

Socially Responsible Lawyers: Why You Need to Understand Social Media to Competently Represent Your Clients, Part 2

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Social media, while both useful and necessary in the practice of law, carries intrinsic risks that can keep attorneys (and attorneys for attorneys, like us) up at night. We previously discussed attorneys' ethical obligations to educate themselves regarding social media and to effectively incorporate the use of social media into their practice of law. Now, we will discuss ethical problems that can arise when attorneys use social media and how to avoid them.

On the one hand an opposing party's social media accounts can be useful in conducting litigation, on the other hand an attorney may want to advise his own client on social media use. Attorneys may, and should, generally advise clients about the privacy settings and content of their social networking sites. See PBA Formal Opinion 2014-300; see also Phila. Bar. Assoc. Professional Guidance Committee Opinion 2014-5. For example, an attorney should advise clients to change the privacy settings on their social media accounts to prevent public access. It is also a best practice to tell clients not to post any information about their case or the issues that underlie it. However, attorneys may not instruct or permit clients to delete or destroy content on their social media sites. Alteration of social media accounts can give

rise to spoliation issues for the client and disciplinary issues for the attorney. In Virginia, an attorney was suspended for five years for instructing his client to delete damaging photographs from his Facebook account, withholding the photos from opposing counsel, and withholding from the trial court emails discussing the plan to delete such information. See *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013); see also *Allied Concrete v. Lester*, 736 S.E.2d 699 (Va. 2013) (noting that the same attorney and his client were both sanctioned monetarily for spoliation of an incriminating photograph from the client's Facebook account).

Social media risks are not limited to clients, but rather attorneys must also be mindful of their own use of social media. In Iowa, a civil trial was delayed by several months after the plaintiff's attorney made a post about the case on Facebook just before the start of trial which the court found tainted the jury pool. In Louisiana, an attorney was disbarred after she created an online petition asking the public to contact the court regarding an ongoing family court matter, promoted the petition on her personal Twitter account, posted related recordings on social media and engaged in other similar conduct. In Illinois, an attorney was ordered

to pay a fine, do pro bono work and attend a seminar on social media and legal ethics after he took photos of evidence during a trial he was observing and posted tweets regarding the ongoing trial proceedings.

In Pennsylvania, an attorney was suspended for one year and one day when he posted false information about an adverse party on LinkedIn and Twitter, among other disciplinary violations. See *ODC v. Adler*, No. 88 DB 2022. The respondent represented plaintiffs in claims against a cat food manufacturer when their cat died after consuming cat food that had been voluntarily recalled. The reason for the recall was potentially elevated levels of choline chloride. The respondent, however, repeatedly and incorrectly asserted that the food contained chlorine, including on LinkedIn and Twitter, notwithstanding that on numerous occasions it had been made clear to the respondent that chlorine was not contained in the food.

Social media use implicates numerous Rules of Professional Conduct. In advising clients on their social media use, attorneys should be particularly mindful of their obligations under Rules 3.3. and 3.4. Under Rule 3.3(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.” Rule 3.3(d) further provides that an attorney “shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision” in an ex parte proceeding, “whether or not the facts are adverse. Thus, an attorney certainly cannot advise a client to hide or de-

stroy evidence and, even further, an attorney who knows that a client has done so must take remedial measures including potentially disclosing such conduct to the court.

When using their own social media accounts, posting about ongoing proceedings is a minefield of risk. First, the Rules of Professional Conduct specifically prohibit a lawyer making a public statement that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding” in a matter in which the lawyer is participating or has participated. See R.P.C. 3.6(a). Violations of this rule can include commenting on ongoing litigation on a lawyer’s personal or professional social media accounts. Second, attorneys are of course bound by confidentiality obligations under Rule 1.6, which generally prohibits disclosure of client confidential information without informed consent, absent certain limited circumstances. Attorneys must be careful not to post confidential information on social media. Third, attorneys are prohibited from making false statements of material facts to third parties in the course of representing clients. See R.P.C. 4.1(a). This includes making statements on social media about facts pertaining to client representations which the lawyer knows or reasonably should know are false. Fourth, attorneys must be mindful of their ethical obligations with respect to advertisement, including on social media. Rule 7.1 prohibits a lawyer from making “false or misleading communication about the lawyer or the lawyer’s services.” If a lawyer allows clients to comment on his social media account, the lawyer should regularly monitor such comments to ensure they accurately reflect services provided and do not potentially run afoul of Rule 7.1. Fifth, judi-

cial privilege may not apply to attorney conduct in sharing information about ongoing proceedings outside of the courtroom. See, e.g., *Bocchetto v. Gibson*, 860 A.2d 67 (Pa. 2004) (attorney's act of sending complaint to the media was not protected by the doctrine of judicial privilege because it was "an extrajudicial act that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to those proceedings").

While social media is a seemingly permanent fixture in the practice of law, and can have many benefits in prosecuting and defending litigation, attorneys must exercise caution when advising clients regarding social media use and when using social media themselves. By doing so, attorneys can minimize risks to themselves and their clients

while ethically incorporating the use of social media in the practice of law.



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