

NFPA Informal Ethics and Disciplinary Opinion No. 16-1

The following Opinion of the National Federation of Paralegal Associations (NFPA) is offered based upon its positions and research in paralegal ethics. It should not be construed as binding and must be interpreted in conjunction with the applicable state's Supreme Court rules and opinions governing the professional conduct of members of the legal profession. This opinion may be used for guidance, and, by the appropriate entity, as a persuasive argument in favor of the findings of NFPA.

QUESTION(S):

What are the general ethical duties of a paralegal when communicating via social media? Specifically: What are the ethical implications of a paralegal sharing or commenting on a social media post, e.g. LinkedIn or Facebook which promotes the services of an attorney? Is it permissible to recommend an attorney's services? May a paralegal provide an "endorsement" of a skill for an attorney on social media such as LinkedIn?

FACTS:

The paralegal requesting this Opinion has observed that technology has changed the practice of law and the way paralegals work, particularly regarding the use of social media. Many jurisdictions have ethical canons or statutes prohibiting paralegals soliciting legal work from the general public on behalf of an attorney. The paralegal is an established and respected NFPA member with an active social media presence. The paralegal would like to determine the extent to which social media use, specifically actions that may give the appearance of a recommendation of or referral to a lawyer or law firm, may constitute breach of a paralegal's ethical duties.

OPINION:

In continuance of NFPA's commitment to identify and address 'ethical dilemmas which could be faced by paralegals in several forums for cyber-communications',¹ this Opinion addresses whether sharing, posting, or commenting on social media posts by or about an attorney/firm meets the definition of legal advertising; are endorsements subject to the Rules of Professional Conduct; and are paralegals subject to the same interpretation of the Rules?

While there do not appear to be any decisions or opinions directed at paralegals using social media to post, comment, share, or otherwise communicate, or their utilization of built-in recommendation or endorsement tools, there are several that address the use of social media by attorneys for attorneys.²

Since paralegals are held to the same standards as attorneys,³ it stands to reason that paralegals are bound by the same rules and canons, and should, therefore, conduct themselves in accordance with

¹ NFPA Informal Ethics and Disciplinary Opinion No. 96-1

http://www.paralegals.org/associations/2270/files/Ethics_Opinion_96_01_cyberspace.pdf.

² Formal Opinion 2014-300 (September 2014) Ethical Obligations for Attorneys Using Social Media - F2014-300.pdf, <https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf>.

³ ABA's Model Guidelines for the Utilization of Paralegal Services, Guideline 1 clearly states "... the paralegal's conduct is consistent with the lawyer's obligations under the Rules of Professional conduct of the jurisdiction in which the lawyer practices".

the ABA Model Rules Professional Conduct (“RPC” or “Rules”) and the corresponding rules for the jurisdictions in which they work.

This Board recognizes that although social media profiles used exclusively for personal purposes (i.e., to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, paralegals must remain aware that *any* information shared via social media might be seen by clients, attorneys, judicial staff, and others, and that such information is likely to be subject to the Rules. It is therefore recommended that:

1. Paralegals may post and accept reviews, but must screen each review for accuracy.
2. Paralegals may comment or respond to reviews or endorsements.
3. Paralegals may solicit reviews and endorsements only as to known skills.
4. Paralegals may endorse attorneys and other paralegals *who are known to them*, on social networking websites.

DISCUSSION:

The temptation is to address the unintentional misuse of all technology; however, the questions before us are of a much narrower scope: (a) What are a paralegal’s general ethical duties when communicating via social media? and (b) What are the ethical implications of the inadvertent use of social media to promote or advertise the services and/or skills of a lawyer or law firm, company, corporation or governmental entity?

The Oxford Dictionary© 2016 defines social media as “[w]ebsites and applications that enable users to create and share content or to participate in social networking.” It further defines social networking as “[t]he use of dedicated websites and applications to interact with other users, or to find people with similar interests to oneself.”

These dedicated websites include, but are not limited to, LinkedIn, Facebook, Twitter, Pinterest, YouTube, Tumblr, Instagram and blogs. Each of these platforms provides informal access for individuals and businesses to network, and increase and maintain relationships. The Law Society, a professional association for Solicitors in England and Wales, provides a helpful insight into the ethics of social media in its Practice Notes published on June 18, 2015:

One of the fundamental considerations that those participating in social media activity should take into account is the potential blurring of the boundaries between personal and professional use, and the importance of recognising that the same ethical obligations apply to professional conduct in an online environment.”⁴

It is well accepted that paralegals are governed by the same rules as the lawyers for whom they work. These rules and canons include the American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules”), ABA’s Model Guidelines for the Utilization of Paralegal Services (“Model Guidelines”), rules of professional conduct promulgated by each state, NFPA’s Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement (“EC”),

⁴ “Social Media” - The Law Society, <http://www.lawsociety.org.uk/support-services/advice/practice-notes/social-media/>.

and the canons and codes of ethics established by other paralegal organizations.

