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ADVICE AND INSIGHT INTO THE PRACTICE OF LAW®

## Practicing Law in the Age of Social Media

## Introduction

The evolving nature of legal practice requires continuous adaptation by attorneys and those who work to support them in their daily practice. Over the years, attorneys have adapted from using books for researching case law to online databases. Attorneys also must remain conversant with changes in statutes, regulations and case law. Similar to other professions, the practice of law has migrated from the use of physical files and written letters to cloud computing and email communications with clients. Clearly, the emergence of social media represents the most recent frontier in the ever-changing information age. The influence of social media on legal practice, client relationships, and the boundaries between professional and personal activities must be scrupulously navigated.

This guide will provide an overview of ethics concerns, practice challenges, potential benefits and pitfalls of social media use related to the practice of law.

## Attorney and Law Firm Social Media Presence

For more than twenty years, the American Bar Association (“ABA”) Legal Technology Resource Center has been publishing the Legal Technology Survey Report.<sup>1</sup>

The most recent ABA TECHREPORT 2016 revealed a significant increase in law firm social network presence, from 17% in 2010 to 74% in 2016.<sup>2</sup> The 2016 report also notes that law firms and individual attorneys are participating in social media to serve professional purposes.

The 2016 ABA TECHREPORT found the following law firm social media presence:

- LinkedIn: 78%
- Facebook: 57%<sup>3</sup>
- Blogs: 26%
- None: 26%
- Don't Know: 10%

The report further demonstrated that LinkedIn, as a professional and career-centered social media forum, appears to be more suited to the legal environment than other social media sites. In contrast to Facebook, LinkedIn focuses on professional status and advancement. A law firm posting about a successful case, therefore, seems more appropriate in a forum focused on careers, rather than one integrated with personal posts about politics, personal milestones, and other informal references.

Attorneys participating in the ABA TECHREPORT indicated the following as to the reasons for participating in social media:

- Career Development/Networking: 73%
- Client Development: 51%
- Education/Current Awareness: 35%
- Case Investigation: 21%

The ABA TECHREPORT 2016 also examined age as a factor in utilization of social media. Its data indicates that attorneys under the age of 40 were participating in social media for professional purposes at a rate of 88%, attorneys age 40-49 at a rate of 85%, 50-59 at a rate of 81% and 60+ at a rate of 64%.

<sup>1</sup> [ABA TECHREPORT 2015 Overview](#)

<sup>2</sup> [ABA TECHREPORT 2016](#)

<sup>3</sup> Approximation based on solos (47%), 2-9 (62%), 10-49 (55%), 100+ (61%). No percentage provided for 50-99 firm size.

## Contemplations and Considerations

Before participating in any social media forum, attorneys and law firms should define their social media goals, as well as review the relevant rules and regulations applying to its use within the relevant jurisdiction. Unfortunately, many attorneys have employed social media in order to develop their business, or as an element of a legal representation, with adverse consequences, including public embarrassment, reputational damage, and suspension of their law license or disbarment.

Before venturing into social media as an attorney or law firm, the following questions should be addressed:

- What is the goal of using social media?
- Which social media forums would be appropriate given the law firm's areas of practice and clients?
- Have ethics opinions and rules been issued in the relevant jurisdiction addressing attorney and/or law firm use of social media?
- Who will be responsible for overseeing social media presence and content?
- Is the designated individual knowledgeable regarding the applicable rules of professional conduct and current ethics opinions on social media use by attorneys and law firms?
- Does the law firm have a social media policy?

## Attorneys and Law Firms as Social Media Users

Once an attorney or law firm has decided to participate in social media, jurisdictional rules related to legal services information must be reviewed. At a minimum, the state equivalent of the following ABA Model Rules should be examined:

- Rule 7.1 Communication Concerning a Lawyer's Services
- Rule 7.2 Advertising
- Rule 7.3 Solicitation of Clients
- Rule 7.4 Communication of Fields of Practice and Specialization

Beyond the text of the rules, attorneys also should review the comments section of each rule for a more detailed explanation of appropriate communications regarding legal services. In addition, law firms should examine all applicable ethics opinions related to use of social media by legal professionals. They should not rely on how other law firms use social media in determining what is and is not considered a violation of the rules. Notably, social media posts acceptable in one jurisdiction may not be acceptable in others.<sup>4</sup>

The District of Columbia Bar issued *Ethics Opinion 370, Social Media I: Marketing and Personal Use*, which alerts attorneys that their use of social media, either personally or professionally, is subject to the District of Columbia Rules of Professional Conduct.<sup>5</sup> This bar opinion also warns attorneys that posting on issues of recent law may create a positional conflict with current or prospective clients.<sup>6</sup> The DC Bar opinion thus reinforces the importance of practitioners researching ethics opinions within their jurisdictions of practice. For example, many jurisdictions prohibit attorneys from identifying "specialties," "skills," and "expertise". The DC Bar opinion nevertheless permits the use of skills, areas of specialization or expertise information on social media if the representations are not false or misleading.<sup>7</sup> Thus, the adage of "Think before you speak" may require a new permutation in the form of "Think before you post."

