically delegate certain tasks to nonlawyers, and under ABA and Virginia Rules 5.5, they cannot assist a nonlawyer in the unauthorized practice of law. On the other hand, lawyers’ duty of competence and diligence encourages lawyers not to “under-delegate” tasks to AI when such delegation would improve their provision of legal services.⁵

   “One way of framing this issue is automation versus augmentation,” states Dr. Tonya Custis, a Research Director at Thomson Reuters who leads a team of research scientists developing natural-language and search technologies for legal research. “There may be some tasks that we shouldn’t automate. For these tasks, AI can help attorneys do their jobs, but AI can’t do their jobs completely. So the question becomes: where do we draw that line?”⁶

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⁴ For a comprehensive article just published in December 2018 on the ethical issues regarding AI, see Drew Simshaw, Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law, 70 HASTINGS L.J. 173 (2018).


⁶ Id.
Regarding the prohibition against lawyers’ assisting others in the unauthorized practice of law (UPL), the relevant rules provide:

ABA Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law (emphasis added)
(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

Virginia Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law (emphasis added)
(c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unauthorized persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

An interesting AI development related to UPL is “legal chatbots.” These are “AI-powered programs that interact with users who have legal issues by simulating a conversation or dialogue. These chatbots are now being used to ... perform such tasks as fight parking tickets, advise victims of crimes, or draft privacy policies or non-disclosure agreements.”7 When lawyers create or maintain these tools, the question arises whether the lawyers are assisting another, here AI-powered technology, in engaging in the unauthorized practice of law. Similarly, such technology is unlikely able to exercise the independent professional judgment and provide the nonlegal counseling needed in many legal situations. See ABA and Virginia Rules 2.1.

ABA Model Rule 2.1: Advisor
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other

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7 Id.
considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

**Virginia Rule 2.1. Advisor**
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

d) A further issue relates to improper sharing of confidential or privileged information with AI-powered tools. Most notably, lawyers’ duty under ABA and Virginia Rules 1.6 requires that they use “reasonable efforts” to ensure such tools do not improperly disclose such information, such as through data breaches or improper commingling of client data. This confidentiality concern regarding AI tools relates to concerns regarding cloud storage of client data generally.

II. Lawyer Well-Being Concerns Related to the Use of Technology


B. Lawyers must attend to their well-being as part of their general ethical duty of competence. Virginia, in fact, recently added language in the comments to Rule 1.1 of its Rules of Professional Conduct to underscore this connection between lawyer well-being and lawyer competence.

**Virginia Rule of Professional Conduct 1.1. Competence**

Comment

[7] A lawyer's mental, emotional, and physical well-being impacts the lawyer’s ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).

C. Lawyers’ increasing use of technology can result in unhealthy reliance on technology and can pose risks to their well-being and their competence. In May 2019 the Virginia State Bar President’s Special Committee on Lawyer Well-Being published a comprehensive report titled “The Occupational Risks of the Practice of Law,” available online: [https://www.vsb.org/docs/VSB_wellness_report.pdf](https://www.vsb.org/docs/VSB_wellness_report.pdf). The report lists one
specific risk of the practice of law as “Technology Addiction” and describes the risk as follows:

“Potential Effects: Ever-connected lawyers who feel obligated to be available at all hours experience reduced attention span and productivity, harm to personal relationships, and risk revealing confidential information through sloppy data use.” Report at 10.

The report then offers practice pointers for individual and organizations to combat this risk:

“Practice Pointers for Individuals:
• Review resources on digitally detoxing, then adopt strategies.
• Identify incremental steps to reduce technology reliance, like designating certain times and spaces as tech-free zones.
• Strive to ‘unplug’ from work when not in the office.