Social Media as a Platform for Communication:

Communicating on social media challenges rules and canons related to integrity and confidentiality; however, a paralegal's ethical duties remain consistent whether the form of communication is in person, in writing, telephonic, or through digital media, including social media. This is especially significant when the paralegal is using social media to comment, post, share, or otherwise communicate 'off the clock'.

Paralegals must avoid inadvertently sharing confidential or proprietary information or giving the impression that their comments represent their firm, company, corporation or governmental entity or firm, company, corporation or governmental entity opinions. Moreover, paralegals must never express personal opinions related to their employers, colleagues, opposing counsel, other attorneys, judges, current or former clients, or any parties to a case pending or closed. Furthermore, social media should not be used to communicate with potential employees, clients, parties represented by other counsel, unrepresented parties, and judges.

Integrity:

Paralegals using social media platforms must be careful not to engage in any conduct which might be considered communication with a represented party represented by a lawyer. This is addressed in EC-1.2: A Paralegal Shall Maintain a High Level of Personal and Professional Integrity:

- (a) A paralegal shall not engage in any ex-parte communications involving the courts or any other adjudicatory body in an attempt to exert undue influence or to obtain advantage or the benefit of only one party.
- (b) A paralegal shall not communicate, or cause another to communicate, with a party the paralegal knows to be represented by a lawyer in a pending matter without the prior consent of the lawyer representing such other party.

(See also: Model Rule 1.4 Communication)

Confidentiality:

While lawyers and paralegals understand that information about clients is not to be revealed, social media provides a portal through which one may unintentionally reveal confidential information. Model Rule 1.6: Confidentiality of Information:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent,
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(See also: EC 1.5 (f) A paralegal shall not engage in any indiscreet communications concerning clients.)

Social Media as a Platform for Recommending or Endorsing Lawyers:

The prevalence of social media and its ease of use provides the opportunity for even the most thoughtful of us to inadvertently engage in legal advertising, provide referrals, or to endorse, recommend, or even defame an attorney or firm.

The most controversial application is LinkedIn's endorsement feature. According to LinkedIn, "[a]n endorsement is a one-click way for your connections to endorse the Skills & Endorsements listed on your profile." By comparison, it defines a recommendation as "a written statement of recommendation from a connection."⁵ LinkedIn characterizes endorsements as:

... a great way to recognize your colleagues for the skills you've seen them demonstrate. It helps contribute to the strength of their profile, and increases the likelihood they'll be discovered for opportunities related to the skills their connections know they possess.⁶

It is a seemingly innocuous action – clicking to confirm that a person wields a particular skill or skill set, and it is conceivable that a paralegal would, in good faith, wish to endorse an attorney. However, that simple action, could easily violate several of the ABA Model Rules, and by extension, state ethics rules, including RPCs 4.1 Truthfulness in Statements to Others; 7.1 Communication Concerning a Lawyer's Services; and 7.4 Communication of Fields of Practice and Specialization. However; the endorsement of a skill may be perceived as a false or misleading statement about that attorney's skills and abilities.

LinkedIn harvests information from an individual's profile to generate a skills list for endorsement. The problems ensue when those harvested skills do not accurately reflect the attorney's actual skills or practice. This issue is compounded when the paralegal does not have firsthand knowledge of the attorney's skillset. The end result is information that, according to the ABA might be construed under RPC 7.1 as 'Communication Concerning a Lawyer's Services'.⁷ We look to [ABA Formal Opinion 10-457](#):

... information constitutes a "communication about the lawyer or the lawyer's services," and is therefore subject to the requirements of Model Rule 7.1 as well as the prohibitions against false and misleading statements in Rules 8.4(c) (generally) and 4.1(a) (when representing clients). Together, these rules prohibit false, fraudulent or misleading statements of law or fact. Thus, no website communication may be false or misleading, or may omit facts such that the resulting statement is materially misleading. Rules 5.1 and 5.3 *extend this obligation* to managerial lawyers in law firms by obligating them *to make reasonable efforts to ensure the firm has in place measures giving reasonable assurance that all* firm lawyers and

⁵ "Skill Endorsements and Recommendations", LinkedIn Help Center, <https://www.linkedin.com/help/linkedin/answer/33125?lang=en>.

