2020 MCLE

MINI-MARATHON

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ETHICS IN THE TECHNOLOGY AGE

1 HR ETHICS

WRITTEN MATERIALS

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ETHICAL ISSUES WITH SOCIAL MEDIA

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TOPICS

- Using social media in litigation
- Using social media for marketing
- Responding to online reviews

LITIGATION: COMMUNICATION WITH PARTIES

ISSUE: Can you send a “friend” or access request to a represented party?

CA Rules of Professional Conduct, Rule 4.2: Communication with a Represented Person

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

LITIGATION: COMMUNICATION WITH PARTIES

ISSUE: Can you send a “friend” or access request to a represented party?

CA Rules of Professional Conduct, Rule 4.2: Communication with a Represented Person

(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this rule prohibits communications with:

(1) A current officer, director, partner, or managing agent of the organization; or

(2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

LITIGATION: COMMUNICATION WITH PARTIES

ISSUE: Can you send a “friend” or access request to a represented party?

San Diego County Bar Association, Legal Ethics Opinion 2011-2:

- Concluded that CA Rules of Prof. Conduct and ABA Model Rules prohibit an attorney from making *ex parte* social media “friend” request of a represented party
- The purpose of the attorney’s *ex parte* communication is at the “heart of the offense” -- motivated by quest for information
- Can also violate ethical duty not to deceive by making “friend” request without disclosing purpose of the request
- Did not take position on evidentiary or disciplinary consequences of such conduct

LITIGATION: COMMUNICATION WITH WITNESSES

ISSUE: Can you send a “friend” or access request to witnesses?

San Diego County Bar Association, Legal Ethics Opinion 2011-2:

- Attorney’s duty not to deceive prohibits making “friend” request to parties, and even unrepresented witnesses, without disclosing purpose of the request
- ABA Model Rule 4.1(a) and 8.4(c)
- CA Bus. & Professions Code 6068(d): “It is the duty of an attorney to ... employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

LITIGATION: COMMUNICATION WITH JURORS

CA Rules of Professional Conduct, Rule 3.5: Contact with Judges, Officials, Employees, and Jurors

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

See also ABA Model Rule 3.5

LITIGATION: COMMUNICATION WITH JURORS

ABA Standing Committee on Ethics & Professional Responsibility, Formal Opinion 466

- Attorney may review juror or potential juror's internet presence that is publicly available (not restricted, passive review)
- Attorney may not communicate directly or indirectly with juror or potential juror
- Attorney may not send access request to juror's social media -- this constitutes a "communication"
- When reviewing internet presence, if attorney discovers evidence of juror misconduct that is criminal or fraudulent, s/he must take reasonable remedial measures including, if necessary, disclosure to the court

MARKETING: ADVERTISING ON SOCIAL MEDIA

Material posted by an attorney on social media is subject to professional responsibility rules governing attorney advertising if that material constitutes:

1. A **"communication"** within the meaning of Rule 1-400* of Cal. Rules of Professional Conduct; or
2. **"Advertising by electronic media"** within the meaning of Article 9.5 of the State Bar Act (as codified in CA Bus. & Professions Code 6157 *et seq.*)

-- Formal Opinion No. 2012-186, State Bar of California, Standing Committee on Professional Responsibility & Conduct

*Now Chapter 7 of CA Rules of Professional Conduct

MARKETING: ADVERTISING ON SOCIAL MEDIA

CA Rules of Professional Conduct, Rule 7.1: Communications Concerning a Lawyer's Services

> Comment [1]: This rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any person.

→ **ANALYSIS:** A communication "concerning the lawyer's availability for professional employment" will be subject to advertising rules in Chapter 7 of the CA Rules of Professional Conduct.

MARKETING: ADVERTISING ON SOCIAL MEDIA

Examples of rules under Chapter 7 of the CA Rules of Professional Conduct:

- Cannot make false or misleading communications about the lawyer or the lawyer’s services
- Cannot contain express guarantee or warranty of result of a particular representation
- Caution re: reporting of lawyer’s achievements on behalf of clients or using client testimonials
- Attorney advertising shall include name and address of at least one lawyer or law firm responsible for its content
- Restrictions on solicitations

MARKETING: ADVERTISING ON SOCIAL MEDIA

Examples from Formal Opinion No. 2012-186, State Bar of California, Standing Committee on Professional Responsibility & Conduct:

1. “Case finally over. Unanimous verdict! Celebrating tonight.”
2. “Another great victory in court today! My client is delighted. Who wants to be next?”
3. “Won another personal injury case. Call me for a free consultation.”
4. “Just published an article on wage and hour breaks. Let me know if you would like a copy.”

MARKETING: BLOGGING & COMMENTARY

- Blog may be subject to attorney advertising rules if it directly or indirectly expresses the attorney's availability for professional employment
- Blog that is an integrated part of attorney's or law firm's professional website will be subject to advertising rules to same extent as the website
- Stand-alone blog by attorney is not a communication subject to advertising rules unless it expresses attorney's availability for professional employment

-- Formal Opinion No. 2016-196, State Bar of California, Standing Committee on Professional Responsibility & Conduct

MARKETING: BLOGGING & COMMENTARY

When blogging or making online public statements, be mindful of:

- Advertising rules if applicable
- Duty of maintaining client confidentiality
- Misconduct rules

MARKETING: RESPONDING TO ONLINE REVIEWS

Los Angeles County Bar Association, Professional Responsibility & Ethics Committee, Opinion No. 525:

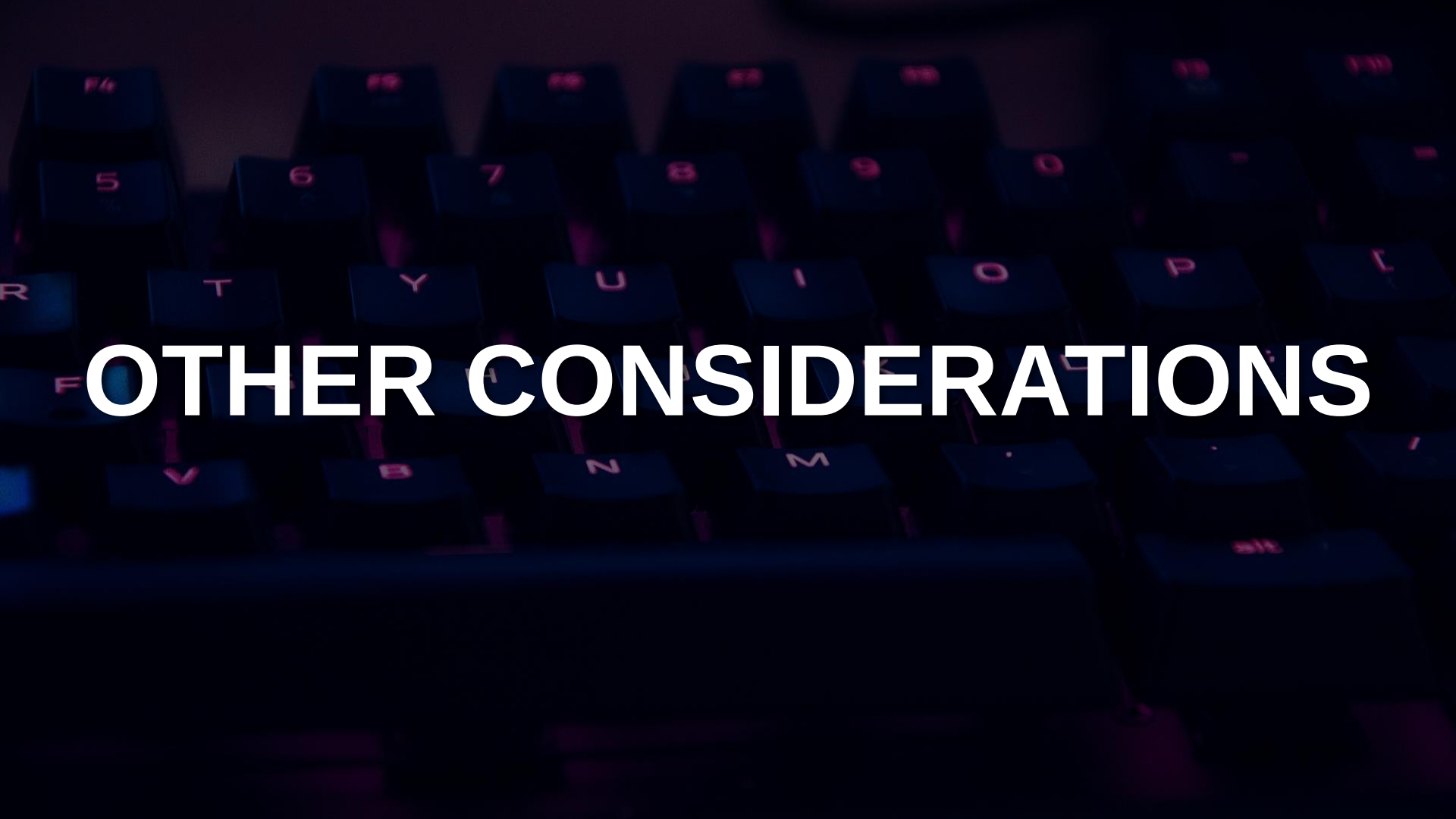
An attorney may publicly respond to a former client's adverse public comments as long as the rebuttal:

1. Does not disclose any confidential information
2. Does not injure the former client in any matter involving the prior representation
3. Is proportionate and restrained

MARKETING: RESPONDING TO ONLINE REVIEWS

San Francisco Bar Association, Ethics Opinion 2014-1:

- Ongoing duty of confidentiality prohibits attorney from disclosing confidential information about prior representation absent former client's informed consent or waiver of confidentiality
- Even where disclosure of otherwise confidential information is permitted, disclosure must be narrowly tailored to issues raised by former client
- If the matter previously handled for former client has not concluded, it may be inappropriate for attorney to provide any substantive response in the online forum, even one that does not disclose confidential information



OTHER CONSIDERATIONS

ETHICS ISSUES INVOLVING E-DISCOVERY

Angel L. Garrett

Partner, Trucker Huss

WHAT IS ELECTRONIC DISCOVERY (E-DISCOVERY)?

- Discovery in litigation or other legal process in which the information requested is in an electronic format
- eDiscovery the process of identifying, collecting and producing electronically stored information
- Can be a very time consuming and costly process
- Counsel must be able to handle this process- ABA Model Rule 1.1

TOPICS

- Applicable Federal Rules of Civil Procedure
- Preservation and Collection of Electronically Stored Information (ESI)
- Scope of E-discovery
- Production of ESI
- Protection of Privileged Information
- Local Rules and Guidelines in California district courts
- Key Takeaways

FEDERAL RULES OF CIVIL PROCEDURES

- E-discovery rules were enacted in 2006 and amended in 2015
- The 2015 amendments focused on 3 areas:
    1. Proportionality - Limiting the scope of discovery
    2. Cooperation
    3. Penalties
- Amended Rules Affecting E-Discovery: FRCP 26, 34, 37

FRCP 26

- Rule 26(b)(1)- Scope of discovery; rule amended to state that information is discoverable under revised Rule 26(b)(1) if it is relevant to any party’s claim or defense and is proportional to the needs of the case.
- Rule 26(f)(3) was amended to add two items to the discovery plan which the parties must discuss during their initial meet and confer (at least 21 days before the case management conference) issues about preserving electronically stored information and court orders under Evidence Rule 502 [rule regarding attorney-client privilege and work product and inadvertent disclosures].

FRCP 34

- Rule regarding document production, including electronically stored information (ESI)
- Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce
- Rule 34(b)(2)(B) requires that objections to Rule 34 requests be stated with specificity. The specificity of the objection is tied to Rule 34(b)(2)(C) which requires that an objection must state whether any responsive materials are being withheld on the basis of that objection
- Rule 34(b)(2)(B) reflects the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection.
- Rule 34(b)(2)(B) requires that the production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response.
- Rule 34(b)(2)(C) requires that an objection to RFP must state whether anything is being withheld on the basis of the objection.
    - Although the producing party does not need to provide a detailed description or log of all documents withheld, it does need to alert other parties to the fact that documents have been withheld and meet and confer regarding the objection

FRCP 37

- Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
- FRCP 37(e) provides a 3-part test that a court must apply in determine whether ESI was property preserved and what penalties are available if it was not.
- (e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that **should have been preserved in the anticipation or conduct of litigation is lost** because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

  (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

  (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

    (A) presume that the lost information was unfavorable to the party;

    (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

    (C) dismiss the action or enter a default judgment.