<sup>4</sup> Christina Vassiliou Harvey, Mac R. McCoy, and Brook Sneath, "[Ten Tips for Avoiding Ethical Lapses When Using Social Media](#)" (ABA, January 2014).

<sup>5</sup> [District of Columbia Bar Ethics Opinion 371](#) (November, 2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

## **LinkedIn**

The ABA TECHREPORT 2016 identifies LinkedIn as the most used social media forum for practitioners responding to the study. LinkedIn serves as a professional website and boasts 400 million+ users. This social media forum is unique in its concentration on professional endeavors rather than personal matters.

### ***Potential Benefits***

As noted above, LinkedIn represents the most popular social media forum for attorneys seeking career development and networking opportunities. Respondents indicated that 78% of their law firms had a presence on LinkedIn. In addition to law firm profiles, many law firms encourage their attorneys to establish an individual profile on LinkedIn in order to share professional successes.

LinkedIn may be more useful for those practitioners seeking to expand their business. Attorneys sharing information about their professional success need not worry about their posts being obscured amidst unrelated personal matters. LinkedIn may be ideal for law firm or self-promotion, but practitioners must be aware when a simple post, endorsement or recommendation may violate ethics rules.

### ***Potential Risks***

One of the potential exposures for attorneys using LinkedIn is unintentionally running afoul of relevant rules of professional conduct. LinkedIn offers members the option to “endorse” other members related to certain skill sets. For example, a litigator may be endorsed for Civil Litigation. Such endorsements, however, may not comply with *ABA Model Rule 7.4 (d): Communication of Fields of Practice & Specialization*, which states in part:

(d) a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

In addition to the endorsement option available to LinkedIn users, another option offers a “recommendation” of a member. Kind words are always welcome by a legal practitioner, but the LinkedIn “recommendation” may be deemed a testimonial and, in some jurisdictions, a violation of rules of professional conduct.

In December 2015, the New York City Bar Association issued *Formal Opinion 2015-7, Application of Attorney Advertising Rules to LinkedIn*, in response to questions about attorney use of LinkedIn. The committee determined that if the LinkedIn profile or other content was advertising, the attorney must comply with *New York Rules of Professional Conduct 7.1, 7.4 and 7.5*, “Specifically each LinkedIn profile or status that is considered advertising must (1) be labeled ‘Attorney Advertising;’ (2) include ‘the name, principal law office address and telephone number of the lawyer;’ (3) be approved under the rules; (4) be preserved; and (5) not contain “false, deceptive or misleading statements.” Therefore, the best intentions of friends and colleagues offering endorsements and providing recommendations must be monitored by attorneys and law firms for compliance with ethics guidelines.

The vast majority of attorneys participating in the ABA TECHREPORT 2016 indicated that career development and networking was their primary motivation for using social media. Client development represented the second most important reason for attorney use of social media. In addition, a law firm's areas of practice may influence whether LinkedIn will support client development. Law firms concentrating on Corporate/Business Organization and Business Transactions, for example, may be more likely to solicit clients via LinkedIn than an attorney concentrating in Personal Injury/Property Damage. The appropriate social media forum selected by a law firm may thus be influenced by whether it is a business to business or business to consumer type of practice.<sup>8</sup>

### **Facebook**

Are attorneys and law firms friends with their clients? It is not uncommon for attorneys and clients to be both colleagues and friends. However, caution should be exercised when linking with a client or a party related to a representation on Facebook. The Facebook format requires users to create their profile and connect via "Friend Requests" to other users. Facebook users may establish their profiles security settings to share as much or as little information as they desire with friends and/or the general public. Nevertheless, in the context of the attorney-client relationship, the idea of being "friends" with clients may not be perceived as a professional communication in the context of client representation.

