

# 127

## USE OF SOCIAL MEDIA FOR INVESTIGATIVE PURPOSES

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### *Introduction*

As various forms of social media have become commonplace, lawyers increasingly utilize social media and social networks as investigative tools. Various social media such as Facebook, Twitter, LinkedIn, and YouTube are potential treasure troves of information concerning opposing parties, witnesses, jurors, opposing counsel, and judges. Use of social media to obtain information in the course of representing clients implicates a number of ethical issues. In many respects, the ethical issues involved in conducting investigations through social media are neither novel nor unique. The Colorado Bar Association Ethics Committee (Committee) recognizes, however, that various jurisdictions and bar associations have expressed differing views about the application of established ethical principles to some aspects of the rapidly-evolving world of investigation through social media. As social media continue to change, and new forms of social media are developed, lawyers should seek guidance from the principles discussed in this opinion and the provisions of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) referenced herein.

This opinion addresses ethical issues that arise when lawyers, either directly or indirectly, use social media to obtain information regarding witnesses, jurors, opposing parties, opposing counsel, and judges. The opinion also addresses circumstances in which lawyers seek to access restricted portions of a person's social media profile or website that ordinarily may be viewed only by permission.

This opinion does not address a lawyer's use of social media for marketing or for disseminating information. This opinion also does not address the extent to which lawyers may have to become familiar with or utilize social media to comply with the applicable standard of care or the ethical obligation to provide competent representation to clients.

### ***Syllabus***

A lawyer may always view the public portion of a person's social media profile and any public posts made by a person through social media. A lawyer acting on behalf of a client may request permission to view a restricted portion of a social media profile or website of an unrepresented party or unrepresented witness only after the lawyer identifies himself or herself as a lawyer, and discloses the general nature of the matter in which the lawyer represents the client. A lawyer acting on behalf of a client may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by counsel in that same matter, without obtaining consent from that counsel. When requesting or obtaining information from a third person who has access to restricted portions of a social media profile or website of a party or witness, a lawyer is subject to the same standards as when requesting any other information in the hands of a third person. A lawyer may not request permission to view a restricted portion of a social media profile or website of a judge while the judge is presiding over a case in which the lawyer is involved as counsel or as a party, nor may a lawyer seek to communicate *ex parte* with a judge through social media concerning a matter or issue pending before the judge. A lawyer may not request permission to view a restricted portion of a social media profile or website of a prospective or sitting juror. A lawyer must never personally use any form of deception to gain access to a restricted portion of a social media profile or website, but a lawyer may advise, direct, or supervise others regarding the use of deceptive tactics to gain access

to a restricted portion of a social media profile or website if those tactics are part of lawful investigative activities.<sup>1</sup> A lawyer may not otherwise avoid prohibitions relating to the use of social media for investigative purposes by delegating investigative tasks to others.

### *Analysis*

The Internet has become indispensable for lawyers in the twenty-first century for, among other things, marketing, conducting investigations and legal research, and obtaining general information in connection with the practice of law. Social media are among the many tools available to lawyers for these purposes. Social networks have been defined as follows:

[I]nternet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings, and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to “friends” – those who have specifically sent a computerized request to view their profile page which the user has accepted.<sup>2</sup>

The capabilities, features and security measures available to users of social media are in a constant state of flux. As social media and social networks evolve, ethical issues undoubtedly will arise that will have to be analyzed on a case-by-case basis. Lawyers utilizing social media in the practice of law should stay reasonably informed of these changes and how they may impact their ethical obligations.<sup>3</sup>

#### **I. Accessing the Public Portion of a Person’s Social Media Profile and Public Posts Made by a Person in Social Media**

Individuals cannot control all of the information, observations, or opinions posted about them on the Internet, including through social media. To the extent they decide to establish their own social media presence, however, individuals generally have some degree of control over the information included. Depending upon the type of social media utilized and the privacy settings

available, individuals may exercise some control over the people, or class of people, to whom certain information is available. Some information posted by a person through social media is available to anyone, or almost anyone, who has Internet access. Other information is accessible only to those granted specific permission by the individual who created the profile.