“Practice Pointers for Organizations
• Recognize that expecting complete availability of employee attorneys is counterproductive.
• Provide technology addiction training during regular IT training programs.
• Cultivate a workplace culture promoting work-life balance with time to disconnect.
• Be aware of the increasing right-to-disconnect movement, which has resulted in some countries restricting work-related communications after business hours.” Report at 10.
APPENDIX

ETHICAL HYPOTHETICAL SCENARIOS

I. Responding to Negative Posts on Social Media

Laura Lawyer developed a website for her law firm that allowed clients to post reviews. One client posted a review that said: “This lawyer is a shyster. I had a bad slip and fall accident and the lawyer told me I had a great case. The lawyer said she would be with me all of the way. The truth is the lawyer did nothing my case didn’t go anywhere. I would recommend staying away from Laura Lawyer. That is, unless you want to be disappointed.” Laura Lawyer had set up the site so that she could respond to comments. She responded to this comment as follows: “This client’s review is unfair. She did not mention that she had preexisting injuries for which she was claiming damages in this case. She did not show up for many scheduled appointments. She ended up getting a settlement, which she does not indicate in the review, which was far more than she could expect to get in a trial.”

Was Laura Lawyer’s response in violation of ABA Model Rule of Professional Conduct 1.6? Virginia Rule of Professional Conduct 1.6? Why or why not?

II. Artificial Intelligence/Do-it-Yourself Lawyering

Wanda needed a will. Her husband had died five years ago, and she had three children, Al (35), Betty (31), and Charles (29). Although Al and Betty were in Wanda’s view mature enough to inherit one third of her considerable estate, Charles was not so mature. He had a tendency to blow through money. In addition, he was estranged from his brother and sister. Wanda worried he might challenge the will but figured that was out of her control. Wanda felt obligated to split the inheritance equally. She had never heard of the idea of a spendthrift trust administered by a trustee for the benefit of a trustee who cannot manage money. When she went to Legal Smart, Inc., and chose “simple will” it did not prompt her to consider a trustee option for Charlie. She thus split the inheritance equally and had no trust set up for Charlie. Moreover, Legal Smart did not prompt her to consider a provision in which Charles would lose his inheritance if he challenged the will. Thus, she neither set up a spendthrift trust nor put a provision disqualifying anyone who challenged the will.

Presume that a competent lawyer could have met with Wanda and learned of Charlie’s lack of judgment with money. Also recognize that a lawyer who heard about Charles’ estrangement would advise Wanda of her ability to put a provision in the will disqualifying Charles from his inheritance. Are the lawyers who run Legal Smart acting competently by providing a mechanism for Wanda to plug in information and produce a simple will, without inquiring about the circumstances of the beneficiaries, acting competently under the ABA Model Rules of Professional Conduct? Under the Virginia Rules of Professional Conduct
III. The Lawyer Addicted to Technology

Justin is a young associate in a large firm. He carries his phone with him everywhere, to dinner, by his bed at night, to the bathroom, etc. He also checks email both on his phone and computer every hour. If a client or colleague calls during dinner, Justin takes the call and leaves the table. He tells everyone that, if someone seeks to contract him, he does not ever want to be unavailable. After a year of such connection to his phone, emails, etc., he takes a week vacation but cannot seem to stop checking his calls and emails on the vacation. Justin increasingly suffers insomnia. He is irritable with family and at times at work, though he tries to avoid being seen by supervising partners speaking harshly with staff. Whereas before practice Justin was known for his sense of humor, he now rarely laughs. His wife just had their first child and Justin insisted on having his laptop and cell phone at the hospital. To what extent is Justin’s well-being, and the well-being of his familial relationships, at risk? Is Justin violating any ABA Rules of Professional Conduct? Any Virginia Rules of Professional Conduct?

NEW HAMPSHIRE BAR ASSOCIATION ETHICS OPINION ON SOCIAL MEDIA

New Hampshire Bar Association 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. 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, 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 counterargument 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 counterargument. 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 “friendning,” 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. 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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31 Pace Law Review 228 (Winter 2011).
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Evidentiary And Ethical Considerations, ABA Section of Labor and Employment
Law, 6th Annual Labor and Employment Law Conference, October 31 – November
3, 2012.

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