PRESERVATION AND COLLECTION OF ESI

- ABA Model Rule 3.4 – Fairness to Opposing Party and Counsel
  - A lawyer should 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.
- Issue litigation hold
- Interview with client’s IT department
- Identify custodians
- Interview witnesses to have a good understanding of where all the potentially relevant ESI is
- Know your client’s rules and document destruction policies
- Have client suspend its document destruction policies
- Spoliation

SCOPE OF ELECTRONIC DISCOVERY

- FRCP 26 – proportionality and discovery plan requires the parties to address the scope of electronic discovery
- Meet and Confer with opposing counsel regarding ESI protocols, including search terms and using analytics
- Discuss ESI sources, amount of data, any burdens associated with collective, review and production of data
- The number of pages per GB varies depending on the file

Document Type	Average page/GB
Microsoft Word	Appx. 65,000
Emails	Appx. 100,000
PPT	Appx. 17,000

PRODUCTION OF ESI

- FRCP 34 permits the requesting party to specify the desired format
  - If nothing is stated then it should be produced in the form it is usually maintained or in a reasonably useable form.
- Agree on the production formats (e.g. native files, PDFs with OCR, etc.)
- If doing productions in near-paper or image format then agree on the metadata to be produced (i.e. limit production to certain fields or to only those fields required by local court rule).
- Data-dumping or hiding the ball
- Document manipulation
- Retain a copy of production

PROTECTING PRIVILEGED INFO

- FRCP 26(b)(5)(B) – if privileged information is producing, the party claiming privilege may notify the receiving party re this information and the basis for it; the receiving party must destroy or return this info and any copies and cannot use this info.
  - If there is a dispute regarding whether this information is privileged, then they can seek the Court's determination but may not use this information until the claim is resolved
- FRCP 26(f)- requirement that at the initial conference, counsel discuss the terms of a claw back agreement, protective orders or discovery management orders
- FRE 502(b) addresses inadvertent disclosures
  - Inadvertent disclosures do not operate as a wavier if the holder of the privilege or protection took reasonable steps to prevent disclosure; and the holder promptly took reasonable steps to rectify the error, including the party making the claim of privilege notifies the receiving party

LOCAL RULES AND GUIDELINES RE ESI

- N.D. Cal. has a e-Discovery website at

https://www.cand.uscourts.gov/forms/e-discovery-esi-guidelines/

  - Guidelines for the Discovery of Electronically Stored Information
  - ESI Checklist for use during the Rule 26(f) meet and confer process
  - Model Stipulated Order Re: Discovery of ESI (Standard Cases)
  - Model Stipulated Order Re: Discovery of ESI (Patent Cases)
  - Standing Order for All Judges of the N.D. Cal. regarding contents of CMC, including preservation of ESI and meeting and conferring on the ESI checklist

- S.D. Cal. has a model order governing discovery of ESI at https://www.casd.uscourts.gov/_assets/pdf/rules/Local%20Rules.pdf

KEY TAKEAWAYS

- Preserve ESI early in the case, sometimes even before lawsuit is filed
- Discuss ESI preservation and processes with your team, client and opposing counsel
- Be specific in your RFP responses
- Meet and confer with opposing counsel
- Have a protective order or clawback agreement
- Review the local rules

DUTY TO SECURE CLIENT DATA AND COMMUNICATIONS

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Corporate Counsel, Google Cloud

ABA MODEL RULE 1.1 - DUTY TO STAY INFORMED RE: TECHNOLOGY

“A lawyer shall provide competent representation to a client.”

Comment 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.”

HOW TO STAY ETHICAL?

- Attend CLE talks like this one!
- Train other lawyers in your firm/practice/company
- Have discussions with your IT team to ensure you understand how your data is being secured
- When contracting with third party vendors, ensure that they have similar confidentiality and security best-practices in place

ABA MODEL RULE 1.6(C) - DUTY TO IMPLEMENT "REASONABLE" DATA SECURITY MEASURES

"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."

Comment 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."

Formal Opinion 477: "[A] lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."

TIMES ARE CHANGING...

Files kept in locked file cabinets → Online datarooms

Redactions applied with a marker → Electronics redactions

Meetings held behind closed doors → Con-call dial-ins

Documents delivered by couriers → Files sent electronically

CONSIDER “BEST PRACTICES”:

If you use Google docs/sheets/slides -- set your default setting to “Private” or “Invite only” instead of “allow anyone who has the link to access.”

Redactions - be sure they’re done appropriately. On Adobe, drawing a black box is NOT the same as a redaction.

Hang-up on con-calls and dial-back in to a different number in case someone silently “stayed on”.

Devices - require log-in passwords, force password resets after certain period of time, employ two-factor authentication, use computers as “user” instead of “administrator,” employ malware/virus scanning tools.

Document formats: .docx, .xlsx, .pptx are encrypted with a stronger protection compared to standard .doc, .xls, .ppt; use “Secure” versions of Adobe PDFs

When using public Wi-Fi networks, use “https” version of websites whenever possible, use a VPN connection whenever possible.

SENDING FILES

ABA Formal Opinion 477R (update to Formal Opinion 99-413):

“A lawyer generally may transmit information relating to the representation of a client over the Internet...where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access.” “[L]awyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters . . . to determine what effort is reasonable.”

- Do not send confidential information via unencrypted email attachments
- Do not send confidential information via a “shared site” through anyone who has the link
- Send passwords in a separate communication from the email delivery the link

WHAT IF THERE IS A DATA BREACH?

- If you discover a breach of your network
  - Ethical duty to act promptly to stop the bleeding
  - Responsibility to conduct a post-breach investigation
  - Duty to notify clients affected by the data breach
    - A data breach is defined as “a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer’s ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.” (ABA Opinion 483)

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LISA MAK

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Lisa Mak is a trial attorney at Minami Tamaki LLP in the Consumer and Employee Rights Group, where she litigates cases on behalf of workers and consumers. Ms. Mak has served as trial counsel in multiple trials involving a variety of employment disputes in state and federal court.

In 2016, she was co-lead counsel on a jury trial which resulted in a $3.5 million total verdict for four female officers at the Sacramento County Sheriff's Department. The verdict was listed in the LexisNexis "Top 10 Employment Verdicts" for 2016, and was recognized by Leaders in the Law in its "Northern California's Leading Lawyers" 2017 publication. Ms. Mak has been honored for her civil rights work by the Equal Justice Society, the Center for Workers' Rights, and the Asian Pacific Islander Legislative Caucus. She has been selected as a SuperLawyers Rising Star each year since 2015.

She currently serves on the Board of Directors for the Asian American Bar Association of the Greater Bay Area, the Bar Association of San Francisco, and Asian Pacific Islander Legal Outreach. She is also active in the California Employment Lawyers Association. Ms. Mak graduated from UC San Diego summa cum laude, and received her law degree from UC Hastings.

MING ZHU

Corporate Counsel, Google

Ming is in-house counsel at Google LLC, where she product counsels M&A transactions within Google Cloud, from diligence through integration.

Ming began her career as a fellow with the Lawyers Committee for Civil Rights, and worked as a litigation associate at Ropes & Gray (Boston) and Latham & Watkins (Menlo Park) before moving in-house as corporate counsel for Electronics For Imaging, Inc. Ming currently serves on the Board of Directors for APABA-Silicon Valley and Stanford Professional Women, and on the Advisory Board of the Asian Law Alliance.

Ming was born in Beijing, China and is fluent in Mandarin. She received her B.A. in International Relations from Stanford University and her J.D. from Harvard Law School, where she served as an editor of the Harvard Law Review and as co-chair of APALSA. In her spare time, she enjoys reading, traveling, and spending time with her six-year-old twin daughters.

PATTY TSAI

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Patty's practice focuses on preparing and prosecuting patent applications, including both US and foreign patent applications, and counseling clients on patent portfolio strategy. Her technical expertise includes chemistry and materials, semiconductor technologies, and electrochemical engineering.

Patty serves on the Board of Directors for the Asian American Bar Association of the Greater Bay Area and Taiwan Culture & Education Foundation. Patty also serves as a Social Media Chair of the ABA JIOP Alumni Committee, and as a career coach of UCLA Law Women LEAD. Patty received her B.S. and B.A. from the University of Washington with College Honors. Patty received her J.D. from UCLA School of Law.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2012-186

ISSUE: Under what circumstances would an attorney's postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?

DIGEST: Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a "communication" within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting.

AUTHORITIES INTERPRETED: Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code section 6106, 6151, and 6152.

Business and Professions Code sections 6157 through 6159.2.

STATEMENT OF FACTS

Attorney has a personal profile page on a social media website. Attorney regularly posts comments about both her personal life and professional practice on her personal profile page. Only individuals whom the Attorney has approved to view her personal page may view this content (in Facebook parlance, whom she has "friended").[2/] Attorney has about 500 approved contacts or "friends," who are a mix of personal and professional acquaintances, including some persons whom Attorney does not even know.

In the past month, Attorney has posted the following remarks on her profile page:

- "Case finally over. Unanimous verdict! Celebrating tonight."
- "Another great victory in court today! My client is delighted. Who wants to be next?"
- "Won a million dollar verdict. Tell your friends and check out my website."
- "Won another personal injury case. Call me for a free consultation."
- "Just published an article on wage and hour breaks. Let me know if you would like a copy."

[1/] Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[2/] References to Facebook and "friending" should not be construed as limiting this opinion to that particular social media website. For example, Attorney could post the same language on Twitter, which would be viewed by all of her followers. Guidance to attorneys in this area has not kept pace with all forms of social media usage. Rather than discussing each form of social media, which forms likely will change over time, this opinion sets forth the general analysis that an attorney should undertake when considering use of any particular form of social media.

DISCUSSION

Although attorneys are permitted to advertise, any such advertisements must comply with a number of restrictions in both the Rules of Professional Conduct and the Business and Professions Code.[3/] For example, Business and Professions Code section 6157.1 prohibits any "false, misleading or deceptive statement" in an advertisement, while section 6157.2 prohibits including in an advertisement any "guarantee or warranty regarding the outcome of a legal matter." Bus. & Prof. Code, §§ 6157.1 and 6157.2; see also rule 1-400, Std. 1.[4/] Rule 1-400 provides even more detailed requirements with which attorney advertising must comply. Specifically, rule 1-400(D) provides rules that must be followed to ensure that a communication is not false or misleading, or made in a coercive manner. Rule 1-400 also provides sixteen enumerated "Standards"[5/] listing examples of communications which are presumed to be in violation of rule 1-400.

In the above hypothetical, Attorney must determine whether her postings constitute advertisements that must comply with these various advertising rules.[6/] Rule 1-400, however, speaks in terms of "communications" rather than "advertisements." Thus, it is important to look at how both terms are defined.

Business and Professions Code section 6157(c) defines "advertise" or "advertisement" as:

> [A]ny ***communication***, disseminated by television or radio, by any print medium, including, but not limited to, newspapers and billboards, or by means of a mailing 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 by, or on the behalf of, an attorney.

Bus. & Prof. Code, § 6157(c) (emphasis added). Although section 6157(c) does not refer to computer-based communications like Facebook or Twitter postings, there is little doubt that the restrictions of sections 6157.1 and 6157.2 indeed apply to computer-based communications. See, e.g., Bus. & Prof. Code, §§ 6158 (referring to "advertising by electronic media" in the context of Sections 6157.1 and 6157.2); 6157(d) (defining "electronic medium" as including "computer networks"). What may be less clear is whether a posting on Facebook or Twitter, like that described in the hypothetical, is considered "directed generally to members of the public and not to a specific person," as required under section 6157(c)'s definition of an advertisement. This opinion does not take a position on this point because, whether or not the hypothetical posting constitutes an "advertisement" as defined in section 6157(c), it nonetheless will be subject to the same requirements as any other advertisement by virtue of rule 1-400 – provided it is a "communication," as specified in section 6157(c) and rule 1-400(A).[7/]

[3/] This Formal Opinion interprets such rules and statutes under a number of factual scenarios. Questions of legal constitutionality of those rules or statutes (even as applied) are outside of the scope of this Formal Opinion.