For purposes of this opinion, the *public portion* of a person's social media profile or webpage refers to the information posted by an individual through some form of social media that is available to and viewable by anyone with access to the Internet or at least by anyone who subscribes to, or is a member of, the larger social network through which the information is posted. For purposes of this opinion, the *restricted portion* of a person's social media profile or website refers to information or portions of the profile accessible to and viewable by only those receiving specific permission from the person who established the profile or posted the information.

Bar association ethics committees that have addressed this issue generally agree that lawyers may view any information publicly posted by a witness, or included on the public portion of that person's social media profile.<sup>4</sup> Such information is treated no differently from any other publicly available information or public record. The Committee believes that the same rule applies to the public portion of a social media profile or posting established by any other individual, including an opposing party, opposing counsel, a judge before whom the lawyer is appearing, or a juror. The Committee concludes that simply viewing the public portion of a person's social media profile or any public posting made by an individual does not constitute a "communication" with that person. Therefore, the lawyer's conduct in viewing such material does not implicate any of the restrictions upon communications between a lawyer and certain others involved in the legal system. Similarly, a lawyer may view or utilize information to which the lawyer already has access through the lawyer's social media connections.

Several provisions of the Rules prohibit or limit communications between a lawyer and various types of individuals involved in the legal system. Colo. RPC 3.5(b) prohibits *ex parte* communications between a lawyer and a judge, juror, prospective juror, or other official by means prohibited by law. Colo. RPC 4.2 prohibits a lawyer who represents a client from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the same matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. Colo. RPC 4.3 restricts communications between a lawyer who represents a client and a person who is *not* represented by counsel. The Committee believes that these rules are not implicated when a lawyer reviews or attempts to review the public portion of social media profiles of any of the classes of persons identified in Rules 3.5, 4.2, and 4.3, because the lawyer's actions in such circumstances do not constitute a form of communication with the individual.

In expressing this opinion, the Committee realizes that some social media networks automatically notify a person when someone views his or her profile. In these circumstances, the person whose profile is viewed may also receive information concerning the individual who viewed the profile. Some bar association committees have opined that it is proper for a lawyer to view a juror's social media profile *only* so long as the juror remains unaware that such investigation is occurring.<sup>5</sup> The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility expressed its disagreement with this view, reasoning that in such circumstances, the lawyer is not communicating with the juror. Rather, the social media service is communicating with the juror based on a technical feature of the particular social media, consistent with agreements between the provider and the subscriber.<sup>6</sup> The Committee agrees with the ABA's view in this regard. Moreover, the Committee believes that the same logic applies

when a lawyer views the public portion of a social media profile or posting of a judge or a person the lawyer knows to be represented by counsel. Judges who maintain a presence on social media should expect that attorneys and parties appearing before them will view the public portion of the judge's profile. Similarly, lawyers should advise their clients to expect opposing counsel or their agents to view the public portions of their social media profiles.

There may be circumstances in which a lawyer might take improper advantage of the fact that a particular individual will receive automatic notification that the lawyer or someone on the lawyer's behalf viewed the individual's social media profile. Colo. RPC 4.4(a) provides that in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. A lawyer who engages in repetitive viewing of an individual's social media profile could potentially violate Colo. RPC 4.4(a) if if the lawyer knew the other person would receive notice each time the lawyer viewed the profile, the lawyer had no other legitimate purpose for the repetitive viewing, and the repetitive viewing rose to the level of harassment or intimidation. To constitute a violation of the Rules, this would have to be an extreme situation, and it would be an exception to the general opinion expressed herein.

## **II. The Use of Deception to Gain Access to a Restricted Portion of a Social Media Profile or Website**

In most respects, conducting investigations or discovery through social media is no different than performing these tasks by any other means. In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Colo. RPC 1.6. *See* Colo. RPC 4.1. It also is professional misconduct for a lawyer to personally engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Colo. RPC 8.4(c). Given these clear provisions of

the Rules, a lawyer must never personally use deception to gain access to a restricted portion of a social media profile or website. This prohibition includes “pretexting” and other forms of trickery through which the person seeking access to a restricted portion of a social media profile pretends to be someone other than himself or herself. As stated in an article in the Colorado Supreme Court Attorney Regulation Counsel Newsletter, “donning an alias and ‘friending’ someone on Facebook to gain access to restricted information is prohibited.”<sup>7</sup>

