Navigating the Use of Social Media by Family Law Attorneys and Our Clients

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Social media continuously changes how we communicate, receive news and connect with others in our personal and professional lives. Social media functions as a platform to connect with family, friends, clients, former clients or other lawyers. However, these casual conversations of emojis, videos, photographs, comments and text become critical in a legal proceeding and can create potential headaches for both litigants and attorneys. Inevitably, relevant, discoverable evidence lies within the social media accounts of at least one person involved in a litigation.

Two ethics opinions[1] broadly define social media to include "any electronic platform through which people may communicate or interact in a public, semi-private, or private way." This includes blogs, public and private chat rooms, listservs, other online locations, social networks, and websites. The opinion specifies, but does not limit its ruling to, Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo, and Lawyers.com because all users of social media can share information, messages, email, instant messages, photographs, video, voice, or videoconferencing content. Whether you are posting for your own law practice or reviewing a client's content, examine both the substance and the privacy of all of that content.

Who Views What? Privacy Settings Work

Using social media to publicize your legal skills and services has never been easier or more dangerous. As a social media user, be conscious of what you post, your tone, and who sees your content. On any day, your social media posts let others interpret your life as they choose, not always as you intend. Like all marketing, it requires thoughtful planning and knowledge of the rules that govern professional advertising.

Wherever attorneys communicate with the public, other attorneys, or clients online, users may have the ability to limit who may see their posted content and who may post content to their pages, and our ethical rules apply. American Bar Association Model Rule 1.1 (Competence) addresses our professional obligation to keep abreast of changes in our practice as part of our obligation to maintain the requisite knowledge and skills to competently practice law. In 2012 the ABA published Comment [8] to Model Rule 1.1, to add the language "…including the benefits and risks associated with relevant technology…" *(emphasis added)*. While lawyers do not need to be experts, they must understand the basic features of technology commonly used in legal practice.[2] Learn about, use and update your privacy settings on all social media accounts to avoid inadvertent social media violations.

One easy step allows you to control who sees your posts: Only accept "friend" and "follower" requests from people you know. This security setting protects your content from being available to the entire public. Additionally, you can and should use the feature which requires you to review and approve any endorsement or comment that someone else wants to post on your social media profile, especially if you do not frequently check your accounts.

Think Before You Post: Use of Social Media for Marketing Legal Services

On social media, we portray the best version of ourselves. We love posting pictures of that great vacation, that shiny new car, posting honors or accolades like "Super Lawyers" or "Best Lawyers in America," or touting that big courtroom victory. But think twice before posting. The information we promote about our practices on both personal and professional social media accounts must be completely accurate. Any misleading content, let alone deceptive identification of the lawyer, firm or your qualifications, violates the Rules of Professional Conduct which prohibit false or misleading communication about a lawyer's services.[3]

In May 2016, the New Jersey Supreme Court Committee on Attorney Advertising issued a Notice to the Bar which was supposed to serve as a "reminder" regarding advertising awards, honors or accolades. Again, in May 2021, the New Jersey Supreme Court Committee on Attorney Advertising issued a Notice to the Bar after

reviewing numerous law firms' advertising pages (which included email signature blocks), setting forth guidelines reminding attorneys about the required two-step process for posting about awards, honors, and accolades that compare a lawyer's services to other lawyer's services:

A. Lawyers are first responsible for making sure the organization made an "adequate and individualized inquiry into the professional fitness of the lawyer."[4] The inquiry should not rely solely on a survey of lawyer's voting or calling in for one another. Be especially mindful of awards, and honors, and accolades that are received based on payment. The committee stated, "[fa]ctors such as payment of money for issuance of the award; membership in the organization that will issue the award; and a level of participation on the organization's Internet website render such awards suspect."[5] The inquiry must comport with R.P.C. 7.1(a)(3)(ii), which provides that the comparison be substantiated.

B. If the award or honor passes the first step a lawyer still must provide the following information/language "*in proximity* to the reference to the award, honor, or accolade," which cannot be provided by reference to another page or in tiny print: (i) a description of the methodology on which the award is based;[6] (ii) name of the comparing organization (the committee notes that the organization is often different from the award); and (iii) the statement "No aspect of this advertisement has been approved by the Supreme Court of New Jersey."[7] The notice provides an example of how an award or honor should be cited no matter where it is posted.

Before you share on LinkedIn or Facebook that you received an award, make sure the required additional information about the award is present. Improper use of honors or accolades such as "Super Lawyers," "Best Lawyers in America," "Rising Star," or "Super Lawyer" violates the Ethic Rules and may lead to disciplinary action.