[4/] Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[5/] The Standards actually go through No. 16, but Standard 11 has been repealed, thereby leaving 15.

[6/] In California State Bar Formal Opinion No. 2001-155, this Committee concluded that a law firm website is subject to professional responsibility standards governing attorney advertising. The website considered was a commercial website that included, among other promotional content: a description of the law firm and its history and practice; and the education, professional experience, and activities of the firm's attorneys. Specifically, this Committee found that a commercial law firm website is governed by rule 1-400 because the website's content concerns a lawyer's availability for professional employment. This Committee similarly found that such websites are subject to the State Bar Act provisions governing electronic media advertising in Article 9 of the Business and Professions Code.

[7/] Each of the restrictions and requirements included in Business and Professions Code sections 6157.1 and 6157.2 can be found – in a substantially similar form – in rule 1-400. For example, section 6157 prohibits false or deceptive statements; this same concept is captured, among other places, in rule 1-400(D). Section 6157.2 (a) through (c) prohibits guarantees and misleading testimonials; these concepts are captured in rule 1-400, Standards 1, 2, and 13. Section 6157(d) requires disclosure about whether the client will be responsible for certain costs; this concept is captured in rule 1-400, Standard 14.

Rule 1-400, which is entitled "Advertising and Solicitation," applies to any "communication," without concerning itself with whether such communication also constitutes an "advertisement." Indeed, rule 1-400(A) provides four non-exclusive examples of "communications" subject to the rule, only one of which is based on the communication being an "advertisement . . . directed to the general public or any substantial portion thereof." Rule 1-400(A)(3). Thus, in our hypothetical, Attorney primarily must determine whether any of her postings constitute "communications" under rule 1-400(A). If they do, then those postings that constitute "communications" must comply with several significant requirements imposed elsewhere in rule 1-400 and the accompanying standards.

Communications under Rule 1-400

Rule 1-400(A) defines "communications" for purposes of that rule as: "any message or offer made by or on behalf of a member ***concerning the availability for professional employment*** of a member or a law firm directed to any former, present, or prospective client…" (emphasis added). Rule 1-400(A) then goes on to provide non-exclusive examples of types of messages or offers that are covered by the rule, provided that they are "concerning the availability for professional employment." This includes, without limitation:

> (1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

Rule 1-400 does not expressly refer to electronic communications, like those occurring on Facebook, Twitter, or other internet-based social media websites. Nonetheless, just as there is little doubt that a Facebook or Twitter posting that otherwise meets the definition of "advertising" in Business and Professions Code section 6157(c) would be considered an advertisement, there is little doubt that a social media posting that otherwise meets the criteria described in rule 1-400(A) would be a communication for purposes of that rule. Thus, the pertinent question for determining whether a posting constitutes a "communication" under rule 1-400(A) is whether it "concern[s] the availability for professional employment" of Attorney.[8/]

If a posting is found to be a communication subject to rule 1-400, the result is that the posting must comply with the mandates of Rule 1-400(D); it also should avoid falling within one of the sixteen enumerated types of communications presumed to be in violation of rule 1-400, as set forth in the Standards. Rule 1-400(D) generally provides that a communication must not be untrue or misleading (rule 1-400(D)(1), (2) & (3)), must disclose that it is a communication (rule 1-400(D)(4)), and must not be transmitted in a coercive or intrusive manner (rule 1-400(D)(5)).[9/] As discussed above, the sixteen Standards provide various types of communications (such as, for

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[8/] This opinion does not address whether the initial "friend" or "connection" request, if motivated primarily by business development purposes, can itself constitute a communication subject to rule 1-400.

[9/] Specifically, rule 1-400(D) provides, in pertinent part:

> (D) A communication or a solicitation (as defined herein) shall not:
>
> (1) Contain any untrue statement; or
>
> (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
>
> (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
>
> (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
>
> (5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
>
> . . .

example, communications using font size smaller than 12 point, Std. 5, or testimonials or guarantees of results without appropriate disclaimers, Stds. 1 & 2), which are presumed to be in violation of rule 1-400.

In our scenario, Attorney posts two types of professional information: (1) general legal information, such as recommendations of good articles; and (2) information about her legal practice, such as complaints she has filed and victories in court. With respect to the first type of information (*e.g.*, Example Number 5, below), we conclude that this does not constitute information concerning availability for employment. When Attorney posts information about her practice, however, rule 1-400 may apply.

Specific Examples

Consider the following examples[10/] of Attorney's use of personal social media sites for status postings which are visible to all of her "friends," "connections," or "followers" (although not to the public at large):

Example Number 1: "Case finally over. Unanimous verdict! Celebrating tonight."

In the Committee's opinion, this statement, standing alone, is not a communication under rule 1-400(a) because it is not a message or offer "concerning the availability for professional employment," whatever Attorney's subjective motive for sending it.[11/] Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication.

Example Number 2: "Another great victory in court today! My client is delighted. Who wants to be next?"

Similarly, the statement "Another great victory in court today!" standing alone is not a communication under rule 1-400(a) because it is not a message or offer "concerning the availability for professional employment." However, the addition of the text, "[w]ho wants to be next?" meets the definition of a "communication" because it suggests availability for professional employment. Thus, it is subject to rule 1-400(D) and rule 1-400's Standards.

Having concluded this status posting is a communication, the post violates the prohibition on client testimonials. An attorney cannot disseminate "communications" that contain testimonials about or endorsements of a member unless the communication also contains an express disclaimer. See Rules Prof. Conduct, rule 1-400(E), Std. 2; see also *Belli v. State Bar* (1974) 10 Cal.3d 824 [112 Cal.Rptr. 527] (holding that suggesting clients are "dazzled by the services they have received from the attorney" is prohibited, and consequently an attorney "cannot advertise that he has performed his services so well that his clients consequently praise him"). Attorney has not included a disclaimer, so her status posting is presumed to violate rule 1-400.

Similarly, the post may be presumed to violate rule 1-400 because it includes "guarantees, warranties, or predictions regarding the result of the representation." See Rules Prof. Conduct, rule 1-400(E), Std. 1. The post expressly relates to a "victory," and could be interpreted as asking who wants to be the next victorious client.

The Committee further concludes that "Who wants to be next?" when viewed in context, seeks professional employment for pecuniary gain. Accordingly, Attorney's post runs afoul of rule 1-400(E), Std. 5, because it does not bear the word "Advertisement," "Newsletter," or words to that effect.[12/] Attorneys may argue that including this

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[10/] To the extent a status posting invites further discussions between the poster and the reader, this opinion does not address whether those further discussions themselves may constitute communications subject to rule 1-400.

[11/] If, in fact, the statement is not true, then Attorney may be violating other rules not addressed in this opinion – for example, Business and Professions Code section 6106.

[12/] Rule 1-400, Standard 5 states that the word "Advertisement," "Newsletter," or similar words appear in "12-point print on the first page." The Committee recognizes that certain social media postings may not allow for the user to choose the font size of postings, and thus technical compliance with Standard 5 may be impossible. It may be that the State Bar needs to review such standards to bring them current in the face of the prevalence of electronic communications. Until any changes are made to this language, however, the Committee cannot express an opinion to the effect that the use of font size of less than 12-point is acceptable.

wording for each "communication" posting would be overly burdensome, and destroy the conversational and impromptu nature of a social media status posting. The Committee is of the view, however, that an attorney has an obligation to advertise in a manner that complies with applicable ethical rules. If compliance makes the advertisement seem awkward, the solution is to change the form of advertisement so that compliance is possible.[13/]

Finally, the Committee notes that a true and correct copy of any "communication" must be retained by Attorney for two years. Rule 1-400(F) expressly extends this requirement to communications made by "electronic media." If Attorney discovers that a social media website does not archive postings automatically, then Attorney will need to employ a manual method of preservation, such as printing or saving a copy of the screen.

Example Number 3: "Won a million dollar verdict. Tell your friends to check out my website."

In the Committee's opinion, this language also qualifies as a "communication" because the words "tell your friends to check out my website," in this context, convey a message or offer "concerning the availability for professional employment." It appears that Attorney is asking the reader to tell others to look at her website so that they may consider hiring her. This language therefore is subject to the adverse presumption in rule 1-400(E), Standard 5 (*e.g.*, it must contain the word "Advertisement" or a similar word) and the preservation requirement in rule 1-400(F).[14/]

Example Number 4: "Won another personal injury case. Call me for a free consultation."

Again, the Committee concludes that this posting is a "communication" under rule 1-400(A), due primarily to the second sentence.

A communication has to include an offer about availability for professional employment so the "free" consultation language at first might indicate the posting is not a communication. Yet the rule does not limit "communications" to messages seeking financial compensation for services. To the contrary, a communication includes any "message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm." See Rules Prof. Conduct, rule 1-400(A).[15] Given that the rule does not require that all communications are for pecuniary gain, we conclude that an offer to perform a professional service for free can constitute a communication. An offer of a free consultation is a step toward securing potential employment, and the offer of a

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[13/] For example, Facebook offers businesses the opportunity of creating a "Fan Page," on which statements of "Advertisement" or "Newsletter" might be considered less awkward, provided that the "Fan Page" complies with Business and Professions Code sections 6157 and 6158.

[14/] The posting in this example is distinct from running and capping as described in the California Business and Professions Code. A "runner" or "capper" is defined in California Business and Professions Code section 6151 as "any person, firm, association or corporation acting for consideration" as an agent for a lawyer or law firm, in soliciting business. In contrast to prohibited running and capping activities identified in Business and Professions Code section 6152, Attorney's posting does not establish or seek to establish an agency relationship for profit with anyone who views her postings, nor does it imply that Attorney is seeking to do so. Nonetheless, because it is a communication subject to rule 1-400, Attorney must comply with rule 1-400(D) and the Standards set forth in rule 1-400.

[15/] In contrast, solicitations – an express subset of communications subject to further restrictions – are defined to be communications "[c]oncerning the availability for professional employment of a member or law firm in which a significant motive is pecuniary gain," and which "is delivered in person or by telephone, or directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication." Rule 1-400(B). Because Attorney is not reaching out in person or on the telephone, her postings cannot be solicitations, regardless of whether she seeks pecuniary gain. See Cal. State Bar Formal Opn. 2001-155 (describing the "delivered in person or by telephone" requirement for a solicitation as very specific and thus intended as an easy-to-understand "bright line" test); see also Cal. State Bar Formal Opn. 2004-166 (lawyer's communication with a prospective fee-paying client in an internet chat room for victims of mass disaster not a prohibited solicitation, but an improper communication, because it is delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel).

free consultation indicates that the lawyer is available to be hired. On balance, this example in the Committee's opinion constitutes a "communication."

Example Number 5: "Just published an article on wage and hour breaks. Let me know if you would like a copy."

In this instance, we believe the statement does not concern "availability for professional employment." The attorney is merely relaying information regarding an article that she has published, and is offering to provide copies. See *Belli v. State Bar, supra*, 10 Cal.3d 824, 839 [112 Cal.Rptr. 527] (holding that "[e]xposition of an attorney's accomplishments in an effort to interest persons" in an event involving an attorney did not violate restrictions on attorney advertising); see also Los Angeles County Bar Assn. Formal Opn. 494 ("Communications or solicitations solely relating to the availability of seminars or educational programs, or the mailing of bulletins or briefs where there is no solicitation of business, are also constitutionally protected under the State Constitution and First Amendment as noncommercial speech."). Accordingly, this posting does not fall under rule 1-400, and need not comply with any of the Standards of rule 1-400(E).

CONCLUSION

Attorney may post information about her practice on Facebook, Twitter, or other social media websites, but those postings may be subject to compliance with rule 1-400 if their content can be considered to be "concerning the availability for professional employment." Such communications also may be subject to the relevant sections of California Business and Professions Code sections 6157 *et seq*.

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

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 480 **March 6, 2018**

Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.[1]

Introduction

Lawyers comment on legal topics in various formats. The newest format is online publications such as blogs,[2] listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").[3]

Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer's public commentary may also implicate the lawyer's duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

Online public commentary provides a way to share knowledge, opinions, experiences, and news. Many online forms of public commentary offer an interactive comment section, and, as such, are also a form of social media.[4] While technological advances have altered how lawyers

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016 [hereinafter the "Model Rules"]. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] A "blog" is commonly understood to be a website consisting of written entries (posts) regularly updated and typically written in an informal or conversational style by an individual or small group. As recently described in a California State Bar advisory opinion, "[b]logs written by lawyers run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to self-promotional descriptions of the attorney's legal practice and courtroom successes to overt advertisements for the attorney or her law firm." State Bar of Cal. Comm'n on Prof'l Responsibility & Conduct Op. 2016-196 (2016).