Personally engaging in any form of deception to gain access to the restricted portion of a person’s social media profile violates Colo. RPC 8.4(c), and it also violates Colo. RPC 4.1 if the lawyer’s actions occur during the representation of a client. This type of conduct also may violate Colo. RPC 4.3, which provides that in dealing on behalf of a client with a person who is not represented by counsel, the lawyer shall not state or imply that the lawyer is disinterested. A lawyer assuming a false identity in seeking access to information from a restricted portion of a social media website in a client matter may imply to the person from whom information is sought that the lawyer is a disinterested person. This would create a false impression if the lawyer is actually seeking information from the third party in connection with a client matter.

No exception in the Rules permits a lawyer to personally employ deception or subterfuge to gain access to restricted information through social media. In *In Re Pautler*, 47 P.3d 1175 (Colo. 2002), the Colorado Supreme Court clarified that deceitful conduct by a lawyer is never justified, even in exigent circumstances. In *Pautler*, a deputy district attorney posed as a public defender in order to convince a murder suspect to turn himself in to law enforcement authorities. The attorney believed he was protecting the public through his actions because the suspect already had confessed to multiple killings and was still at large. In the course of affirming the discipline imposed on Mr. Pautler, the Court clarified that lawyers “must adhere to the highest moral and

ethical standards, even in circumstances in which they believe that lying serves the public interest.”<sup>8</sup>

However, lawyers may advise, direct, or supervise others, including law enforcement agents, investigators, and clients, in the use of deceit or misrepresentation, provided that the use of deceit or misrepresentation occurs during “lawful investigative activities.” Colo. RPC 8.4(c); *see also* CBA Op. 136. During lawful criminal investigations, for example, government lawyers may advise or supervise others engaged in deceit or misrepresentation related to social media. Lawyers also may advise or supervise others engaged in this type of conduct in civil cases, provided that the conduct occurs during lawful investigative activities. As Opinion 136 explains, whether conduct is a part of lawful investigative activities is a legal question that is heavily dependent upon the relevant facts, and there is little relevant legal precedent. Lawyers considering whether to advise, direct, or supervise others engaged in this conduct should proceed extremely cautiously.<sup>9</sup>

### **III. Requesting Permission to View a Restricted Portion of a Social Media Profile or Website of an Unrepresented Party or Witness**

Viewing a restricted portion of a social media profile generally requires some form of communication with the person who established the profile. Through this communication, the person seeking access communicates a request that may be accepted, rejected, or simply ignored. There is no difference under the Rules between interviewing a person and communicating with that person through social media. Bar association ethics committees and commentators differ regarding the information lawyers must include when requesting access to a restricted portion of a social media profile or website of an unrepresented party or witness. Both the New York City Bar Association Committee on Professional Ethics and the Commercial and Federal Litigation Section of the New York State Bar Association have opined that an attorney or the attorney’s agent

may use his or 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.<sup>10</sup> The Oregon State Bar expressed a similar opinion, with the caveat that if the account holder from whom access is requested asks for additional information from the requesting lawyer, or if the lawyer has some other reason to believe that the person misunderstands the lawyer’s role, the lawyer must either must provide additional information and not state or imply that the lawyer is disinterested, or the lawyer must withdraw the request.<sup>11</sup>

On the other hand, the New Hampshire Bar Association Ethics Committee opined that a lawyer’s request for access to a restricted portion of a social media profile that discloses the lawyer’s name, but not the lawyer’s identity and role in pending litigation, is generally improper because it omits material information.<sup>12</sup> Although the New Hampshire opinion cited as authority for this conclusion a 2009 Philadelphia Bar Association Professional Guidance Committee opinion, the Philadelphia opinion does not deal directly with the issue of a lawyer seeking access to a restricted portion of a social media profile in the lawyer’s own name. Instead, it addresses the propriety of having another person seek access, whose name would not be recognized or associated with the lawyer. The Philadelphia opinion concluded that such conduct would violate Pennsylvania ethics rules that are substantially identical to Colo. RPC 4.1 and 8.4(a) and the former version of Colo. RPC 8.4(c), and would possibly violate the Pennsylvania equivalent of Colo. RPC 4.3 (pertaining to dealing with an unrepresented person).<sup>13</sup>

This Committee generally agrees with the New Hampshire opinion. A lawyer who represents a client and personally requests access to the restricted portion of a social media profile established by an unrepresented party or witness implies that he or she is disinterested if disclosure includes the fact that he or she is a lawyer, but does not include additional information. In regard

to communications with unrepresented persons in general, Comment [1] to Colo. RPC 4.3 provides in part:

An unrepresented person, particularly when not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, the lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.

