



epiq focus

Ethical Issues in Using Social Media

Why should lawyers care about social media, and whether they are using it ethically? Obviously, lawyers should be concerned about compliance with ethical requirements in everything they do, but there may be some hidden ethical pitfalls in the use of social media about which they need to be aware, both on behalf of themselves and their clients. The use of social media is everywhere – your associates and partners are using it, your competitors are using it, and your clients are using it and want you to use it, too. The effective (and ethical) use of social media falls squarely within every lawyer’s duty of competence, as set forth in ABA Model Rule 1.1 and California Rule of Professional Conduct (CRPC) 3-110. Comment 8 to the ABA rule provides that “[t]o 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.”

About 80 percent of Fortune 500 companies have a Facebook page, 83 percent of Fortune 500 companies have Twitter accounts, and the content is all discoverable. That is an important thing to keep in mind when advising a client on creating a social media policy, regulating who can post to or must review the content on such accounts, or preserving social media evidence when necessary to help implement a client’s litigation hold. Providing such advice not only implicates the ethical duty of competency, but also requires lawyers to consider ethical requirements when seeking the social media evidence of opposing parties.

Whichever side of a matter you are on, information contained on social media and in electronic communications can be very helpful in all sorts of litigation contexts, from family law (divorce and custody) proceedings to personal injury/insurance, trade secret theft, intellectual property, non-compete, employment discrimination, and even commercial dispute matters.

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Keep in mind that although lawyers may view public areas of social media accounts, communicating with an unrepresented person through social media may be problematic (ABA Rule 4.3), as is “friending” a party, witness or juror under false pretenses in order to access non-public information (ABA Rule 4.1(a)). As San Diego Bar Ethics Opinion 2011-2 stated, “[the] rules bar an attorney from making an ex parte friend request of a represented party... We have further concluded that the attorney’s duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request.”

And although employers are more and more frequently searching social media in connection with background checks on potential employees, they need to be aware that uncovering information, even inadvertently, about an applicant’s age, race, religion, national origin, disability or other characteristics may give rise to a claim that such information was used inappropriately in making hiring or other employment-related decisions.

In addition to using social media in their representation of clients, lawyers and law firms typically have websites, Facebook and LinkedIn pages, and Twitter accounts of their own, and need to be aware that such content may be considered regulated attorney communications. Under CRPC 1-400, a “communication” is “any message or offer made by or on behalf of a member [of the bar] concerning the availability for professional employment of a member of a law firm directed to any former, present, or prospective client...” Accordingly, the content of such pages and accounts may need to be retained for a period of time that varies by state (for example, two years in California, one year in New York). In addition, when considering what to put on a Facebook page or other social media account, lawyers need to keep in mind their ethical duties of candor (ABA Rule 3.3, CRPC 5-200(B); maintenance of client confidences (ABA Rule 1.6(c), CRPC 3-100), and duty to supervise (ABA Rule 5.3(c)), for it should go without saying that subordinates cannot be permitted to engage in conduct that lawyers could not perform themselves under the rules of professional conduct. Lawyers should also be wary of the distinction between providing legal information versus legal advice through social media, lest they run afoul of restrictions on unauthorized practice of law outside the jurisdiction of their state licensure (ABA Rule 5.5) or inadvertently create an attorney-client relationship.

These are just some of the ethical issues that can arise in lawyers’ use of social media, and readers are encouraged to attend CLEs on the topic for a fuller treatment of these and related issues.

About the Author

Jeff Jacobs, Chief Legal Officer for Epiq, has extensive experience with litigation and electronic discovery matters as both in-house and outside counsel for private and governmental entities.

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