[3] These are just examples of public written communications but this opinion is not limited to these formats. This opinion does not address the various obligations that may arise under Model Rules 7.1-7.5 governing advertising and solicitation, but lawyers may wish to consider their potential application to specific communications.

[4] Lawyers should take care to avoid inadvertently forming attorney-client relationships with readers of their public commentary. Although traditional print format commentary would not give rise to such concerns, lawyers interacting with readers through social media should be aware at least of its possibility. A lawyer commenting publicly about a legal matter standing alone would not create a client-lawyer relationship with readers of the commentary. *See* Model Rule 1.18 for duties to prospective clients. However, the ability of readers/viewers to make comments or to

communicate, and therefore may raise unexpected practical questions, they do not alter lawyers' fundamental ethical obligations when engaging in public commentary.[5]

Duty of Confidentiality Under Rule 1.6

Model Rule 1.6(a) provides:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

As Comment [2] emphasizes, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

This confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[6] In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.

Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6.[7] Rule 1.6(b) provides other exceptions to Rule 1.6(a).[8] However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to a

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ask questions suggests that, where practicable, a lawyer include appropriate disclaimers on websites, blogs and the like, such as "reading/viewing this information does not create an attorney-client relationship."

Lawyer blogging may also create a positional conflict. *See* D.C. Bar Op. 370 (2016) (discussing lawyers' use of social media advising that "[c]aution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict.") *See also* ELLEN J. BENNETT, ELIZABETH J. COHEN & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 148 (8th ed. 2015) (addressing positional conflicts). *See also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 50-51 (11th ed. 2018) ("[S]ocial media presence can pose a risk for attorneys, who must be careful not to contradict their firm's official position on an issue in a pending case"). This opinion does not address positional conflicts.

[5] *Accord* D.C. Bar Op. 370 (2016) (stating that a lawyer who chooses to use social media must comply with ethics rules to the same extent as one communicating through more traditional forms of communication).

[6] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (2017). There is also a general principle noted in the Restatement (Third) of the Law Governing Lawyers that "[c]onfidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients." AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS §59, cmt. e (1998). It is beyond the scope of this opinion to define what specific elements will be considered to distinguish between protected client information and information about the law when they entwine.

[7] *See* Wis. Op. EF-17-02 (2017) ("a client's identity, as well as a former client's identity, is information protected by [Rule 1.6]"); State Bar of Nev. Comm'n on Ethics and Prof'l Responsibility Formal Op. 41, at 2 (2009) ("Even the mere identity of a client is protected by Rule 1.6."); State Bar of Ariz. Comm. on the Rules of Prof'l Conduct Op. 92-04 (1992) (explaining that a firm may not disclose list of client names with receivable amounts to a bank to obtain financing without client consent). *See also* MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. [2] (2017) & N.Y. Rules of Prof'l Conduct R. 7.1(b)(2) (requiring prior written consent to use a client name in advertising). *But see* Cal. Formal Op. 2011-182 (2011) ("…[I]n most situations, the identity of a client is not considered confidential and in such circumstances Attorney may disclose the fact of the representation to Prospective Client without Witness Client's consent.") (*citing to* LA County Bar Ass'n Prof'l Responsibility & Ethics Comm'n Op. 456 (1989)).

[8] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(7) (2017).

lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.[9]

Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6.[10] The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.[11]

A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical.[12] Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.

The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is

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[9] For ethical issues raised when a lawyer is participating in an investigation or litigation and the lawyer makes extrajudicial statements, see *infra* at page 6.

[10] *See* ABA Formal Op. 479 (2017). *See also In re* Anonymous, 932 N.E.2d 671 (Ind. 2010) (neither client's prior disclosure of information relating to her divorce representation to friends nor availability of information in police reports and other public records absolved lawyer of violation of Rule 1.6); Iowa S. Ct. Attorney Disciplinary Bd. v. Marzen, 779 N.W.2d 757 (Iowa 2010) (all lawyer-client communications, even those including publicly available information, are confidential); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995) ("[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it"); State Bar of Ariz. Op. 2000-11 (2000) (lawyer must "maintain the confidentiality of information relating to representation even if the information is a matter of public record"); State Bar of Nev. Op. 41 (2009) (contrasting broad language of Rule 1.6 with narrower language of Restatement (Third) of the Law Governing Lawyers); Pa. Bar Ass'n Informal Op. 2009-10 (2009) (absent client consent, lawyer may not report opponent's misconduct to disciplinary board even though it is recited in court's opinion); Colo. Formal Op. 130 (2017) ("Nor is there an exception for information otherwise publicly available. For example, without informed consent, a lawyer may not disclose information relating to the representation of a client even if the information has been in the news."); *But see In re* Sellers, 669 So. 2d 1204 (La. 1996) (lawyer violated Rule 4.1 by failing to disclose existence of collateral mortgage to third party; because "mortgage was filed in the public record, disclosure of its existence could not be a confidential communication, and was not prohibited by Rule 1.6"); Hunter v. Va. State Bar, 744 S.E.2d 611 (Va. 2013) (rejecting state bar's interpretation of Rule 1.6 as prohibiting lawyer from posting on his blog information previously revealed in completed public criminal trials of former clients). See discussion of *Hunter*, *infra*, at note 20.

[11] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-433 (2004) ("Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.")

[12] MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6 cmt. [4] (2017). The possibility of violating Rule 1.6 using hypothetical facts was discussed in ABA Formal Opinion 98-411, which addressed a lawyer's ability to consult with another lawyer about a client's matter. That opinion was issued prior to the adoption of what is now Rule 1.6(b)(4) which permits lawyers to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to secure legal advice about the lawyer's compliance with these Rules. However, the directive provided in Formal Opinion 98-411 remains sound, namely, that a lawyer use caution when constructing a hypothetical. For an illustrative case, see *In re* Peshek, M.R. 23794, 2009 PR 00089 (Ill. 2010). Peshek was suspended for sixty days for violating Rule 1.6. Peshek served as a Winnebago County Public defender for about 19 years. After being assaulted by a client, Peshek began publishing an Internet blog, about a third of which was devoted to discussing her work at the public defender's office and her clients. Peshek's blog contained numerous entries about conversations with clients and various details of their cases, and Peshek referred to her clients by either first name, a derivative of their first name, or their jail ID number, which were held to be disclosures of confidential information in violation of Rule 1.6. She was suspended from practice for 60 days.

not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a).[13] Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record."[14] Accordingly, if a lawyer wants to publicly reveal client information, the lawyer[15] must comply with Rule 1.6(a).[16]

First Amendment Considerations

While it is beyond the scope of the Committee's jurisdiction to opine on legal issues in formal opinions, often the application of the ethics rules interacts with a legal issue. Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals' right to free speech, this right is not without bounds.[17] Lawyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer's free speech rights are limited.[18]

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[13] We again note that Rule 1.6(b) provides other exceptions to Rule 1.6(a).

[14] Model Rule 1.9 addresses the duties lawyers owe to former clients. Rule 1.9(c)(1) permits a lawyer, who has formerly represented a client, to use information related to the representation that has become generally known to the disadvantage of a former client, and Rule 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation except as the Rules permit or require with respect to a current client. This opinion does not address these issues under Model Rule 1.9. The generally known exception in Rule 1.9(c)(1) is addressed in ABA Formal Opinion 479.

[15] Lawyers also have ethical obligations pursuant to Rules 5.1 and 5.3 to assure that lawyers and staff they supervise comply with these confidentiality obligations.

[16] In addition to the requirements of Rules 1.6(a), a lawyer may consider other practical client relations and ethics issues before discussing client information in public commentary to avoid disseminating information that the client may not want disseminated. For instance, Model Rule 1.8(b) reads: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Rule 1.8(b) could be read to suggest that a lawyer may use client information if it *does not* disadvantage a client. The lawyer, nevertheless, has a common-law fiduciary duty not to profit from using client information even if the use complies with the lawyer's ethical obligations. *See* RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 60(2) (1998) ("a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made"). *Accord* D.C. Bar Op. 370 (2016) ("It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client's consent in a written form.")

[17] *See* Gregory A. Garbacz, *Gentile v. State Bar of Nevada: Implications for the Media*, 49 WASH. & LEE L. REV. 671 (1992); D. Christopher Albright, *Gentile v. State Bar: Core Speech and a Lawyer's Pretrial Statements to the Press*, 1992 BYU L. REV. 809 (1992); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998). *See also* Brandon v. Maricopa City, 849 F.3d 837 (9th Cir. 2017) (when a lawyer speaks to the media in her official capacity as an attorney for county officials, such speech involves her conduct as a lawyer and therefore is not "constitutionally protected citizen speech").

[18] *See In re* Snyder, 472 U.S. 634 (1985) (a law license requires conduct "compatible with the role of courts in the administration of justice"); U.S. Dist. Ct. E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993) ("once a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct"); *In re* Shearin, 765 A.2d 930 (Del. 2000) (lawyers' constitutional free speech rights are qualified by their ethical duties); Ky. Bar Ass'n v. Blum, 404 S.W.3d 841 (Ky. 2013) ("It has routinely been upheld that regulating the speech of attorneys is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of '[t]he license granted by the court.'" [citing *Snyder*]); State ex rel. Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46 (Neb. 1982) ("A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into

The plain language of Model Rule 1.6 dictates that information relating to the representation, even information that is provided in a public judicial proceeding, remains protected by Model Rule 1.6(a).[19] A lawyer may not voluntarily disclose such information, unless the lawyer obtains the client's informed consent, the disclosure is impliedly authorized to carry out the representation, or another exception to the Model Rule applies.[20]

At least since the adoption of the ABA Canons of Ethics, the privilege of practicing law has required lawyers to hold inviolate information about a client or a client's representation beyond that which is protected by the attorney-client privilege. Indeed, lawyer ethics rules in many jurisdictions recognize that the duty of confidentiality is so fundamental that it arises before a lawyer–client relationship forms, even if it never forms,[21] and lasts well beyond the end of the professional relationship.[22] It is principally, if not singularly, the duty of confidentiality that enables and encourages a client to communicate fully and frankly with his or her lawyer.[23]

Ethical Constraints on Trial Publicity and Other Statements

Model Rule 3.5 prohibits a lawyer from seeking to influence a judge, juror, prospective juror, or other official by means prohibited by law. Although using public commentary with the client's informed consent may be appropriate in certain circumstances, lawyers should take care not to run afoul of other limitations imposed by the Model Rules. [24]

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some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics.").

[19] *See* ABA Formal Op. 479 (2017). See also cases and authorities cited *supra* at note 10.

[20] One jurisdiction has held that a lawyer is not prohibited from writing a blog that includes information relating to a representation that was disclosed in an open public judicial proceeding after the public proceeding had concluded. In Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013) the Supreme Court of Virginia held that the application of Virginia Rule of Professional Conduct 1.6(a) to Hunter's blog posts was an unconstitutional infringement of Hunter's free speech rights. The Committee regards *Hunter* as limited to its facts. Virginia's Rule 1.6 is different than the ABA Model Rule. The Virginia Supreme Court rejected the Virginia State Bar's position on the interpretation and importance of Rule 1.6 because there was "no evidence advanced to support it." But see *People vs. Isaac* which acknowledges *Hunter* but finds a violation of Colorado Rule 1.6. We note, further, that the holding in *Hunter* has been criticized. *See* Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Give Way to the First Amendment & Social Media in Virginia State Bar ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. 75, 98-106 (2013).

[21] *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2017) (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 permitted by the Rules). *Implementation Chart on Model Rule 1.18*, American Bar Ass'n (Sept. 29, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckdam.pdf.

[22] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (2017); *see also* D.C. Bar Op. 324 (Disclosure of Deceased Client's Files) (2004); Swidler & Berlin v. United States, 524 U.S. 399 (1998). *See also* GILLERS, *supra* note 4, at 34 ("[w]hether the [attorney-client] privilege survives death depends on the jurisdiction but in most places it does").