We must monitor and control the content posted by independent sites, as well as our own social media accounts. Although this is not a new concept, new directories seem to pop up constantly and it can be difficult to monitor what is being posted. The duty to monitor what other people say about you can be onerous, since we do not control what others post. If you find listings that describe a law firm as "the most" or "the best" or otherwise better than any other firm, beware of violations of R.P.C. 7.1 for allowing communication which forms unjustified expectations.

Occasionally, one of your cases might generate interest from the media or you might have the urge to share your success on social media. Before you post "great day in court on a difficult custody case," make sure you look to the various Rules of Professional Conduct which govern these communications. Just as you would pause before accepting a call from a reporter, before you "tweet," remember that attorneys should not advertise or communicate about an active or closed case without the client's consent because R.P.C. 1.6, a fundamental tenet of the attorney/client relationship, requires lawyers to refrain from revealing information relating to the representation of a client unless the client gives informed consent.[8] Also, pursuant to Model Rules 1.6, 3.5 (impartiality and decorum of the tribunal) and 3.6 (trial publicity), lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a different provision of the Model Rules.

As use of social media by lawyers and clients continues to grow, we must continue to understand the ethical challenges associated with them. In December 2020, the New Jersey Advisory Committee on Professional Ethics issued Opinion 738 to clarify whether attorneys may publicly respond to online criticism without violating Rules of Professional Conduct 1.6 and 1.18.[9] Pursuant to Rule 1.6 (confidentiality of information) and 1.18 (prospective client) lawyers may not reveal information relating to representation or information obtained in a consultation without the client's consent, even if no attorney-client relationship continues. A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution the advisory committee suggested language it deemed an appropriate response to negative online criticism (which was originally suggested in a recent Pennsylvania advisory opinion): "I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."[10] With this new directive, social media platforms present particular difficulties because we may not know what is being posted and we might not have independent ability to correct inappropriate posts, even if the authors intended only praise. We also bear responsibility for what others say about us, including our associates and staff.[11]

As a rule of thumb, it is better not to respond to

reviews even if the review is untruthful. Responding to an online negative review (or any review) can lead to trouble for lawyers. Recently, an attorney in Oregon received a public reprimand, but could have been subjected to a 30-day suspension, after revealing a client's criminal record and full name in response to a negative online review.[12] The attorney's previous client posted online on several different websites critiquing the amount of legal fees he had paid versus the results obtained. In addition, the client wrote that the attorney was a "horrible attorney," a "very crooked attorney," and "…I mean how bad of a lawyer do you have to be to lose something that can't be lost?"[13] In response, the attorney responded with the client's full name and criminal history. It is important to note that the client did not reveal in his review that he had been convicted of theft and burglary, only the attorney did. The Oregon Supreme Court noted that by revealing the client's first and last name and criminal history, the knowledge would be available not only to those reading the reviews but to anyone that searched the client's name.[14] Responding to online reviews is a big and growing issue as more attorneys turn to the internet for advertising and more potential clients turn to the internet for reviews.

Attorneys should be particularly careful when responding to comments on social media, making sure the comment does not divulge confidential client information or later indicate the establishment of an attorney-client relationship.[15] On Facebook or Twitter, where individuals can share content worldwide, make sure the information is general and does not contain legal advice. An attorney should take particular care when responding to individual questions on social media because the public comment or tweet could establish an attorney-client relationship, which would be done without a conflict check, and may be viewed by others and contain confidential or privileged information. Remember, people can take the things they see and read online out of context and make their own assumptions. Everything you post is subject to the reader's interpretation.[16] Avoid posting information that could be interpreted as legal advice on a public platform.

Tweeting and Friending: Social Media Activity for Clients

When clients use social media, especially during a divorce, custody case, or support action, there are some urgent, timely changes they may have the right to make to protect themselves and others in their family. Diligent and zealous representation may require lawyers to review a client's social media postings, and/or proactively advise clients about how their social media can be used by them, or against them. Simply put, emails, texts, tweets and posts can be used in Court.

Have your client identify all accounts and advise changing all of the passwords, even if they believe their passwords are secret, secure and cannot be guessed. Passwords can be stored on, or across, devices and we want our clients to have the privacy that they believe exists.