A person who is a witness or an unrepresented party may not recognize the lawyer by name. A witness may not even be aware of the existence of an ongoing legal dispute or of pending litigation. A person receiving a "friend request" from a lawyer or an agent of a lawyer under these circumstances may be inclined to allow access based upon false assumptions. Other individuals may be more suspicious or protective by nature. Except when a request is part of lawful investigative activities permitted by Colo. RPC 8.4(c), as described below, lawyers and their agents must provide sufficient disclosure to allow the unrepresented person to make an informed decision concerning whether to grant access to restricted portions of a social media profile. This means (1) providing the name of the lawyer requesting access or for whom the requesting person is acting as an agent, (2) disclosing that the lawyer is acting on behalf of a client, and (3) disclosing the general nature of the matter in connection with which the lawyer is seeking information. The lawyer also must identify the client if disclosure is necessary to avoid a misunderstanding regarding the lawyer's role. For example, a lawyer representing a party in a personal injury matter seeking access to a restricted portion of the profile of someone identified as a bystander witness would need to provide his or her real name, disclose that he or she is a lawyer, and state that the lawyer seeks access in connection with representation of a client in a personal injury matter in which this person has been identified as a witness. If the lawyer is seeking access to a restricted portion of the social media profile of an unrepresented party, the above-quoted comment to Colo. RPC 4.3

also suggests that the lawyer may have to explain that his or her client has interests opposed to those of the unrepresented party.

The Committee also agrees that an attorney violates the ethical duty not to deceive by personally requesting access to the restricted portion of an unrepresented person's social media profile without disclosing the reason for the request.<sup>14</sup> Some individuals may be willing to allow anyone access to the restricted portion of their social media profile. Other people, however, are more discerning in allowing access to the restricted portions of their profiles. In such cases, the true identity of the person seeking access to the profile and the other information discussed above would be material to the person's decision to grant or deny access. Accordingly, a lawyer's failure to include information concerning the lawyer's identity and the reasons for his or her request could be a misrepresentation by omission. In this regard, Comment [1] to Colo. RPC 4.1, which applies when a lawyer is representing a client, provides in pertinent part that "omissions or partially true but misleading statements can be the equivalent of affirmative false statements."

Based on Colo. RPC 8.4(c), however, a lawyer may advise, direct, or supervise another who makes a social media access request in a way that might be considered deceptive or misleading, including by omitting the reason for the request, provided that the request occurs during lawful investigative activities. Colo. RPC 4.3 does not apply when a lawyer provides such guidance pursuant to the specific exception in Colo. RPC 8.4(c). *See* CBA Op. 136.

A lawyer's ethical obligations are different when seeking access to the restricted portion of a person's social media profile for reasons unrelated to either the representation of a client or a legal matter in which the lawyer is personally involved. When, for example, a lawyer seeks to "friend" another person on Facebook for purely social reasons or in connection with professional networking, the lawyer need not disclose the additional information required when doing so with

respect to a client matter or a legal matter in which the lawyer is a party.