[23] See generally Preamble to ABA Model Rules for a general discussion of the purposes underlying the duty of confidentiality. *See also* GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, §§ 9.2 & 9.3 at 9-6, 9-14 (3d ed. Supp. 2012).

[24] *See, e.g.*, *In re* Joyce Nanine McCool 2015-B-0284 (Sup. Ct. La. 2015) (lawyer disciplined for violation of Rule 3.5 by attempting to communicate with potential jurors through public commentary); *see also* The Florida Bar v. Sean William Conway, No. SC08-326 (2008) (Sup. Ct. Fla.) (lawyer found to have violated Rules 8.4(a) and (d) for posting on the internet statements about a judge's qualifications that lawyer knew were false or with reckless disregard as to their truth or falsity).

Lawyers engaged in an investigation or litigation of a matter are subject to Model Rule 3.6, Trial Publicity. Paragraph (a) of Rule 3.6 (subject to the exceptions provided in paragraphs (b) or (c)) provides that:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Thus any public commentary about an investigation or ongoing litigation of a matter made by a lawyer would also violate Rule 3.6(a) if it has a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter, and does not otherwise fall within the exceptions in paragraphs (b) or (c) of Model Rule 3.6.[25]

Conclusion

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules.

[25] Pa. Bar Ass'n Formal Op. 2014-300 (2014) (lawyer involved in pending matter may not post about matter on social media). This opinion does not address whether a particular statement "will have a substantial likelihood of materially prejudicing an adjudicative proceeding" within the meaning of Model Rule 3.6.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2016-196

ISSUES: Under what circumstances is "blogging" by an attorney a "communication"[1/] subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions of the State Bar Act[2/] regulating attorney advertising?

DIGEST:

1. Blogging by an attorney may be a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both.

2. A blog that is an integrated part of an attorney's or law firm's professional website will be a communication subject to the rules and statutes regulating attorney advertising to the same extent as the website of which it is a part.

3. A stand-alone blog[3/] by an attorney, even if discussing legal topics within or outside the authoring attorney's area of practice, is not a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising unless the blog directly or implicitly expresses the attorney's availability for professional employment.

4. A stand-alone blog by an attorney on a non-legal topic is not a communication subject to the rules and statutes regulating attorney advertising, and will not become subject thereto simply because the blog contains a link to the attorney or law firm's professional website. However, extensive and/or detailed professional identification information announcing the attorney's availability for professional employment will itself be a communication subject to the rules and statutes.

AUTHORITIES INTERPRETED: Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.[4/]
Business and Professions Code sections 6157–6159.2.

1/ California's Rule of Professional Conduct regulating attorney advertising, rule 1-400, by its terms applies only to "communications" by attorneys, which are defined as "any message or offer made by or on behalf of a member [of the State Bar] concerning the availability for professional employment . . . directed to any former, present, or prospective client." The counterpart provision of the State Bar Act, Business and Professions Code section 6157, regulates attorney advertisements, which are defined as "communications" soliciting employment under specified conditions. Under either scenario, a message must be a "communication" to be subject to regulation.

2/ California Business and Professions Code section 6000, *et seq*.

3/ As used in this opinion, a "stand-alone" blog is a blog that exists independently of any website an attorney maintains or uses for professional marketing purposes.

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

STATEMENT OF FACTS

Attorney A is a small firm practitioner in criminal defense law who writes a stand-alone blog entitled "Perry Mason? He's Got Nothing on Me!" The most recent post, which is typical in content and tone to virtually all of his posts, begins, "I won another case last week. That makes 50 in a row, by my count. Once again, I was able to convince a jury that there was reasonable doubt that my client – who had tested positive for cocaine when pulled over by the local constabulary for erratic driving – was completely unaware of the two-kilo bag of the same substance in her trunk. They were absolutely mesmerized by my closing argument. Here's to the American justice system!" The blog does not explain what A regards as a "win," or what percentage of the claimed victories involved court trials. The blog does not expressly invite readers to contact Attorney A, but it does identify Attorney A as "one of California's premier criminal defense lawyers," and his name appears as a hyperlink to his law firm's professional web page.

Attorney B is a member of a law firm focusing on tax law and litigation that maintains a firm website identifying the types of services the firm provides, the background and experience of the firm's lawyers, testimonials from firm clients, and other similar information. One page of the website, indistinguishable from the other pages in layout and features, is designated as a "blog," both on the page and in the related menus linking to it. The "blog" contains a series of articles written by Attorney B and the other lawyers of the firm on changes in tax law and other topics of potential interest to the firm's clients. Each post concludes with the statement, "For more information, contact" the author of the particular post.

Attorney C is a solo practitioner in family law who writes a blog on family law issues. The blog consists primarily of short articles on topics of potential interest to other family law practitioners and divorcing couples, such as special considerations in high-asset divorces, recent legislative developments in child and spousal support laws, and an explanation of custody law when one former spouse moves to another state. Attorney C's primary purpose in blogging is to demonstrate his knowledge of family law issues, and thereby to enhance his reputation in the field and increase his business. The blog includes a hyperlink to C's professional web page, but the blog postings do not describe Attorney C's practice or qualifications, and contain no overt statements of Attorney C's availability for professional employment. However, several of the blog posts end with the statement that if the reader has "any questions about your divorce or custody case, you can contact me" at Attorney C's professional office phone number.

Attorney D is a solo practitioner in trusts and estates law who maintains a blog expressing his views on a variety of topics relating to the state of the judiciary and the importance of judicial independence, in particular his concern with the impact of reduced funding for the courts on access to justice and his opposition to judicial recall efforts that Attorney D characterizes as politically motivated. Attorney D claims no expertise in the constitutional or other legal issues related to the concept of judicial independence. Although he describes specifically the negative impact of reduced court funding on the Probate Court in which he regularly practices, and bases his opinions on personal experience, Attorney D includes no express invitation or offer to provide legal services in any of his blog posts or any other content of this website. The site does include a hyperlink to D's professional web page located at the bottom of each page.

Attorney E is an employment law attorney who maintains a blog about jazz artists, performances, and recordings. The blog is not part of the website Attorney E maintains to promote his practice, but his professional website contains a link to the blog. Similarly, the blog contains a link to Attorney E's professional website, along with contact information and a brief biographical note explaining that Attorney E is an employment law attorney.

DISCUSSION

"Blogging" has become an increasingly frequent activity of attorneys. Although the various definitions of "blog"[5/] consistently describe it as a website or web page on which a writer, or group of writers, records observations,

[5/] Dictionary.com defines "blog" as "a website containing a writer's or group of writers' own experiences, observations, opinions, etc., and often having images and links to other websites"

reflections, opinions, comments, and experiences that are personal in nature, the term now encompasses essentially any website or page consisting of brief articles or comments on any variety of subjects. Blogs written by attorneys run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to self-promoting descriptions of the attorney's legal practice and courtroom successes, to overt advertisements for the attorney or her law firm.

By its nature, blogging raises First Amendment free speech issues. Prohibited for most of the 20th Century, advertising by attorneys was found to be protected commercial speech by the U.S. Supreme Court in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 [97 S.Ct. 2691]. *Bates* provides that truthful attorney advertising cannot be absolutely prohibited, but may be subject to reasonable restrictions.

In contrast, informational and educational writing by lawyers for publication, such as newspaper and magazine articles and practice guides, historically have been considered core or political speech, fully protected under the First Amendment[6/] and subject to restriction or limitation only under extraordinary circumstances, such as when public health and safety is at risk. This is true even though most articles on legal topics by attorneys likely are written, at least in part, to enhance the authoring attorney's professional reputation and visibility and, for attorneys in private practice, to increase business. As has been made clear by both the U.S. Supreme Court (see *Bolger v. Youngs Drug Products Corp*. (1983) 463 U.S. 60, 66–68 [103 S.Ct. 2875]) and the California Supreme Court (see *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 956–962 [119 Cal.Rptr.2d 296]), the fact that a blog is economically motivated does not, in and of itself, mean that it is "commercial speech" subject to regulation by the State Bar as advertising; commercial motivation is only a factor to be considered.

Most "traditional" blogs expressing the blogger's knowledge and opinions on various topics and issues, legal and non-legal, will be regarded as core or political speech. However, if a blog post advertises the attorney's availability for employment, according to the standards established by the Rules of Professional Conduct and statutes adopted in light of the court cases applicable to attorney advertising, the blog may be held subject to those rules and statutes.[7/]

This opinion is not intended to chill or limit the protected speech of any lawyer, but rather to provide guidance to attorneys engaged in blogging activity as to the types of blogs or blog posts that may fall within the ambit of those regulations and statutes.[8/]

(http://dictionary.reference.com/browse/blog?s=t); Merriam-webster.com defines the term as "a Web site that contains online personal reflections, comments, and often hyperlinks provided by the writer" (http://www.merriam-webster.com/dictionary/blog); and the online Oxford English Dictionary defines "blog" as a "personal website or web page on which an individual records opinions, links to other sites, etc. on a regular basis" (http://www.oxforddictionaries.com/us/definition/american_english/blog?searchDictCode=all). Blogging by lawyers is sometimes referred to as "blawging."

6/ This distinction has been recognized since at least 1928, when the Canons of Professional Ethics adopted by the American Bar Association – and followed in all states for most of the century – held that "[a] lawyer may with propriety write article for publications in which he gives information upon the law" (Canon 40), while at the same time providing that "[i]ndirect advertisements for professional employment . . . and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible." (Canon 27). (See also Utah State Bar Ethics Advisory Opinion No. 98-15, N.J. Att'y Advertising Comm. Op. 23, 149 N.J.L.J. 1298 (1997); Tex. Ethics Op. 425, 1985 (Tex. Sup. Ct. Prof. Ethics Comm.); Ill. Ethics Adv. Op. 763, 1982 (Ill. St. Bar Ass'n).)

7/ See also *Belli v. State Bar* (1974) 10 Cal.3d 824, 831–833 [112 Cal.Rptr. 527], in which the California Supreme Court held that solicitations for educational activities (a lecture series) constituted fully protected speech, but further noted,"We do not mean to suggest, of course, that Belli and others should be permitted to use such solicitation as a subterfuge for soliciting legal business."

8/ This opinion addresses only the question of whether different types of blogging constitute attorney advertising under the Rules of Professional Conduct and related provisions of the State Bar Act. It does not address other professional ethical requirements imposed on attorneys, which may come into play in their online postings. (See, for example, *In re Joyce Nanine McCool*, 2015-B-0284, Attorney Disciplinary Proceeding, Supreme Court of Louisiana [lawyer disbarred due to overzealous social media activism against judges].)

Advertising for California attorneys is governed primarily by rule 1-400, which prohibits "communications" which are false or deceptive in content or presentation, or which tend to confuse, deceive, or mislead the public. (Rule 1-400(D)(1), (2), and (3).) Rule 1-400(D)(4) also prohibits "communications" which do not "indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be." Rule 1-400 also includes a list of standards adopted by the State Bar's Board of Trustees (rule1-400(E))[9/] that describe types of communications that are presumed to be deceptive or misleading, and are therefore presumptively prohibited under the rule. These communications include such things as guarantees, warranties, or predictions regarding the result of the representation (Standard (1)) and testimonials about or endorsements of a member without an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter" (Standard (2)).[10/]

Rule 1-400, by its terms applies only to "communications" by attorneys.[11/] Rule 1-400(A) defines a "communication" as "any message or offer made by or on behalf of a member [of the State Bar] concerning the availability for professional employment . . . directed to any former, present, or prospective client." To qualify as a communication, the message or offer must: (1) be made by or on behalf of a California attorney; (2) concern the attorney's availability for professional employment; and (3) be directed to a former, present, or prospective client.

All blogs maintained by an attorney, in the attorney's professional capacity, meet the first and third parts of this test.[12/] Blog posts written or specifically authorized by an attorney are messages made by or on behalf of a member of the State Bar. Posts on the Internet are directed to the general public, which necessarily includes all possible former, present, or prospective clients. (Cal. State Bar Formal Opn. Nos. 2001-155 and 2012-186.)

Thus, whether a blog post may be found to be a "communication" subject to regulation under rule 1-400 will depend on whether it meets the second part of the test: Is the post "concerning the availability for professional employment" of the member or her firm?