### **Potential Benefits**

As of September, 2016, Facebook boasted of 1.18 billion daily active users. Interestingly, 84.9% of daily active users are outside the United States and Canada. The Pew Research Center reports that nearly eight in ten online Americans (79%) use Facebook. Facebook usage is more than double that of other social media outlets, with Twitter at 24%, Pinterest at 31%, Instagram at 32%, and LinkedIn at 29%.<sup>9</sup>

The most obvious potential benefit for attorneys and law firms using Facebook is the vast reach of this social media forum. Facebook represents a user-friendly social media option for attorneys. Before utilizing Facebook, however, a legal practitioner should consider whether this venue an appropriate place to share information about law firm services and if potential clients would be reached via this forum.

### **Potential Risks**

Facebook offers great diversity in both its users and the type of information shared by users. In contrast to LinkedIn, more personal information is shared on Facebook ranging from notices of births, marriages and deaths to politics and breaking news. Therefore, professional posts about legal practice may be inconsistent with the customary scope of Facebook postings. For example, is a post about a recent case victory recognized among posts about what users are having for dinner or political debates?

Facebook also permits users to "tag" someone in a post, a process which presents a number of complex issues for attorneys. A user seeking an attorney may post a request for a referral. In response, other users may "tag" an attorney or law firm to the post. This mechanism may create the erroneous appearance that an attorney-client relationship has been initiated. Attorneys also must be scrupulous in responding to such posts or requests in order to avoid an impression by the prospective client that an attorney-client relationship has been created.

8 Allison Shields, "[Blogging and Social Media](#)," ABA TECHREPORT 2016, Legal Technology Resource Center.

9 Shannon Greenwood, Andrew Perrin, Maeve Duggan, "[Social Media Update 2016](#)," Pew Research Center, (November 11, 2016).

### ***Social Media and the Rules of Professional Conduct***

Social media does not relieve attorneys of their responsibility to follow their established protocol for client intake, conflicts checking and engagement letter execution, regardless of whether the client visited the attorney's office or connected through social media.

Similar to any posting on social media forums, Facebook posts also may be deemed advertising and thus require review and assessment by the attorney or law firm. The State Bar of California issued *Formal Opinion 2012-186 (2012)* which reviews five sample social media posts to demonstrate what may and may not be deemed as advertising pursuant to ethics rules.

The five sample social media status updates cited in the California opinions were:

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 a million dollar verdict. Tell your friends and check out my website.
4. Won another personal injury case. Call me for a free consultation.
5. Just published an article on wage and hour breaks. Let me know if you would like a copy.

The analysis of the status updates also included a review of the *California Business and Professional Code (Cal.Bus.&Prof.Code §§6157.1 and .2)* and Rules of Professional Conduct of the State of California.<sup>10</sup> The committee review focused on whether or not the status updates constituted a communication concerning the availability to provide legal services to the public.

The committee determined that the first post was not a communication but rather an announcement of a recent victory, which did not contain information about professional availability.<sup>11</sup> The second post included "Who wants to be next?" which indicated the attorney's availability for employment. In addition, it may have included a guarantee, warranty or predictions, which are not permitted by the rules.<sup>12</sup> The third and fourth posts were regarded as similar communications of attorney availability, thus constituting a potential violation of the rules.<sup>13</sup> The fifth post was considered general legal information, which did not breach the applicable rules.<sup>14</sup>

As attorneys adapt to social media in their practice, a few examples of attorney missteps should be kept in mind.

One of the most infamous examples of attorney social media use is delineated in the case of *Lester v. Allied Concrete*.<sup>15</sup> The underlying matter involved wrongful death personal injury case. During the course of the litigation, it was alleged that the attorney representing the plaintiff-widower instructed his client, via his paralegal, to "clean up his Facebook page" and eventually the client decided to shut it down. As discovery proceeded, plaintiff's counsel did not produce materials requested by defense counsel relating to the client's Facebook page as it existed on the date the discovery request was filed. Following a verdict for the plaintiff, the trial judge sanctioned the client \$180,000 and attorney \$522,000 for failing to appropriately respond to discovery requests throughout the litigation.

<sup>10</sup> State Bar of California Formal Opinion 2012-186 (2012)

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Lester v. Allied Concrete Co.*, 2011 Va. Cir. LEXIS 245 (Va. Cir. Ct. 2011 Sept. 6, 2011)

Another matter involving Facebook concerns the investigation by a defense firm of a plaintiff in a personal injury matter.<sup>16</sup> The attorneys asked a paralegal at the firm to research the plaintiff. At some point, the paralegal “friended” the plaintiff on Facebook in order to access his profile. This communication represented a violation of the model rules by contacting a represented party. Although the attorneys asserted ignorance of the paralegal’s actions or “friending”, this contention did not comprise a defense. As a result, disciplinary charges ensued.

