

epio focus

Social media ethical
obligations for lawyers



Introduction

Social media has revolutionized the world we live in today. Individuals can share information with their friends, family, coworkers, and clients over several platforms (such as Facebook, LinkedIn, Twitter, and blogging websites). It is rare to meet someone who does not use at least one social media site for personal or professional purposes – and lawyers are not exempt from this. Many lawyers and law firms use social media for business purposes to advertise services and employment opportunities, network with other legal professionals, share compelling legal news, communicate with clients, and attract new business.

While the benefits are plentiful, lawyers need to be careful when using social media as lawyers have several ethical obligations when it comes to its use. These rules affect a lawyer's practice habits, including how they post on social media, advertise and market their services, approach litigation and eDiscovery, train support staff, and handle client interaction. As such, lawyers must consider their ethical duties before using social media in both personal and professional contexts.

General social media obligations

Jurisdictional Considerations

Social media posts have the potential to reach individuals in any area of the country. This may be problematic if a lawyer shares information outside of their practicing jurisdiction. Under American Bar Association (“ABA”) Model Rule 5.5(b)(2), lawyers are prohibited from sharing information that would make the public believe that they are admitted to practice law in a jurisdiction where they are not licensed. Because of this, lawyers need to be mindful of what content they post and where it is shared. Lawyers should consider implementing the following practices when posting on social media:

- **Think twice before posting.** Avoid posting information that could be interpreted as legal advice on a public platform. Lawyers should offer electronic legal advice privately to clients in a direct message or email. In a situation where lawyers can interactively provide free legal advice over the Internet to members of the public, lawyers should make sure the recipients reside in jurisdictions where they are licensed to practice law.
- **Be mindful of the platform's sharing capabilities.** When posting on a site like Twitter or Facebook where individuals can share content worldwide, make sure the information is general and does not contain legal advice. Examples of acceptable topics include generalized legal news updates and case summaries.
- **Be transparent about licensing and representation.** As lawyers, knowing what language and actions form an attorney-client relationship is crucial. Under ABA Model Rule 1.18(a), “a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” When posting on social media platforms, lawyers should consider including a note about where they are licensed or a disclaimer stating that their content is not meant to form an attorney-client relationship or provide legal advice. This is especially ideal for lawyers who blog or post on an interactive platform.

Advertising legal services

Some lawyers may choose to advertise their services over social media. While lawyers are allowed to communicate information regarding their services through any media¹, advertisements must not be false or misleading.²

¹ ABA Model Rule 7.2(a), Communications Concerning a Lawyer's Services: Specific Rules

² ABA Model Rule 7.1, Communications Concerning a Lawyer's Services

Additionally, comment 12 to Rule 7.2 provides that “any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.” This is a simple obligation that lawyers should not overlook when posting an advertisement.

Lawyers must also be conscientious of their intentions. When a lawyer knows someone needs legal services and they try to solicit their business for pecuniary gain, ABA Model Rule 7.3 prohibits live person-to-person solicitation in most situations. This is because it can make the individual feel pressured and hinder their decision regarding representation. If the lawyer’s communication is geared towards the public, such as in a social media Internet banner, it is not solicitation.³ The rule also defines “live person-to-person contact” as “in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection.” This does not include chat rooms, text messages, or other written communications that people can easily disregard.⁴ As such, under the ABA’s approach it appears that direct social media contact that users can ignore, delete, or block would not fall under this umbrella. However, this is an area where it is very important for lawyers to know their state’s take on advertising ethics, because the states vary on what constitutes live person-to-person contact.

Responsibility for non-lawyers

Lawyers are also responsible for the actions of non-lawyers that they retain, employ, or associate with in the course of business. This commonly

includes law clerks and paralegals that work closely with them on case files. Lawyers are expected to monitor the non-lawyers’ activities to ensure they behave ethically. When a non-lawyer behaves unethically on social media, lawyers can be held responsible for their actions if they order the conduct, ratify the conduct, or fail to take remedial action.⁵ Because of this responsibility, lawyers must ensure that their support staff is aware of acceptable social media practices in the workplace. In addition to supervising these individuals, hosting team meetings and training will help non-lawyers understand what is expected of them.