In California State Bar Formal Opinion No. 2012-186, this Committee analyzed whether five short hypothetical posts on a social media website would be considered "communications" under rule 1-400. The Committee concluded that posts which contained words of offer or invitation relating to representation ("Who wants to be next?"; "Check out my web site!"; or "Call for a free consultation") met the criteria, while those which were informational in nature, offering free copies of an article the attorney had written, did not. We believe the same analysis applies with respect to blogs. Thus, a blog post which contains an offer to the reader to engage the attorney, or is a step towards securing potential employment, such as offering a free consultation, would be a

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[9/] See rule 1-400(E): "The Board of Trustees of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules."

[10/] The State Bar Act also includes Article 9.5 (encompassing §§ 6157–6159.2) governing legal advertising. Like rule 1-400, these sections prohibit any advertising that is false or misleading (§ 6157.1) or that contains any guarantee of outcome or promise of quick payment (§ 6157.2). Section 6158 provides that the "message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated." Sections 6158.1 and 6158.2 set forth types of communications that are presumed either to be false, misleading, or deceptive (§ 6158.1) or to be in compliance with the provisions of this statutory article (§ 6158.2).

[11/] Although rule 1-400 also regulates "solicitations" by attorneys, those provisions are not applicable to blog posts, even those which concern the availability of the writer for professional employment. A "solicitation" under the rule is defined as a "communication . . . (a) delivered in person or by telephone, or (b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication." Whether or not a blog post is a communication under rule 1-400, it cannot be a solicitation because it is not "delivered in person or by telephone," nor is it "directed to a specific person known to be represented by counsel." (See Cal. State Bar Formal Opn. Nos. 1995-143 and 2004-166.)

[12/] As we discuss below in connection with Attorney E, an attorney's blog addressing non-legal issues is unlikely to be deemed a "communication" for purposes of rule 1-400.

"communication" within the meaning of rule 1-400 and subject to the rule's requirements and conditions, while a post which provides or offers only information or informational materials would not.

Formal Opinion No. 2012-186 did not address the type of posts made in many blogs, which describe in detail the services offered by the authoring attorney or law firm, and contain detailed author contact information, but which do not include express words of offer or invitation to engage the attorney's services. The Committee believes such posts can constitute "communications" subject to rule 1-400. This Committee has previously opined that, even without specific words of invitation or offer, a website that "includes a description of Attorney A's law firm and its history and practice; the education, professional experience, and activities of the firm's attorneys;" and other features relating to the practice of law implicitly indicates the firm's availability for professional employment and, thus, is a "communication." (Cal. State Bar Formal Opn. No. 2001-155.) The detailed listing of services, qualifications, background, and other attributes of the attorney or law firm, and their distribution to the public, carries with it the clear implication of availability for employment.

The Committee believes the same analysis applies to blog posts that detail an attorney or law firm's courtroom victories or other professional successes. Such posts necessarily involve a description of the type and character of the legal services the attorney/law firm provides, as discussed above. The Committee continues to believe that this characterization does not apply to general expressions of excitement or exultation over a single result,[13/] but advises that multiple such posts may be held to be communications because they implicitly concern the attorney's availability for professional employment, particularly if they include more detailed information about the attorney's practice or are related to posts that include such information.

While a recitation or listing of all of an attorney's cases and outcomes, without commentary, may be informational, "[a] message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result" is presumed to be false, misleading, or deceptive. (Bus. & Prof. Code section 6158.1(a); see also, Standard (1) of rule 1-400 regarding "guarantees, warranties, or predictions regarding the result of the representation.") Even a numerical quantification of "wins" or similar terms can be misleading, absent a description of what the attorney blogger considers a "win"; a courtroom victory is a far different thing than pleading to a lesser charge, though both arguably can be described under some circumstances as "wins."

Although there are no California ethics opinions or cases directly on point, the Supreme Court of Virginia held in *Hunter v. Virginia State Bar ex rel. Third District Committee* (2013) 285 Va. 485 [744 S.E.2d 611] (cert. denied (2013) __ U.S. __ [133 S.Ct. 2871]), that an attorney's blog which focused almost exclusively on the attorney's successes in the field of criminal defense law constituted advertising within the meaning of Virginia's attorney advertising rule. The Supreme Court of Virginia found that attorney Horace Hunter's focus on his skills as an attorney and his firm's seemingly unbroken record of successes "could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter," and therefore was subject to regulation. This is consistent with Comment [3] to ABA Model Rule of Professional Conduct, Rule 7.1,[14/] which states:

> An advertisement 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

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[13/] See California State Bar Formal Opinion No. 2012-186, where the Committee found that a posting of "Case finally over. Unanimous verdict! Celebrating tonight," standing alone, was not a "communication." The Committee added, "Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication."

[14/] The ABA Model Rules are not binding in California but may be used for guidance by lawyers where there is no direct California authority and the ABA Model Rules do not conflict with California policy. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852.) Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. (Rule 1-100(A) [ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered]; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656 [82 Cal.Rptr.2d 799].)

> 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.

While California's rules and statutes differ from Virginia's and the Model Rules, they share many similarities in this area. Rule 1-400(D)(2) and (D)(3) prohibit communications which "[c]ontain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public," as well as communications which "omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public." As noted above, both Standard (1) of rule 1-400 and Business and Professions Code section 6158.1(a) provide that communications which contain guarantees, warranties, or predictions are presumed to be false, misleading, or deceptive.

Both the Virginia Supreme Court in *Hunter* and the Model Rules provide that 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. The same is true in California. Both rule 1-400 and the State Bar Act provide that an appropriate disclaimer may, but will not necessarily, overcome the presumption that descriptions of case results are misleading. Standard (2) of rule 1-400(E) provides that only a testimonial or endorsement bearing a disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter" can overcome the presumption that those testimonials and endorsements are false, misleading, or deceptive pursuant to the rule. Section 6158.3 provides that any electronic media advertisement which conveys a message portraying a result in a particular case or cases must either "adequately disclose the factual and legal circumstances that justify the result portrayed in the message" or "state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts." The section warns, however, that "use of the disclosure alone may not rebut any presumption created in Section 6158.1."

In light of these considerations, we review the individual fact scenarios described above.

Attorney A – "Perry Mason? He's Got Nothing on Me!"

Attorney A's blog is an extreme example of a blog post that does not include specific words of invitation to retain the authoring attorney's services, but which, in the Committee's view, is a "communication" subject to rule 1-400. The blog posts describe the attorney's services as a criminal defense lawyer, and make specific representations concerning the quality of those services ("they were absolutely mesmerized by my closing argument"). The posts also implicitly express Attorney A's availability for professional employment and invite readers to employ Attorney A's services. The comments in the blog posts about the justice system are far more self-promotional than analytical, serving primarily to reinforce the message that the author is capable of taking advantage of the system.

Under the facts presented, Attorney A's blog posts describing his courtroom successes would presumptively violate the following standards adopted by the State Bar's Board of Trustees pursuant to rule 1-400(E): Standard (1) [a communication which contains guarantees, warranties, or predictions regarding the result of the representation] and, in the case of any posts describing the satisfaction of his clients, Standard (2) [a communication which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer]. They also presumptively would be deemed false, misleading, or deceptive under Business and Professions Code section 6158.1 as a "message as to the ultimate result of a specific case or cases presented out of context without adequately providing information as to the facts or law giving rise to the result."[15/] This is particularly true in the instant case because the posts do not explain what Attorney A means when he says he has "won" 50 cases in a row, which could include a broad range of results.

[15/] Attorney A's blog also risks violating his duty of confidentiality owed to the client described in the blog, if that client is identifiable even without inclusion of his name. See Comment [4] to Model Rule 1.6, which states that the prohibition against revealing client confidential information "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." (See also *In re Peshek*, M.R. 23794 (Ill. 2010).) As referenced in footnote 7 above, this opinion does not address these and other potential ethics issues raised by the various hypothetical blogs discussed herein.

The Committee further believes that the express disclosure required under rule 1-400(D)(4) and section 6158.3 that the post may constitute attorney advertising should be conspicuously displayed on the blog post itself.

Attorney B - Blog as Part of a Professional Website

Professional websites maintained by attorneys and law firms have been found to concern their availability for professional employment and, thus, are attorney advertising subject to regulation. In California State Bar Formal Opinion No. 2001-155, this Committee concluded that an attorney's professional website is a communication within the meaning of rule 1-400(A), as well as advertising subject to regulation under Business and Professions Code section 6157. The Committee further expressed the belief that "this conclusion is not altered by the inclusion in the web site of information and material of general public interest."[16/]

The Committee concludes that "information and material of general public interest" includes a blog or blog post that is on the firm website. As part of a larger communication (the professional website) which concerns the firm's availability for professional employment, the blog will be subject to the same requirements and restrictions as the website.

Consistent with Formal Opinion 2001-155's finding that law firm websites are *per se* communications pursuant to rule 1-400, the committee believes that the website – and any included blog – meets the requirement of rule 1-400(D)(4) that it clearly indicate it is a communication by context, and therefore no additional disclosure of that fact is required.

Attorney C – Stand-Alone Blog in Attorney Practice Area

Attorney C's blog consists of short articles directly related to C's area of practice on such topics as "How to Make a Visitation Exchange Go Smoothly," "Collaborative Divorce in California," "How to Survive Divorce with Style and Some Cash Left," and "California QDROs (Qualified Domestic Relations Orders)." None of the blog posts focuses on current or former cases of Attorney C's, nor describes his own family law practice. All of the posts identify Attorney C as the author, with Attorney C's name hyperlinking to his professional web page. Some of the posts conclude with the statement that if the reader has "any questions about your divorce or custody case, you can contact me" at Attorney C's professional office phone number.

The Committee opines that, except as noted in the following paragraph, Attorney C's stand-alone family law blog is not a "communication" subject to rule 1-400. Even though Attorney C's primary purpose in blogging is to demonstrate his knowledge of family law issues to his colleagues and prospective clients in order to enhance his reputation in the field and increase his business, the blog posts are informational expressions of Attorney C's knowledge and opinions. They are not offers or messages concerning Attorney C's availability for professional employment; they do not invite readers to employ Attorney C's services; and they do not specifically describe the services that Attorney C offers. For these reasons, the Committee believes they are not "communications" subject to the rule.

The Committee believes, however, that the concluding statement in several of the blog posts in which Attorney C asks his readers to call him if they have questions about their personal divorce or custody cases does constitute words of invitation evidencing Attorney C's availability for professional employment. Unless the concluding statements are removed, the posts to which they are attached may be found to be "communications" subject to the provisions of rule 1-400, including that rule's requirement in (D)(4) that the post "indicate clearly, expressly, or by context, that it is a communication."

[16/] This is consistent with the conclusion reached in American Bar Association Committee on Ethics and Prof. Responsibility, Formal Opinion No. 10-457. The ABA opinion concludes that the requirements of rules 7.1, 8.4(c), and 4.1(a) also apply to information of a general nature contained on the website, including information provided to assist the public in understanding the law and in identifying when and how to obtain legal services. Although the opinion does not specifically refer to a website-based blog, its application of the requirement to articles, information provided in a narrative form, and FAQ's (frequently asked questions) makes the application to blogs clear.

If several blog posts, or parts thereof, are grouped together, and some of those blog posts are potentially subject to rule 1-400, it would be prudent for the attorney to include a conspicuous disclosure pursuant to rule 1-400(D) proximate to the blog posts explaining that some of the posts listed may constitute attorney advertising.

Attorney D – Stand-Alone Blog on Legal Topics Outside of Attorney Practice Area

Attorney D's stand-alone blog includes posts concerning what he sees as the negative impact of reduced court funding on societal access to justice, including his own practice area of trusts and probate law, as well as the impact of politically-motivated recall petitions on judicial independence. Although Attorney D is a practicing lawyer and the blog includes a hyperlink to his professional web page, the Committee concludes that the facts presented indicate that the blog does not concern Attorney D's availability for professional employment. Therefore, the blog would not be construed as a "communication" subject to rule 1-400 or an "advertisement" under Business and Professions Code section 6157(c).

