

Social Media and Legal Ethics: SPECIAL ISSUES DURING COVID-19

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What is Social Media?

Webster defines Social Media as:

“forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)”

THE CDC OF SOCIAL MEDIA

- COMPETENCE
- DILIGENCE
- CONFIDENTIAL COMMUNICATIONS

COMPETENCE

Rule 1.1 Competence

- Rule 1.1. Competence

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

Rule 1.1 Competence...cont'd

ABA Comment 8 to Rule 1.1

Maintaining Competence

[8] 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. (underline added)

DILIGENCE

Diligence

- Rule 1.3. Diligence
- A lawyer shall act with reasonable diligence and promptness in representing a client.

Diligence... Cont'd.

ABA COMMENT TO RULE 1.3

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

COMMUNICATION AND CONFIDENTIALITY

Communication and Confidentiality

- Rule 1.4. Communication
- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Confidentiality

- Rule 1.6. Confidentiality of Information

(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.

Rule 1.6 Confidentiality...cont'd

- Reasonableness is the benchmark to judge safeguards. Considerations:
 - Level of sensitivity of the information;
 - Cost of particular safeguards;
 - Difficulty/burden associated with the safeguards;
 - Scope of retainer/ongoing nature of client relationship.

Communication and Confidentiality

- In re Kristine Peshek, M.R. 23794 (Illinois, 5/18/09).
- In the Matter of Eric Michael Gamble, No. 112,037 (Kansas 12/5/14).

Confidentiality- Other Considerations

- Use of Public Wifi (especially while traveling):
 - Easily monitored by host (surreptitious fashion);
 - Another user can “clone” the Wifi and monitor all your traffic/data;
 - Other users can wreak havoc on your laptop: illegal bank information/pornography/DNC emails;
 - Every firm’s technology policy should cover Wifi Use.

Confidentiality (Emails)

- **EMAIL ADDRESS "AUTO-COMPLETE"** - Large Firms Should Remove By Default;
- **USE OF COMPANY COMPUTER/EMAIL TO COMMUNICATE WITH ATTORNEY**- Attorney must be able to accurately advise whether the Employer has right to access such information.
- **THUMB DRIVES**- Should attorneys be expected to ensure the data on such drives is encrypted?

Confidentiality (Clients)

- Especially when counseling younger clients, lawyer should advise that posting information about legal matters online risks potential waiver of the attorney-client privilege, and loss of litigation work-product protection and confidentiality (“My lawyer thinks...”)

Confidentiality (Evidence)

- Rule 3.4(a) prohibits obstructing access to evidence; or altering, destroying, or concealing evidence: Before removal or change in content of client's social media, an accurate copy should be made and preserved, consistent with Rule 3.4(a). (Post-litigation change in privacy setting?)

Confidentiality (Discovery)

- **DISCOVERY AND SOCIAL MEDIA:** Because social media postings are subject to discovery and subpoenas, a lawyer should instruct clients on social media vis-a-vis litigation holds, document preservation, and document collection.

Uses and Risks of Social Media

- Researching Clients, Jurors, or Witnesses;
- Personal Use; and
- Other Concerns.

Dishonesty and Deception

- RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engage in conduct that is prejudicial to the administration of justice;

Researching Clients, Jurors, Witnesses

All about INFORMATION

Information you can find on social media:

- Prejudices and Opinions;
- Likes and Dislikes;
- Activities;
- Associations and Groups;
- Party or Candidate Preferences;
- Etc.

Researching Clients, Jurors, Witnesses

Rule 4.1. Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;

Researching--Risk

- *Disciplinary Counsel v. Brockler*, 145 Ohio St.3d 270, 2016-Ohio-657.
- *In re Complaint as to the Conduct of Jim Carpenter*, Oregon (OSB 02-32;SC S50321).

Personal Use of Social Media

- Keep in touch with Friends and Family;
- Social Interaction;
- Entertainment;
- Information Gathering;
- Convenience; and
- Employment Opportunities

Personal Use of Social Media

You are still subject to the Rules of Professional Conduct.

There is no expectation of Privacy. There is no such thing as a 'private' social media site. Posting information on-line is no different from publishing in a newspaper. Privacy settings do not protect you.

Get Smart—There is no “Cone of Silence.”

Personal Social Media Use- The Risk

- In the Matter of Sarah Peterson Herr, 2012 SC 94 (Supreme Court of Kansas, 1/13/14).
- In the Matter of Frank R. Wilson (State Bar of California Case # 06-0-13019).
- In re Joyce Nanine McCool, 2015-0284 (La. 6/30/15), 172 So.3rd 1058.

Personal Use of Social Media and Privacy

- **“PRIVATE” FACEBOOK PAGE:** Material posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy.

Responding to Negative Online Reviews

D.C. RPC 1.6(e)(3)

- Responding to Negative Online Reviews By Clients
 - D.C. RPC 1.6(e)(3) permits responding in limited fashion: May “use or reveal *client confidences or secrets*” ... “to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to *respond to specific allegations by the client concerning the lawyer’s representation of the client.*”

Social Media- Lawyers and Judges

ABA Committee on Ethics and Professional Responsibility, Formal Opinion 462 (2013)

“Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch.”

Social Media- Lawyers and Judge

Rule 3.5

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (d) engage in conduct intended to disrupt a tribunal.

Social Media- Lawyers and Judge

- ABA FORMAL OPINION 462

A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

Social Media- Lawyers and Judges

Rule 8.4

It is professional misconduct for a lawyer to:

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law;

Social Media- Lawyers and Judges-

- *Domville v State*, 103 So3d 184 (Fla. 4th DCA 2012), rev. denied. *State v Domville*, 110 So.3rd 441 (Fla 2013).
- In the Matter Concerning Ferguson, Public admonishment (California Commission on Judicial Performance May 31, 2017).

Considerations for Social Media Use

- Privacy in most Social Media Context is a Myth;
- Beware of the Rules of Professional Conduct and Ethics Opinions in Louisiana or any other state in which you practice;
- Develop a Social Media Policy for your Office and FOLLOW it;
- Protect Client Information;
- No False or Misleading Statements;
- Beware of Advertising Pitfalls;
- Be careful of who you Friend;
- Beware of Inadvertent or Unauthorized Practice of Law; and
- Keep up with Emerging Technology as it Affects your Practice.

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