#### **IV. Requesting Permission to View a Restricted Portion of a Social Media Profile of a Person the Lawyer Knows to be Represented by Counsel**

In the course of representing a client, a lawyer may not personally request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by another lawyer in that matter, without obtaining consent from that counsel. Colo. RPC 4.2 prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person the lawyer knows to be represented by another 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. If a request for access to the represented person's social media profile is for the purpose of gaining information for use in the matter in which the lawyer represents a client, then the communication would be prohibited. On this issue, various bar association ethics committees and commentators appear to be substantially unanimous.<sup>15</sup>

As with other forms of prohibited conduct discussed in this opinion, a lawyer may not circumvent the prohibition against contacting a person the lawyer knows to be represented by counsel under the circumstances discussed above by utilizing the services of a third party, including a non-lawyer, except while advising, directing, or supervising others engaged in lawful investigative activities. Colo. RPC 8.4(c); CBA Op. 136; CBA Formal Op. 96, "Ex Parte Communications With Represented Persons During Criminal and Civil Regulatory Investigations and Proceedings" (adopted 1994, revised 2012). Moreover, the prohibitions relating to communications with a person represented by counsel apply even if the represented person initiates or consents to the communication. *See* Colo. RPC 4.2, cmt. [3]. Accordingly, a lawyer representing a client in a matter must not accept a request to participate in a social media website from a person the lawyer knows to be represented by counsel in that matter. If the lawyer and the

person represented by another lawyer are already part of the same limited social network, the lawyer should avoid posting communications relating to the representation that might be viewed by the represented party.

**V. Requesting Permission to View a Restricted Portion of a Social Media Profile or Website of a Prospective or Sitting Juror**

Pursuant to Colo. RPC 3.5(a), a lawyer shall not seek to influence a juror or prospective juror by means prohibited by law. Pursuant to Colo. RPC 3.5(b), a lawyer shall not communicate *ex parte* with a juror or prospective juror during the proceeding unless authorized to do so by law or court order. As with witnesses and parties, requesting permission to view a restricted portion of a social media profile of a prospective or sitting juror involves a communication with that person. Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper *ex parte* communication, whether a lawyer or someone else acting on the lawyer's behalf initiates the communication. The same prohibition would apply to communications through social media initiated by a juror. Essentially, communications between a lawyer and a juror through social media are no different than face-to-face communications or telephonic communications between a lawyer and a juror.

After a jury is discharged, the provisions of Colo. RPC 3.5(c) also would apply to communications through social media, just as with any other form of communication between a lawyer and a former juror. Rule 3.5(c) provides that a lawyer shall not 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;
- (3) the communication involves misrepresentation, coercion, duress

or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts.

Even if communication with a discharged juror is not otherwise prohibited, lawyers and those acting on their behalf must respect the desire of the juror not to talk with the lawyer and may not engage in improper conduct during any communications through social media. *See* Colo. RPC 3.5, cmt. [3].

**VI. Requesting or Obtaining Information from a Person With Access to Restricted Portions of a Social Media Profile or Website of a Party or Witness**

In some circumstances, lawyers or their agents do not have direct access to restricted portions of the social media profile of a party or witness, but may know a third person who does. The lawyer's ethical obligations when dealing with the third person on behalf of a client will partially depend on the status of the third person. Except as permitted by Colo. RPC 8.4(c), a lawyer may not request that the third person make requests for new or additional information from a party or witness if the lawyer would be legally or ethically prohibited from requesting or obtaining it directly. Moreover, the lawyer may not request the third person to engage in deceptive conduct to obtain access to new or additional information from a party or witness through social media. The analysis of such conduct would be the same as under Section II of this opinion.

The Committee believes that the use of social media in this scenario does not significantly alter the lawyer's ethical obligations. Even if the Committee assumes the lawyer is not otherwise prohibited from communicating with the third person, the lawyer must adhere to the same ethical standards that apply whenever the lawyer requests information from a third person who is not a client. A lawyer may advise a client concerning the client's legal rights to access a restricted portion of a social media profile or website. Also, consistent with Colo. RPC 4.2, a lawyer may advise a client concerning direct communications through social media that the client is legally

entitled to engage in with another party the lawyer knows to be represented by counsel. *See* Colo. RPC 4.2, cmt. [4]. However, a lawyer may not simply use the client as a means of communicating directly with a represented party in circumvention of Rule 4.2. *See also* Colo. RPC 8.4(a).