Attorney E– Non-Legal Blog Linked to Professional Web Page

The fact that Attorney E's blog by-line is a hyperlink to Attorney E's professional website, contains contact information, and identifies Attorney E as an attorney will not change the character of the associated blog or render it attorney advertising. Neither a link from the by-line to the attorney author's professional page nor the inclusion of contact information will itself serve to transform a blog on any topic, legal or non-legal, into advertising subject to rule 1-400 or Business and Professions Code sections 6157, *et seq*. An attorney may freely write a blog on any of countless legal and non-legal subjects, and may identify himself or herself as an attorney thereon, without concern of being subject to rule 1-400, unless the blog or blog post specifically invites the reader to retain the attorney's services or otherwise indicates the attorney's availability for professional employment pursuant to rule 1-400(A) or Business and Professions Code section 6157.

CONCLUSION

A blog by an attorney will not be considered a "communication" subject to rule 1-400 or an "advertisement" subject to Business and Professions Code sections 6157, *et seq*., unless the blog expresses the attorney's availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly, for example, through a detailed description of the attorney's legal practice and successes in such a manner that the attorney's availability for professional employment is evident.

A blog included on an attorney's or law firm's professional website is part of a "communication" subject to the rules regulating attorney advertising to the same extent as the website of which it is a part.

A stand-alone blog by an attorney on law-related issues or developments within his or her practice area is not a "communication" subject to the rules regulating attorney advertising unless it invites the reader to contact the attorney regarding the reader's personal legal case, or otherwise expresses the attorney's availability for professional employment.

A stand-alone blog on law-related issues maintained by an attorney that is not part of the attorney's professional website is not a "communication" subject to attorney advertising regulations unless the blog indicates the attorney's availability for professional employment.

A non-legal blog by an attorney is not a "communication" subject to the rules or statutes regulating attorney advertising, even if it includes a hyperlink to the attorney's professional web page or contains biographical or contact information. However, the biographical or contact information itself may be subject to the rules and statutes.

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

*[**Publisher's Note**: Internet resources cited in this opinion were last accessed by staff on February 4, 2016. Copy of these resources are on file with the State Bar's Office of Professional Competence.]*

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g., In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

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

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3*.[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal*.[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

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14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror….").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

SDCBA Legal Ethics Opinion 2011-2
(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)
Available at https://www.sdcba.org/index.cfm?pg=lec2011-2

I. FACTUAL SCENARIO

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

II. QUESTION PRESENTED

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

III. DISCUSSION

A. Applicability of Rule 2-100

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

Similarly, ABA Model Rule 4.2 says: **"**In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 7 to ABA Model Rule 4.2 adds: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or

whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

1. Are the High-ranking Employees Represented Parties?

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

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

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

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

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

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

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

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

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel's ex parte contacts violated that

rule as well. "Unconsented questioning of an opposing party's employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 *unless the sole purpose of the communication* is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government's counsel is required." (*Id*. at *7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney's ex parte communication is at the heart of the offense.

The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and "nothing in the rule precludes the attorney from advising the client that such a communication can be made." (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

3. Response to Objections

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

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

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

   It is important to underscore at this point that a communication "about the subject of the representation" has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) In litigation, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ. Proc. § 2017.010.) Discovery casts a wide net. "For discovery purposes, information should be regarded as 'relevant to the subject matter' if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating

settlement thereof." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney's duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party's response to a friend request at least "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (*Ibid*.) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

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

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

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

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

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

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

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York's prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as "the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network." That, said the New York Bar, is "because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."

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

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user's circle, those communications reach beyond "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of

the purpose for which the [Facebook user's] lawyer is consulted. . . ." (Evid. Code §952, defining "confidential communication between client and lawyer." Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in "getting their teeth" into the opposing party, a major music company.)

That observation may be true as far as it goes[4], but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure.

"[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

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

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

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9th Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. "There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor." (*Id*. at *5.) The Court

ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. "The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary, (Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation.
suggest support for our conclusion that there was no ethical violation to begin with." (*Id.* at *6.)

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

4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney. The evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-100(A): Opinions of ethics committees in California are not binding, but "should be consulted by members for guidance on proper professional guidance." See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee's opinion, "the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court." But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: "Some federal courts have imposed sanctions for violation of applicable rules of professional conduct." (citing *Midwest Motor Sports*, *supra*.))

B. Attorney Duty Not To Deceive

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

is represented or not and whether the person is a party to the matter or not.

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

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

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

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

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

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

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

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York's Committee on Professional and Judicial Ethics considered whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation." (*Id*., emphasis added.) Consistent with New York's high court's policy favoring informal discovery in litigation, the Committee concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request." In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York's rules prohibiting acts of deception are violated "whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website." (*Id*.)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, "someone whose name the witness will not recognize," to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. "The third person would state only truthful information, for example, his or her true name, but would not reveal

that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer's duty under Pennsylvania Rule of Professional Conduct 8.4 not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." The planned communication by the third party

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

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

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

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

IV. CONCLUSION

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

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our

view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

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

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

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

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4 There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

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5 The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or

job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id*. at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id*. at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id*. at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id*. at p. 5), the opinion has no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 525
December 6, 2012

ETHICAL DUTIES OF LAWYERS IN CONNECTION WITH ADVERSE COMMENTS PUBLISHED BY A FORMER CLIENT

SUMMARY

This Opinion addresses whether, and if so how, an attorney may respond to a former client's adverse public comments about the attorney, when the former client has not disclosed any confidential information and there is no litigation or arbitration pending between the attorney and the former client. The Committee concludes that the attorney may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

TABLE OF AUTHORITIES

Cases

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725

County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839

In the Matter of Dixon (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23

General Dynamics Corp. v. Superior Ct. (1994) 7 Cal.4th 1164

Oasis West Realty v. Goldman (2011) 51 Cal.4th 811

Oxy Res. California LLC v. Superior Court (2004) 115 Cal.App.4th 875

Styles v. Mumbert (2008) 164 Cal.App.4th 1163

Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564

Statutes

California Business and Professions Code section 6068(e)

California Evidence Code section 912

California Evidence Code section 950, *et seq.*

Opinions

Los Angeles County Bar Ass'n Form. Opn. No. 396 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 452 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999)

Los Angeles County Bar Ass'n Form. Opn. No. 519 (2007)

Cal. State Bar Form. Opn. 1983-71 (1983)

Rules

California Rules of Professional Conduct, Rule 3-100(A)

ABA Model Rules of Professional Conduct, Rule 1.6(b)(5)

Other Authorities

Restatement (Third) of the Law Governing Lawyers, section 64, comment e

FACTS

Attorney previously represented Former Client in a civil proceeding. Attorney no longer represents Former Client in any respect. Subsequent to the conclusion of the representation, Former Client posts a message on a website discussing lawyers, stating that Attorney was incompetent and over-charged him, and others should refrain from using Attorney. This Opinion assumes that no confidential information is disclosed in the message[1] and Former Client's conduct does not constitute a waiver of confidentiality or the attorney-client privilege.[2] There is no litigation or arbitration pending between Attorney and Former Client.

ISSUE

In what manner, if any, may Attorney publicly respond to disparaging public comments by Former Client, whether of malpractice or otherwise?

DISCUSSION

[1] For purposes of this Opinion, "confidential information" is defined to include both privileged information and information which, while not privileged, is nevertheless considered to be confidential under California Business and Professions Code section 6068(e)(1).

[2] This Opinion also assumes that the person making the website posting is a former client. The Opinion does not address those situations where the disparaging comment is posted by an unknown author.

An attorney "may not do anything which will injuriously affect [a] former client in any matter in which [the attorney] formerly represented [the client] …." *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574. *See also Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, 821; *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167 ("an attorney is forever forbidden from … acting in a way which will injure the former client in matters involving such former representation." [Citation omitted.]).[3]

An attorney also owes a duty of confidentiality to former clients as well as to current clients. California Business & Professions Code section 6068(e)(1) (it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of, his or her client."); *see also* CRPC, Rule 3-100(A); *Wutchumna Water Co. v. Bailey, supra,* 216 Cal. at 573-574 ("nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship"); *Oasis West Realty v. Goldman, supra,* 51 Cal.4th at 821; *Styles v. Mumbert, supra,* 164 Cal.App.4th at 1167.

The attorney-client privilege under California Evidence Code section 950, *et seq.,* is not subject to the creation of exceptions other than as specified by statute. *See, e.g., Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739; *OXY Res. California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889 (courts may not "imply unwritten exceptions to existing statutory privileges." [Internal citations omitted.] "The area of privilege ' "is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme." ' " [Citation omitted.])

In the absence of waiver of confidentiality and the attorney-client privilege by Former Client (*see, e.g.,* Cal. Evid. Code § 912), there is no statutory exception to the duty of confidentiality under Business & Professions Code section 6068(e)(1) or the attorney-client privilege under Evidence Code section 950, *et seq.*, that would permit an attorney to defend himself or herself by disclosing confidences or privileged information.[4] *See General Dynamics Corp. v. Superior Ct.* (1994) 7 Cal.4th 1164, 1190 ("Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client"); *see also* Los Angeles County Bar Ass'n Form. Opn. No. 519 (there is no self-defense exception to the lawyer's duty of confidentiality under Business & Professions Code section 6068(e) that would allow an attorney to disclose confidential client information to defend against a lawsuit brought by a non-client against the attorney).

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[3] It should be noted that, while instructive concerning the duties owed to a former client, none of the holdings of these three cases was based on facts involving an attorney's response to a former client's adverse public comments about the lawyer.

[4] This Committee's opinion in Los Angeles County Bar Ass'n Form. Opn. No. 396 (1982) is not to the contrary. In that opinion, the Committee opined that a lawyer, in a formal legal proceeding involving alleged malpractice by him, could provide a declaration disclosing certain privileged communications in order to rebut claims being made by a former client against the attorney. Unlike the factual scenario underpinning Opn. No. 396, this Opinion does not involve a judicial proceeding based upon a claim of malpractice or otherwise.

This Opinion assumes there has been no waiver of any confidential information Former Client provided to Attorney while Attorney represented Former Client. Thus, absent a statutory exception allowing Attorney to reveal confidential communications in response to Former Client's public statement, Attorney remains obligated to preserve Former Client's confidential information, and Attorney cannot disclose such information in response to that public statement unless authorized to do so by a court's ruling in a judicial proceeding.[5]

The bar on Attorney revealing confidential information in responding to Former Client's internet posting does not mean Attorney cannot respond at all. If Attorney does not disclose confidential or attorney-client privileged information, and does not act in a way that will injure Former Client in a matter involving the prior representation, he/she may respond.

However, the Attorney's response also must be proportionate and restrained. *See* Restatement (Third) of the Law Governing Lawyers, section 64, comment e (referencing a "proportionate and restrained" public response). In other words, not only must Attorney refrain from revealing any confidential information (because it is assumed that there has been no waiver by Former Client), and avoid saying anything that would injure Former Client in a matter related to the prior representation, he/she may say no more than is necessary to rebut the public statement made by Former Client. This rule has been recognized in other contexts where the extent of an attorney's ability to respond to a statement made by a former client has been considered. *See*, *e.g.*, Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999) (lawyer may disclose confidential information in a fee dispute with a former client only if relevant to the dispute, if reasonably necessary due to an issue raised by the former client, and if the lawyer avoids unnecessary disclosure); Los Angeles County Bar Ass'n. Form. Opinion No. 452 (1988) (lawyer may file a creditor's claim in former client's bankruptcy proceeding but may not prosecute objections to discharge); *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 58-59 (former client's malpractice suit against lawyer does not wholly waive lawyer's duties under the lawyer-client privilege, but constitutes waiver only to the extent necessary to resolve the suit; attorney may not disclose more than is essential to preserve the attorney's rights.)

Therefore, under these circumstances, Attorney may respond to Former Client's internet posting, so long as:

(1) Attorney's response does not disclose confidential information;

(2) Attorney does not respond in a manner that will injure Former Client in a matter involving the former representation; and

(3) Attorney's response is proportionate and restrained.

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[5] There are some authorities from outside California that suggest an exemption to an attorney's duties of loyalty and confidentiality may exist in certain circumstances when necessary in "self-defense." *See, e.g.*, Rule 1.6(b)(5) of the ABA Model Rules of Professional Conduct. It is important to bear in mind, however, that California has not adopted the ABA Model Rules, and they may be consulted for guidance only when there is no California rule directly applicable. *See*, *e.g.*, *County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852; Cal. State Bar Formal Opn. 1983-71.

This Opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.