Finally, attorneys also should consider social media use by family or friends of clients. Following a confidential settlement, a plaintiff’s daughter posted the following on social media, “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.”<sup>17</sup> As a result, the settlement was revoked and the plaintiff received nothing.<sup>18</sup>

## Challenging the Standard of Care

Social media is relevant to the practice of law, even for those attorneys who do not participate in this technology personally or professionally. Notably, social media may be critical to a litigator researching potential jurors or juror activity prior to and/or during the course of a trial. Social media may provide an important tool in researching the potential injuries and actions of a plaintiff in a personal injury matter. It also may be used to investigate the behavior of an opposing spouse in a child custody matter. Attorneys should, therefore, be cognizant of how social media is relevant to their areas of practice and corresponding client representations.

*ABA Model Rule of Professional Conduct 1.1: Competence* states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The ABA has modified the comment 8 of this rule to state:

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*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Social media may be a part of everyday life and, as such, may be relevant to lawyer representation of clients accessing these forums. Just as attorneys must adapt to new laws, rules and regulations, so too must they adjust to use of technology and its influence on the legal practice. Attorneys should thus consider their areas of practice and the relevance of social media to client representations.

*Social media is relevant to the practice of law,  
even for those attorneys who do not participate  
in this technology personally or professionally.*

<sup>16</sup> Debra Cassens Weiss, “[Lawyers accused of using paralegal to friend litigant on Facebook are facing ethics probe](#),” A.B.A.J., (April 20, 2016 07:45AM CST),

<sup>17</sup> David Smiley, *Daughter’s Facebook boast costs former Gulliver Prep headmaster \$80,000 discrimination settlement*, Miami Herald (February 26, 2014) (court tossed out discrimination settlement ruling the ex-employee and his daughter breached the confidentiality agreement when she took to social media to brag about it).

<sup>18</sup> Id.

## Social Media and Prospective Clients

With billions of people participating in social media, individuals may inevitably utilize the technology to seek legal representation. When approached by a potential client via social media, attorneys should treat that contact in the same manner as other customary contacts and consider the duties to prospective clients set forth in *ABA Model Rule 1.18*.

Due to the nature of instant interaction through social media, individuals reading an attorney's social media posts may presume the formation of an attorney-client relationship. In order to avoid this presumption, include a disclaimer with social media postings indicating that postings to this site do not create an attorney-client relationship. Note that this may be a challenge for those attorneys using sites such as Twitter, with a limitation of 140 characters per post.

Attorneys must remain vigilant in maintaining the integrity of the profession, abiding by legal ethics, and giving specific legal advice only to individuals who are documented clients of the law firm. Clearly, the casual nature of social media will not serve as a defense in a legal malpractice or disciplinary matter.

## Use of Social Media in Client Representations

Many client representations will involve an investigation into a client's use of social media. As such, attorneys should be prepared to discuss with clients their own use of social media in the past, present and future. Clients should be made aware that the information posted in any social media forum may be sought by an opposing party and used against them.

Various legal specialties encounter technology usage by their clients. Litigators often use social media in client representation. Family law practitioners also may encounter discovery requests for their client's social media posts related to extramarital affairs, child care, alcohol or drug use. A personal injury attorney may be subject to a discovery request seeking access to a plaintiff's social media to investigate the severity of an alleged injury.

In addition to advising clients of the defensive strategies related to social media usage, attorneys should be aware of limitations on their own usage to investigate both opposing and related parties during the representation. For example, LinkedIn may provide notice to a member that their profile was viewed and also reveal the individual or entity accessing the profile. Facebook may provide the same information to users, or a "friend request" may be required to access a profile. Attorneys also should instruct their legal support staff when conducting research regarding limitations in contacting represented parties. Unfortunately, ethics opinions vary as to whether these types of notifications to represented parties, witnesses or jurors violate the rules of professional conduct.<sup>19</sup>

<sup>19</sup> New Hampshire Bar Ass'n Ethics Comm., Opinion 2012-13/5 (6/20/13). See Also San Diego County EthicsOp. 2011-2, and Philadelphia Ethics Op. 2009-2 (consistent with this requirement); but see New York City Ethics Op. 2010-2 (there is no ethical obligation to affirmatively disclose the reason for such request).



## Law Firm Websites and Other Social Media Networks

A law firm website presents specific information to the public. A disclaimer should be prominently displayed on the website. The ABA has provided advice on lawyer websites and disclaimers in *Formal Opinion 10-457, Lawyer Websites*. The opinion states, in part, the following:

Warnings or cautionary statements on a lawyer's website can be designed to and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader. Such warnings or statements may be written so as to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party.