**VII. Requesting Permission to View a Restricted Portion of a Social Media Profile of a Judge Presiding Over a Case in Which the Lawyer Is Involved as Counsel or as a Party**

Lawyers are not the only members of the legal profession utilizing social media. A 2013 national survey of state judicial employees reported that 37% of responding judges used Facebook, specifically, to read and consume content, while 23.1% said they posted and commented on personal Facebook pages; and 9.83% of judges who responded said they read and consumed content on Facebook in their professional roles, while 5.33% said they posted or shared content in a professional capacity.<sup>16</sup>

Some ethics opinions have concluded that a judge may be a “friend” on a social networking site with a lawyer who appears as counsel in a case before the judge.<sup>17</sup> The Colorado Judicial Ethics Advisory Board has not yet addressed the issue. While it is beyond the scope of this opinion, and beyond the authority of the Committee, to opine on the obligations of judges under the Colorado Code of Judicial Conduct, Colo. RPC 3.5 requires lawyers to consider the interplay between a lawyer’s actions and a judge’s obligations and authority under the Code of Judicial Conduct.

Colo. RPC 3.5 also covers communications between a lawyer and a judge during a proceeding before the judge. Lawyers may not seek to influence a judge by means prohibited by law, nor may they communicate *ex parte* with a judge during the proceeding concerning the matter before that judge, unless authorized to do so by law or court order. *See* Colo. RPC 3.5(a) and (b). Rule 2.9 of the Colorado Code of Judicial Conduct, for example, provides that except in limited

circumstances, a judge “shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter.” Rule 2.4(B) of the Code provides that a judge “shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.” Lawyers are prohibited from seeking to influence a judge through improper *ex parte* communications or any other means that would cause the judge to violate the provisions of the Code of Judicial Conduct.

The Committee believes that Colo. RPC 3.5 does not prohibit lawyers from participating on social networking sites with judges, seeking permission to view restricted portions of a judge’s social media profile, or becoming “friends” with judges through social media during any period in which the lawyer is not appearing in a legal matter over which the judge presides. However, Colo. RPC 3.5 prohibits a lawyer from actively communicating *ex parte* with a judge during the period the lawyer is appearing as counsel or as a party before a judge, concerning or relating to the matter before that judge. This prohibition would clearly apply to any *ex parte* communications through social media concerning the legal matter itself, or issues therein, from the time the legal matter is assigned to the judge through the date that the judge’s participation or potential participation in the matter has concluded. A lawyer generally should not send a “friend request” to a judge while the judge is presiding over a case in which the lawyer is appearing as counsel or a party. At least one commentator has recommended that to eliminate any risks and to comply with Rule 3.5, a lawyer and judge who know they are part of the same restricted social network, and who learn that the lawyer is to appear in a matter before the judge, should “un-friend” one another.<sup>18</sup> While the Committee does not believe such steps are mandated, lawyers must be cautious about what they post on any social media network of which they know a judge is a member while they have legal

matters pending before that judge.

### ***Conclusion***

Social media provide a valuable and powerful investigative tool. Undoubtedly, the various forms of social media existing at the time this opinion is issued will undergo significant changes, and additional forms of social media will be developed. Therefore, it is impossible to address all of the specific features of social media and the ethical obligations of lawyers utilizing them for investigative purposes. In general, lawyers utilizing social media for investigative purposes should be guided by the Rules and should consider how they would apply to other more traditional means of obtaining information and forms of communication.

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<sup>1</sup> See Colo. RPC 8.4(c); CBA Formal Op. 136 [TBC], “Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation” (2019) (CBA Op. 136).

<sup>2</sup> N.Y. City Bar Ass’n Comm. on Prof. Ethics, Formal Op. 2010-2, “Obtaining Evidence from Social Networking Websites” (2010) (N.Y. City Bar Op. 2010-2).

<sup>3</sup> The ABA recently amended the comments to Rule 1.1 of the Model Rules of Professional Conduct to require lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Model Rule 1.1, cmt. [8]. The Colorado Supreme Court has not adopted this comment as of the date of this opinion; but Colorado attorneys should consider it as instructive.

<sup>4</sup> See, e.g., N. H. Bar Ass’n Ethics Advisory Comm., Advisory Op. 2012-13/05, “Social Media Contact with Witnesses in the Course of Litigation” (2013) (N.H. Op. 2012-13/05); San Diego Cnty. Bar Legal Ethics Comm., Legal Ethics Op. 2011-2; N.Y. Bar Ethics Op. 843 (2010) (San Diego Cnty. Op. 2011-2).