LAWYER'S RESPONSE TO CLIENT'S NEGATIVE ONLINE REVIEW

FORMAL OPINION 2014-200

The PBA Legal Ethics and Professional Responsibility Committee has been asked whether the Pennsylvania Rules of Professional Conduct ("PA RPC") impose restrictions upon a lawyer who wishes to publicly respond to a client's adverse comments on the internet about the lawyer's representation of the client. The Committee concludes that the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that a lawyer cannot reveal client confidential information in response to a negative online review without the client's informed consent.

We further believe that any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

Applicable Ethics Rules

PA RPC 1.6 provides, in pertinent part:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

. . .

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

. . .

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the

> lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment [14] to Rule 1.6 states:

> [14] Fifth, where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) 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. The right to defend also applies, of course, where a proceeding has been commenced.

Under PA RPC 1.6(e), the duty of confidentiality survives the termination of the client-lawyer relationship.

Scope of Restricted Information

Rule 1.6(a) prohibits lawyers who do not have the client's informed consent from revealing information relating to "representation of a client" with certain limited exceptions. "Information relating to representation" is generally recognized to be very broad and is not limited to secrets or confidences." *Pennsylvania Ethics Handbook, 2011 Ed.,* § 3.3 at 51; *Iowa Supreme Court Att'y Discipline Bd. v. Marzen*, 779 N.W.2d 757, 765–67 (Iowa 2010) (concluding that" the rule of confidentiality is breached when an lawyer discloses information learned through the lawyer-client relationship even if that information is otherwise publicly available").

Exceptions to Confidentiality

Among the exceptions to the rule of confidentiality is the "self-defense exception," PA RPC 1.6(c)(4) (which is identical to 1.6(b)(5) in the Model Rules). That section permits, but does not require, a lawyer to reveal information to the extent the lawyer reasonably believes necessary:

- to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

- to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved; or

- to respond to allegations in any proceeding concerning the lawyer‘s representation of the client.

Oxford Dictionaries Online defines “controversy” as a “disagreement, typically when prolonged, public, and heated.” http://www.oxforddictionaries.com. A disagreement as to the quality of a lawyer’s services might qualify as a “controversy.” However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, Comment [14] makes clear that a lawyer’s disclosure of confidential information to “establish a claim or defense” only arises in the context of a civil, criminal, disciplinary or other proceeding. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a “controversy” in the sense contemplated by the rules to permit disclosures necessary to establish a “claim or defense.” The literal language of Rule 1.6(c)(4) (the self-defense exception) does not authorize responding on the internet to criticism.

The Right to Defend Before an Action is Commenced

> Comment [14] to Rule 1.6 states, in part:
>
> Paragraph (c)(4) 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.

While comment [14] provides that “[p]aragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity” (wrongdoing in which the client’s conduct is implicated), there must be an action or proceeding in contemplation.

The Restatement (Third) of the Law Governing Lawyers, Section 64 is the functional equivalent of PA RPC 1.6(c)(4). Comment c states: “A lawyer may act in self defense ... only to defend against charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification. Imminent threats arise not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.”

The Restatement (Third) of the Law Governing Lawyers, Section 64, comment e states: “Use or disclosure of confidential client information ... is warranted only if and to the extent that

the disclosing lawyer reasonably believes necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy."

State Bar of Arizona Opinion 93-02 concluded that an attorney could disclose otherwise confidential information to the author of a book about the murder trial of a former client in response to assertions made by the former client that the attorney had acted incompetently. The opinion concluded that limiting the exception to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(c)(4) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely superfluous.

In Opinion 2014-1, the San Francisco Bar Association commented:

> [The Arizona opinion] is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information, except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer."* State Bar of Arizona Op. 93-02, pp. 4-5 (Emphasis added). This language is not part of the Restatement as adopted.

ABA Formal Opinion 10-456 states:

> In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."
>
> . . .
>
> The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no

> basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages full and frank disclosure necessary to an effective representation. Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences. . . ."

Ethics Opinions

The New Hampshire Bar Association Ethics Committee was asked whether a lawyer could post a detailed response to a client's online comment that the lawyer took the client's money for a hearing that he knew he could not win. The Committee advised 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." NH Bar News, Feb. 19, 2014.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued Opinion 525 on December 6, 2012 on Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client. It concluded:

> The lawyer may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

The San Francisco Bar Association opined:

> Lawyer is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty to the former client does not prohibit a response, Lawyer's on-going duty of confidentiality prohibits Lawyer from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about a lawyer), or by an lawyer against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. San Francisco Bar Association Op. 2014-1.

Disciplinary Actions

In December 2006, the Supreme Court of Oregon approved a stipulation for discipline suspending a lawyer for 90 days for sending an email message to members of a bar listserv in which the lawyer disclosed confidential information about a former client who had fired the lawyer in an effort to warn colleagues that the former client was "attorney shopping." *In re Quillinan,* 20 DB Rptr 288 (Or. 2006).

The Supreme Court of Wisconsin, in June 2011, suspended the license of a lawyer who wrote and published an Internet blog in which the lawyer revealed confidential information about current and former clients that was sufficiently detailed to identify those clients using public sources. *Office of Lawyer Regulation v. Peshek,* 798 N.W.2d 879 (Wis. 2011).

The Georgia Supreme Court in a March 2013 ruling rejected as inadequate a recommendation of the Georgia State Bar General Counsel seeking a review panel reprimand for lawyer for violating Rule 1.6. The lawyer admitted to posting on the internet confidential information about the lawyer's former client in response to negative reviews about the lawyer the client had posted on consumer websites. *In re Skinner,* 740 S.E.2d 171 (Ga. 2013).

A Chicago lawyer was reprimanded by the Illinois Lawyer Registration and Disciplinary Commission for revealing client communications in response to a former client who posted a negative review of the lawyer on Avvo. The parties' stipulated that the lawyer exceeded what was necessary to respond to the client's accusations by revealing in her response to a negative review that the client had beaten up a co-worker. *In re Tsamis,* Commission File No. 2013PR00095 (Ill. 2013).

Conclusion

While it is understandable that a lawyer would want to respond to a client's negative online review about the lawyer's representation, the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer. We conclude that a lawyer cannot reveal client confidential information in a response to a client's negative online review absent the client's informed consent.

United States Code Annotated Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos) Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in multiple documents. >

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony*.**

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

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

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Early Rule 34 Requests.***

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) ***When Considered Served***. The request is considered to have been served at the first Rule 26(f) conference.

(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A)in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 1-1-20

End of Document

United States Code Annotated Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos) Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 34

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

Currentness

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or -- if the request was delivered under Rule 26(d)(2) -- within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 29, 2015, effective December 1, 2015.)

Fed. Rules Civ. Proc. Rule 34, 28 U.S.C.A., FRCP Rule 34
Including Amendments Received Through 1-1-20

End of Document

United States Code Annotated Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos) Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Currentness

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; amended by Pub.L. 96-481, Title II, § 205(a), October 21, 1980, 94 Stat. 2330, effective October 1, 1981; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 16, 2013, effective December 1, 2013; April 29, 2015, effective December 1, 2015.)

Fed. Rules Civ. Proc. Rule 37, 28 U.S.C.A., FRCP Rule 37
Including Amendments Received Through 1-1-20

End of Document

United States Code Annotated Federal Rules of Evidence (Refs & Annos) Article V. Privileges

Federal Rules of Evidence Rule 502, 28 U.S.C.A.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

CREDIT(S)
(Pub.L. 110-322, § 1(a), Sept. 19, 2008, 122 Stat. 3537; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 502, 28 U.S.C.A., FRE Rule 502
Including Amendments Received Through 1-1-20

End of Document

United States District Court
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER REGARDING ELECTRONICALLY STORED INFORMATION

In cases where the discovery of electronically stored information ("ESI") is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. Preservation

- ❒ The ranges of creation or receipt dates for any ESI to be preserved.
- ❒ The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- ❒ The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- ❒ Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- ❒ The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., "HR head," "scientist," "marketing manager," etc.).
- ❒ The number of custodians for whom ESI will be preserved.
- ❒ The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- ❒ Any disputes related to scope or manner of preservation.

II. Liaison

- ❒ The identity of each party's e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- ❒ Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- ❒ Description of systems in which potentially discoverable information is stored.
- ❒ Location of systems in which potentially discoverable information is stored.
- ❒ How potentially discoverable information is stored.
- ❒ How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- ❒ The amount and nature of the claims being made by either party.
- ❒ The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- ❒ The likely benefit of the proposed discovery.
- ❒ Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

- ❒ Limits on the scope of preservation or other cost-saving measures.
- ❒ Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

- ❒ The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- ❒ The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

- ❒ Whether it is appropriate to conduct discovery of ESI in phases.
- ❒ Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- ❒ Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- ❒ Custodians (by name or role) most likely to have discoverable information and whose ESI
- ❒ will be included in the first phases of document discovery.
- ❒ Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- ❒ The time period during which discoverable information was most likely to have been created or received.

VII. Production

- ❒ The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- ❒ The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- ❒ The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- ❒ The production format(s) that ensure(s) that any inherent searchablility of ESI is not degraded when produced.

VIII. Privilege

- ❒ How any production of privileged or work product protected information will be handled.
- ❒ Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- ❒ Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Plaintiff(s), vs. Defendant(s).	Case Number: C xx-xxxx [MODEL] STIPULATED ORDER RE: DISCOVERY OF ELECTRONICALLY STORED INFORMATION FOR STANDARD LITIGATION

1. PURPOSE

This Order will govern discovery of electronically stored information ("ESI") in this case as a supplement to the Federal Rules of Civil Procedure, this Court's Guidelines for the Discovery of Electronically Stored Information, and any other applicable orders and rules.

2. COOPERATION

The parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court's Guidelines for the Discovery of ESI.

3. LIAISON

The parties have identified liaisons to each other who are and will be knowledgeable about and responsible for discussing their respective ESI. Each e-discovery liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter. The parties will rely on the liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

4. PRESERVATION

The parties have discussed their preservation obligations and needs and agree that preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the costs and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

a) Only ESI created or received between _____ and _____ will be preserved;

b) The parties have exchanged a list of the types of ESI they believe should be preserved and the custodians, or general job titles or descriptions of custodians, for whom they believe ESI should be preserved, e.g., "HR head," "scientist," and "marketing manager." The parties shall add or remove custodians as reasonably necessary;

c) The parties have agreed/will agree on the number of custodians per party for whom ESI will be preserved;

d) These data sources are not reasonably accessible because of undue burden or cost pursuant to Fed. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];

e) Among the sources of data the parties agree are not reasonably accessible, the parties agree not to preserve the following: [e.g., backup media created before _____, digital voicemail, instant messaging, automatically saved versions of documents];

f) In addition to the agreements above, the parties agree data from these sources (a) could contain relevant information but (b) under the proportionality factors, should not be preserved: _____.

5. SEARCH

The parties agree that in responding to an initial Fed. R. Civ. P. 34 request, or earlier if appropriate, they will meet and confer about methods to search ESI in order to identify ESI that is subject to production in discovery and filter out ESI that is not subject to discovery.

6. PRODUCTION FORMATS

The parties agree to produce documents in ☐ PDF, ☐TIFF, ☐native and/or ☐paper or a combination thereof (check all that apply)] file formats. If particular documents warrant a different format, the parties will cooperate to arrange for the mutually acceptable production of such documents. The parties agree not to degrade the searchability of documents as part of the document production process.

7. PHASING

When a party propounds discovery requests pursuant to Fed. R. Civ. P. 34, the parties agree to phase the production of ESI and the initial production will be from the following sources and custodians: _____. Following the initial production, the parties will continue to prioritize the order of subsequent productions.

8. DOCUMENTS PROTECTED FROM DISCOVERY

a) Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding.

b) The parties have agreed upon a "quick peek" process pursuant to Fed. R. Civ. P. 26(b)(5) and reserve rights to assert privilege as follows _____ _____.

c) Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

9. MODIFICATION

This Stipulated Order may be modified by a Stipulated Order of the parties or by the Court for good cause shown.

IT IS SO STIPULATED, through Counsel of Record.

Dated: _____

Counsel for Plaintiff

Dated: _____

Counsel for Defendant

IT IS ORDERED that the forgoing Agreement is approved.

Dated: _____

UNITED STATES DISTRICT/MAGISTRATE JUDGE