In contrast to a law firm website, many social media forums are not conducive to adding a disclaimer to posts by attorneys and law firms. Such websites may allow for comments by the public, sharing of posts to parties unknown and a lack of control once information is posted.

### YouTube Videos

YouTube is not often associated with the practice of law but can represent another example of misuse of social media when videos related to a legal representation are posted online.<sup>20</sup> While good intentions may have motivated the posting, defense counsel for a criminal defendant believed that a video demonstrated their client's innocence. After posting the video to YouTube, the attorney realized that the video, in fact, showed the client committing a crime. The attorney faced disciplinary complaints, violations of criminal discovery proceedings and a very upset client.<sup>21</sup>

### Consumer Websites

Consumer websites are very popular for people seeking a plumber or handyman. Websites such as Yelp are continuously expanding the types of entities participating in the consumer review process, which now includes legal services. One to five star rating options are available for consumers to share their experiences with various business entities. When a dissatisfied client posts negative comments in this forum, the attorney and law firm are precluded from deleting the review. Unfortunately, the frustration associated with these comments has led attorneys to respond in an unprofessional manner, even disclosing confidential information in the social media forum.<sup>22</sup> Inevitably, the attorney will face either a disciplinary complaint related to the response, a legal malpractice claim, or both.<sup>23</sup>

*Attorneys must remain vigilant in maintaining the integrity of the profession, abiding by legal ethics, and giving specific legal advice only to individuals who are documented clients of the law firm.*

<sup>20</sup> Janan Hanna, "Lawyer Sues After his YouTube Post of Client Leads to Suspension," Illinois Bar Journal, May 2014.

<sup>21</sup> Id.

<sup>22</sup> Los Angeles County Bar Association, Formal Ethics Opinion #525 (12/06/12)

<sup>23</sup> *In re Skinner*, Ga., No. S13Y0105, 3/18/13

## Law Firm as an Employer

As an employer, a law firm may use social media to obtain information regarding applicants for employment. If a law firm uses social media in the hiring process, they must retain and preserve the information they use as an employment record. Although at this time there is no federal law prohibiting an employer from requesting a password and/or access to an applicant's non-public social media pages, many states have passed laws prohibiting this practice. As legislation is pending on the federal level as well as in many states, law firms should review case law within their jurisdiction to determine whether this practice is permissible.<sup>24</sup>

Employers should exercise caution regarding employee use of social media. Law firms should consider implementing a social media policy. Of course, they must comply with jurisdictional rules of professional conduct, while maintaining client confidences and simultaneously managing employee social media use. However, the law firm must not violate Section 7 of the National Labor Relations Act in drafting or enforcing a social media policy. Section 7 protects certain concerted rights of employees, whether unionized or not. To help avoid running afoul of the National Labor Relations Board (NLRB), law firms may reference the sample social media policy provided by the NLRB.<sup>25</sup> The memorandum provides examples of improper social media policies and one that was deemed appropriate.

## Social Media and the Solo Practitioner

Engaging in social media may be most attractive to a solo practitioner. A free social media forum that provides access to a large pool of potential clients may be worthy of exploration, but one should proceed with caution.

Larger law firms may have marketing and general counsel to oversee social media forums, postings and responses. A solo practitioner may have less time or ability to engage in those activities.

While the social media forum opens up access to a larger population, so too are postings from disgruntled clients. Outside of social media, an attorney may be able to manage a disgruntled client. However, social media forums create an option for disgruntled clients to state their grievances, which may be seen by an attorney's complete book of business and potential clients.

Solo practitioners should consider whether or not they have the time to create, monitor and comply with jurisdictional rules and regulations related to social media.

## Conclusion

Social media influences the practice of law as attorneys and law firms use its functionalities to network, promote their achievements and acquire potential clients. Social media also influences the practice of law as a research tool in client representations. Attorney use of social media has led to reputational damage, public reprimands, suspensions and disbarment from the practice of law.

As highlighted in the most recent amendment to *ABA Model Rule 1.1* relating to competence, attorneys and law firms must educate themselves on how social media may benefit their practice, as well as how it may create challenges if not used in compliance with applicable rules of professional conduct.

<sup>24</sup> National Conference of State Legislatures, "[Access to Social Media Usernames and Passwords](#)" (11/18/2016).

<sup>25</sup> "[The NLRB and Social Media](#)," a National Labor Relations Board fact sheet (undated). Refer to May 30, 2012, third report, Report of the Acting General Counsel Concerning Social Media Cases for sample social media policy analysis and samples.

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