

Socially Responsible Lawyers: Why You Need to Understand Social Media to Competently Represent Your Clients (Part 1)

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Social media—we love it, we hate it, we can't get away from it. It can be a minefield, filled with dangers and risks and opportunities to create problems. However, it cannot be avoided in the ethical practice of law. When we think about social media and the practice of law, we often think about the problems attorneys and clients create for themselves by using social media in irresponsible ways. However, it is equally important for attorneys to know their obligations to understand social media and even to use social media in connection with representing clients. Pennsylvania Rule of Professional Conduct 1.1 requires attorneys to provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." To be competent, a lawyer is expressly required to understand and use technology:

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. See Pa. R.P.C. 1.1, Comment [8].

Relevant technology certainly includes social media. So, we cannot just bury our heads in the sand and refuse to engage in technology, such as social media, that may be risky or scary. Instead, as attorneys, we are obligated to understand the impact technology may have on our practice, to take steps to avoid risks that may arise from technology and, yes, to use social media when doing so can assist in the competent representation of our clients. In this first of a two-part series, we will discuss how to incorporate social media into your practice in order to bolster your representation of your clients. Later, in the second of the two-part series, we will discuss what not to do when it comes to social media and the practice of law.

Social media creeps into the practice of law in many ways. We must be cognizant of our own use of social media and that of our clients. Social media pervades client representation and is particularly relevant in litigation, with respect to client management, discovery and trial. Competent representation requires attorneys to "have a basic knowledge of how social media websites work, and advise clients about the issues that may arise as a result of their use of

these websites.” See PBA Formal Opinion 2014-300.

When taking on a new client, attorneys should consider the client’s social media presence in evaluating the client, the matter and the strategy for representation. Attorneys should search for potential and existing clients on social media platforms and review publically available information. Social media posts may provide background information regarding the client and the events giving rise to the requested representation. Information shared by the client or about the client outside of discussions with the attorney may assist the attorney in evaluating the information the potential client shares with the attorney. Such information may inform the attorney as to whether or not to accept the client. At a minimum, investigating a client’s social media presence better informs the attorney to flag potential problems and to develop a comprehensive strategy for the representation.

Then, it is imperative to discuss social media with your client at the outset of the representation. It is not only entirely permissible, but obligatory, for attorneys to advise clients about the content of their social networking websites. It is permissible for attorneys to discuss the removal or addition of information from client’s social networking pages, provided that attorneys are not aiding clients in the spoliation of evidence or advising clients to remove or alter potential evidence. Specifically, an attorney may not instruct a client to destroy any relevant content on any social media page. However, an attorney should advise clients to make social media profiles private and to abstain from posting about pending litigation or events and conditions related to

pending litigation. Attorneys should expect that opposing counsel will search and review a client’s social media accounts and should warn clients of this fact.

Likewise, an attorney should consider the relevance of social media pages belonging to other parties involved in matters. Pennsylvania Rule of Professional Conduct 1.3 provides that “a lawyer shall act with reasonable diligence and promptness in representing a client.” This includes promptly identifying potentially relevant social media evidence and taking steps to preserve that evidence. Attorneys should undertake to view and capture existing, public, information on opposing parties’ social media pages as quickly as possible in order to fully investigate and capture relevant information in an ethical manner. Courts have allowed discovery of private social media accounts when publicly available information demonstrates that the private account may include relevant evidence, so taking these steps to preserve such evidence promptly is critical. Attorneys may not contact a represented party via social media, nor may attorneys contacted unrepresented parties using a pretextual basis. However, an attorney can and should obtain and analyze publicly available information on opposing parties’ social media pages. Further, attorneys must consider the relevance of social media in conducting discovery, and craft discovery requests to include social media posts and information which may be pertinent to the representation of your clients. Information from social media websites that was obtained properly and ethically may be used in litigation. Competent and diligent representation requires consideration of these issues. By recognizing the risks and benefits of

social media in the practice of law, attorneys can ensure that this challenging aspect of technology does not impede competent and diligent representation of clients. Social media has impacts on litigation, both offensively and defensively, and the ethical practice of law requires attorneys to acknowledge these impacts and act accordingly. At a minimum, attorneys must understand clients' social media presence and the impact on representation, advise clients regarding social media usage and investigate opposing parties' public social media websites and consider social media in connection with discovery. By undertaking these steps, attorneys can ethically incorporate the use of social media in the practice of law. Next time, we will discuss ethical problems that can arise with respect to social media and how to avoid them. ■

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