⁶ "Skill Endorsements - Overview", LinkedIn Help Center, <https://www.linkedin.com/help/linkedin/answer/31888?lang=en>.

⁷ RPC 7.1 "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

*nonlawyer assistants will comply with the rules of professional conduct.*⁸
[emphasis added]

Although the opinion concerns lawyer websites, it has been interpreted that the same obligation to avoid false or misleading statements extends to social media websites, and, compliance extends to nonlawyer assistants.⁹

In their adaptation of Model Rule 7.1, the state bar associations of several states have also addressed this issue – again, the opinions and rules are directed at lawyers. The following citations represent a sampling:

In California, attorneys must comply with the Rules of Professional Conduct *and* the Business and Professions Code (specifically, Rule 1 - 400(D) which delineates rules that must be followed to ensure that a communication is not false or misleading and Bus. & Prof. Code § 6157.1 which prohibits any “false, misleading or deceptive statement” in an advertisement).¹⁰ (See, California Ethics Opinion 2012-186) These rules apply to social media comments and posts, and may be interpreted to include endorsements as a form of advertising.

In January 2013, Michael Downey, past chair and present member of the Indiana State Bar Association Standing Committee and Professional Conduct, chair-elect of the ABA Law Practice Management Section, and a former member of the ABA Ethics and Technology Committee, in an interview with the Illinois Bar Journal, suggested that endorsements are okay, as long as they are legitimate, "On LinkedIn, it has to be a legitimate endorsement. If people are endorsing me for legal ethics, it should be because they truly believe that I'm good at legal ethics, not because I bought them lunch."¹¹

The Hawai'i Rules of Professional Conduct (7.1 *et seq.*) have been interpreted to include both a lawyer's interactions "in the real world," and on social media. Recent amendments suggest that “when a law clerk, paralegal, firm administrator, etc. acts on a firm social networking site this impacts the rules of professional conduct as applied to the attorney” and “if an attorney allows false or misleading endorsement to remain on his or her LinkedIn profile and doesn't remove them it could be a violation of ethical rules.”¹²

Overall, the rules place the onus on the attorney to monitor her/his social media content and to correct or remove entries that may violate the rules. A paralegal, *with personal knowledge* of an attorney's skill set, may be able to provide legitimate and accurate endorsements, avoiding a potential violation. The prevailing wisdom is that the endorsement feature should be turned off, hidden, or categories limited, eliminating the problem.

⁸ ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010 at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

⁹ 10 Tips for Avoiding Ethical Lapses When Using Social Media | Business Law Section, http://www.americanbar.org/publications/blt/2014/01/03_harvey.html.

¹⁰ California Ethics Opinion 2012-186 <http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20%2812-21-12%29.pdf>.

¹¹ Lawyers and LinkedIn endorsements: proceed with caution | Illinois State Bar Association, <http://www.isba.org/ibj/2013/01/lawpulse/lawyersandlinkedinendorsementsproce>.

¹² Social Media and Ethics Tips for Lawyers - Record on Appeal, <http://www.recordonappeal.com/record-on-appeal/2013/12/social-media-and-ethics-tips-for-lawyers.html>.

CONCLUSION:

Technology – hardware, software, online and offline platforms, and everything in between - is a tool that must be used wisely. With the possible exception of email and texting, social media has become a preferred method of formal and informal communication for both individuals and professionals, and is often used as a marketing tool. The ability to quickly post, comment, and share creates an environment in which one may inadvertently violate confidentiality rules and those governing advertising and marketing.

A paralegal's failure to comply with the governing rules or canons may cause an attorney being disciplined, suspended or disbarred; the paralegal being stripped of any earned certified or professional designation; and possibly criminal prosecution.

By making a request to the National Federation of Paralegal Associations for an opinion and/or recommendation concerning proper conduct for a member of the legal profession as it pertains to ethical conduct, obligations, utilization and/or discipline of and representatives agree to indemnify, hold harmless, and defend the NFPA, its Officers, Directors, Coordinators, Ethics Board and Managing Director from any claims arising from any act or omission of NFPA except those occasioned by NFPA's willful or deliberate acts.

ISSUED: November 29, 2016