Encourage your client to be honest with you about what they have posted on social media. Where applicable, an attorney should advise the client of the potential effect of the client's conduct on a child custody dispute including poorly timed or inadvisable new content on social media.[17] Have your client go through the posts, as far back as you think is appropriate, to check whether they find material that might be useful or potentially damaging in their case. What you do not know can only hurt your client's case.

Lawyers may not, however, give any advice to direct or even suggest that social media content be destroyed. Aside from whether such an instruction would reflect a lack of competency and understanding of how social media providers store and archive data,[18] the advice also violates ethical obligations. RPC 3.4 applies to situations where a lawyer advises a client to delete or alter social media content. One Virginia attorney who advised a client to "clean up" his Facebook page and suggested that some images be removed found himself suspended for five years and facing a $722,000 award of costs and fees against the client and the attorney.[19]

Carefully present your instructions to clients about their past and future social media activity. Clients may want to take a break from social media during their litigation but make sure your client knows how to deactivate but not delete the account.[20] The District of New Jersey granted a spoliation sanction against a plaintiff whose Facebook account was automatically deleted after fourteen days of deactivation of their account.[21] Evidence on social media platforms is subject to the same duty to preserve as other types of electronically stored information. If they do not want to take a break then clients should use each platform's security settings to restrict and control what other people can post on their timeline or account. Everything your client has posted or continues to post can become evidence in their case.

No True Privacy Online: Social Media in the Discovery Process

By now, most attorneys realize that they may not seek to obtain private social media by any pretext, such as seeking to "friend" a witness or by having their agents request access to information that is protected by privacy settings, whether the targeted social media user is represented by counsel or not.[22] How much social media information is discoverable? Attorneys and parties involved in litigation are increasingly looking to social media for potential evidence and attorneys or parties may view the public portion of a person's social media profile.

As a result of the Stored Communications Act,[23] social media service providers are precluded from disclosing stored electronic communications absent any consent from the social media user or other specified situations.[24] A civil subpoena in a family law action will not vitiate the protection provided by the Stored Communications Act. In *Facebook Inc. v. City of S.F.*,[25] the defendants charged with homicide issued broad subpoenas seeking public and private communications, including any deleted posts or messages, from the social media accounts of the homicide victim and a prosecution witness.[26] After the appellate court directed the trial court to quash the subpoenas, the California Supreme Court partially reversed and remanded, in a two-part holding:

1. The appellate court correctly held the subpoenas unenforceable concerning communications addressed to specific persons, or which were and remained configured by the registered user to be restricted; but
2. The Stored Communication Act does not bar disclosure of communications configured to be public, which remained so configured at the time the subpoenas were issued. The Supreme Court would permit disclosure on the grounds that public communications fall under the "lawful consent" exception to the restrictions of the Stored Communications Act, and therefore must be disclosed by a provider pursuant to a valid state subpoena. [27]

The use of a subpoena to obtain information from a non-party social media provider presents certain challenges; therefore, seeking discovery from the social media user, rather than the provider, might be more productive.[28]

The appellate courts in New York addressed social media issues by allowing access. In *Vasquez-Santos v. Mathew*,[29] a former professional basketball player sought damages arising out of an automobile accident. One defendant sought to compel access by a third-party data mining company to the plaintiff's devices, email accounts, and social media accounts, seeking photographs and other evidence of plaintiff engaging in physical activities. The trial court denied the application but the Appellate Division unanimously reversed to permit the discovery. *Vasquez-Santos* represented a trend toward increased access to social media discovery, by permitting a third-party data mining company access to uncover items on the plaintiff's private social media accounts. More generally, the opinion's tone presents social media discovery as customary.

Attorneys should not overlook social media evidence when an individual's willingness to share their life on social media creates another source of evidence. Attorneys should engage in informal discovery by conducting a simple Google search of the person. If a social media user fails to set privacy controls, content may be available to the public. Attorneys should also update the "document" definition in interrogatories to include social media content including profiles, postings, videos, messages, and chats. Be careful that the requests are not too broad, add time frames, and tailor the request so that the information sought will be relevant and likely to lead to admissible evidence. New Jersey Court Rule 4.10(2)(g) limits the use of discovery to issues that will not delay, harass or create an undue burden on the parties.