<sup>5</sup> See, e.g., N.Y. City Bar Ass’n Op. 2012-2; N.Y. Cnty. Lawyers Ass’n Comm. on Prof. Ethics, Formal Op. 743 (2011).

<sup>6</sup> ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 466, “Lawyer Reviewing Jurors’ Internet Presence” (2014).

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<sup>7</sup> James Carlson and Amy DeVan, “New Tools, Same Rules,” 1 OARC Update (Summer 2013), *available at* [coloradosupremecourt.com/newsletters/summer\\_2013](http://coloradosupremecourt.com/newsletters/summer_2013) (Carlson & DeVan).

<sup>8</sup> *Pautler*, 47 P.3d at 1175.

<sup>9</sup> Lawyers providing advice, direction, or supervision pursuant to Rule 8.4(c) have duties to be aware of criminal statutes potentially applicable to fraudulent activity and other access to social media, *see* Colo. RPC 1.1, cmt. [8], and not to counsel or assist a client to engage in criminal conduct, *see* Colo. RPC 1.2(d).

<sup>10</sup> N.Y. City Bar Ass’n Op. 2010-2; Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (2014) (N.Y. State Bar Ass’n Guidelines).

<sup>11</sup> Or. State Bar Formal Op No. 2013-189, “Accessing Information About Third Parties Through a Social Networking Website” (2013) (Or. Op. 2013-189).

<sup>12</sup> N.H. Op. 2012-13/05). *See also* Carlson & DeVan, (advising lawyers who make a “friend” request seeking nonpublic information of an **unrepresented** party to “truthfully identify yourself and your purpose”) (bolded text in original)

<sup>13</sup> Phil. Bar Ass’n Prof. Guidance Comm. Op. 2009-02 (2009).

<sup>14</sup> The San Diego County Bar Legal Ethics Committee opined that regardless of whether the person sought to be “friended” is represented and whether the person is a party to the matter, an attorney violates the ethical duty not to deceive by making a “friend request” to a person’s social media page without disclosing why the request is being made. *See* San Diego Cnty. Bar Ass’n Legal Ethics Op. 2011-2 (2011) (San Diego Cnty. Op. 2011-2).

<sup>15</sup> *See, e.g.*, San Diego Cnty. Op. 2011-2 (stating 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”); Carlson & DeVan (“Don’t...attempt to ‘friend’ a represented party, even if you are truthful about the identity and purpose.”); N.H. Bar Ass’n Op. 2012-13/05 (opining that a lawyer may not send a request to access restricted information to a person using the lawyer’s name and disclosing the lawyer’s role if the lawyer knows the person is represented by counsel); Or. Op. 2013-189 (“If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person’s counsel or with the counsel’s prior consent.”); N.Y. State Bar Ass’n Guidelines (“A lawyer shall not contact a represented person to seek to review the restricted portion of the person’s social media profile unless an express authorization has been furnished by such person.”).

<sup>16</sup> Christopher Davey and Carol Taylor, 2013 CCPIO New Media Survey, A Report of the Conference of Court Public Information Officers (2013), *available at* [www.ccpio.org](http://www.ccpio.org). In previous surveys, judge respondents who said they used social media profile sites without reference to the

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specific type of site grew from 40% in 2010 to 46% in 2012. *Id.*

<sup>17</sup> Hope A. Comisky and William M. Taylor, “Don’t Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas – Discovery, Communications with Judges and Jurors, and Marketing,” 20 Temple Pol. & Civ. Rts. L. Rev. 297, 308 (Spring 2011) (citing Supreme Court of Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 7 (2010)) (Comisky & Taylor); *see* Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (“The Committee believes that a Kentucky judge or justice’s participation in social networking sites is permissible, but the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct.”); *see also* N.Y., Judicial Ethics Comm. Op. 08-176 (permitting judge to join social network that includes lawyers and litigants). *See also* ABA Comm. on Ethics and Prof. Resp., Formal Op. 462, “Judges’ Use of Electronic Social Networking Media” (2013).

<sup>18</sup> Comisky & Taylor, 20 Temple Pol. & Civ. Rts. L. Rev. at 310.