Conclusion

The rise in the use of social media and technology has made the practice of law both more efficient and more dangerous. It is important to remember that the essence of the legal profession is confidentiality. Attorneys should understand the use of social media platforms, the privacy settings and the utilization of such information. Before you click to post that next status update or tweet, make sure you review the Rules of Professional Conduct. ■

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Endnotes

1. Washington D.C. Bar Association, Ethics Opinion 370, "Social Media I: Marketing and Personal Use," and Ethics Opinion 371, "Social Media II: Use of Social Media in Providing Legal Services," both dated March 18, 2019.
2. RPC 7.1 permits comparative advertising provided that: (1) the name of the comparing organization is stated; (2) the basis for the comparison can be substantiated; and (3) the communication includes the following disclaimer, in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey." See also, New Jersey Committee on Attorney Advertising, Notice to the Bar, May 4, 2016.
3. RPC 7.1
4. Supreme Court Committee on Attorney Advertising Reminder: Advertising Awards, Honors and Accolades That Compare A Lawyer's Services to Other Lawyer's Services, Notice to the Bar, issued on May 5, 2021.
5. *Id*.
6. Supreme Court Committee on Attorney Advertising Reminder: Advertising Awards, Honors and Accolades That Compare A Lawyer's Services to Other Lawyer's Services, Notice to the Bar, indicates that a description of the methodology can be provided in the advertising itself or by reference to another "convenient, publicly available" cite.
7. *Id*.
8. RPC 1.6; See also American Academy of Matrimonial Lawyers, Bounds of Advocacy 2.9 ("An attorney should not communicate with the media about an active case under most circumstances. An attorney should not communicate with the media about a case, a client or a former client without the client's prior knowledge and consent, except in exigent circumstances when client consent is not obtainable").
9. American Bar Association, Advisory Committee on Professional Ethics, Formal Opinion 738 (2020).
10. Pennsylvania Bar Association Formal Opinion 2014-200 (2014) retrieved from American Bar Association, Advisory Committee on Professional Ethics, Formal Opinion 738 (2020).
11. RPC 5.1, 5.2, 5.3, 8.4.
12. Debra Cassens Weiss. *Lawyer gets reprimand for responding to negative online review with embarrassing client information,* ABA Journal, July 21, 2021.
13. *Id*.
14. *Id*.
15. RPC 1.6 and 1.18.
16. Recently in California, the Commission on Judicial Performance reprimanded a judge who joined a Facebook group titled "Recall George Cascón." The judge added several of his family members to the group, posted comments and liked numerous posts. In addition, the judge maintained a public Twitter account. The commission determined both social media accounts, available to the public, reflected the appearance of bias in violation of the Judicial Code of Ethics. Commission on Judicial Performance, Decision and Order, September 14, 2021. cjp.ca.gov/wp-content/uploads/sites/40/2021/09/OGara_PR_DO_9-14-2021.pdf .
17. American Academy of Matrimonial Lawyers Bounds of Advocacy 5.2.
18. See e.g. *Crowe v. Marquette Transportation Co. Gulf-Inland, LL*, No. 14-1130 (E.D. La. Jan. 20, 2015) (deactivated Facebook account could be retrieved and the court compelled defendant's consent/cooperation for any subpoenas the defendant wished to issue directly to Facebook).
19. *Allied Concrete Co. v. Lester*, 285 Va. 295, 736 S.E.2d 699 (Va. 2013).
20. Both Facebook and Twitter have tools designed to preserve social media content (Download Your Timeline or Twitter Archive).
21. *Gatto v. United Air Lines, Inc.* 2013 WL 1285285 (D.N.J. 2013).
22. Consider the practical implications of Model Rule 3.4, 4.1-4.4, and 8.4 (misconduct). See also *Robertelli v. N.J. Office of Attorney Ethics*, 224 N.J. 470 (2016) (The plaintiff changed his Facebook settings and made his profile private, the defense attorneys instructed their paralegal to add plaintiff as a "friend" on Facebook).
23. 18 U.S.C. § 2701 et seq.
24. *Ehling v. Monmouth Ocean Hosp. Serv.*, 961 F. Supp. 2d 659 (D.N.J. 2013) (Court held that Facebook posts that are configured to be private are by definition not accessible to the general public and thus fall under the Stored Communication Act).

25. Petitioners include Facebook, Inc., Instagram, LLC, and Twitter, Inc.
26. *Facebook Inc. v. City of S.F.*, 417 P.3d 725 (Cal. 2018). Petition for certiorari denied on May 18, 2020.
27. 18 U.S.C. §2702(b)(3).
28. Facebook will not respond to subpoenas seeking user content. facebook.com/help/133221086752707/
29. *Vasquez-Santos v. Mathew,* 168 A.D. 3d 587 (N.Y. App. Div. 2019).