Social media and litigation

Lawyers frequently encounter social media during litigation, especially during the trial and discovery phases. During trial, lawyers are prohibited from making extrajudicial statements to the public that could prejudice a trial.⁶ However, the ABA rules allow lawyers to make statements that “protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client.”⁷ For example, if opposing counsel publicly makes a negative claim about the lawyer’s client over social media, they can rebut the claim as mitigation and to lessen the prejudicial effect.

During discovery, lawyers have ethical duties to preserve and disclose all information that is relevant to a lawsuit. Under ABA Model Rule 3.4(a), lawyers are prohibited from unlawfully obstructing another party’s access to evidence or unlawfully altering, destroying, or concealing a document with potential evidentiary value. Additionally, ABA Model Rule 3.3 requires that lawyers act with candor towards the court. As such, during discovery lawyers must disclose all

³ ABA Model Rule 7.3 - Comment 1, Solicitation of Clients

⁴ ABA Model Rule 7.3 - Comment 2, Solicitation of Clients

⁵ ABA Model Rule 5.3, Responsibilities Regarding Nonlawyer Assistance

⁶ ABA Model Rule 3.6(a), Trial Publicity

⁷ ABA Model Rule 3.6(c), Trial Publicity

relevant documents (other than those protected by privilege) in their original format to avoid violating these rules. For example, Rule 3.4 applies to situations where a lawyer advises a client to delete or alter social media content that is relevant to a lawsuit. The Sedona Conference recently weighed in on this issue:

Several states have issued ethics opinions or guidelines relating to attorneys counseling clients regarding their use of social media. Those opinions generally provide that attorneys may advise clients regarding changing privacy settings or removing content, as long as they also satisfy preservation obligations and do not obstruct another party's access to evidence. In other words, "unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve." For example, an attorney may advise a client regarding changing privacy or security settings to limit access to the client's social media outside of the formal discovery context. Similarly, an attorney may advise a client to "take down" or remove content, as long as it does not violate substantive law or the duty to preserve.⁸

Therefore lawyers must be careful when instructing clients about their past and future social media activity. Failure to preserve significant evidence can result in sanctions, license suspension, or an unfavorable litigation outcome.

Additionally, lawyers must implement ethical social media collection practices during discovery and trial. One obstacle with social media collection

is that users can easily delete or change their content. Sometimes there is also interactive content that makes collection difficult. Lawyers may need to send a subpoena to the actual social media provider or use more technically advanced collection methods in order to obtain relevant information.⁹ For example, merely taking a screenshot or printing out a social media webpage may not be an accurate reflection of the content because it may not include certain metadata, videos, or other embedded information.¹⁰ This could be a potential Rule 3.4 violation if the missing data holds evidentiary value. For social media data containing relevant evidence, lawyers must provide proper authentication and include all key data in the production. More technically involved collection methods include dynamic capture and content downloading from the provider.¹¹

Accessing social media data has also been a hot topic of debate in the legal profession. Lawyers cannot friend request a party, witness, or juror on a social media website in order to gain access to their private information for purposes of collecting data to use in litigation. This could potentially violate several ABA rules, including Rule 4.2 (communication with represented person), Rule 4.3 (communication with unrepresented person), and Rule 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).¹² It is also unethical to advise clients to friend request someone for this purpose. However, data that is publicly available for viewing is fair game. Even if a lawyer is upfront about their identity and purpose for sending a friend request to an interested party during active litigation and it seems harmless, the lawyer should refrain from doing this because the ethics of this action may still be questionable.

⁸ The Sedona Conference Primer on Social Media, Second Edition, pp. 47-48 (July 2018 Public Comment Version)

⁹ Id at 19.

¹⁰ Id at 22-23.

¹¹ Id at 23-26.

¹² Id at 49-50

Another commonly debated topic is whether lawyers can be friends with judges on social media. It would make sense for judges and lawyers to want to make social media connections, since many run in the same circles. Being friends on social media with a judge that the lawyer does not have cases before would likely not be an issue. However, lawyers should consider the optics of having social media relationships with judges that they regularly have cases before. This could bring up questions of bias during litigation that the lawyer could avoid simply by not connecting with the judge on social media.

Social media and clients

Model Rule 1.1 requires lawyers to provide competent representation to their clients. As of 2012, this includes keeping abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. While lawyers obviously do not need to be information technology experts, they must understand the basic features of technology commonly used in legal practice.¹³ Now that many lawyers commonly use or encounter social media in their practice and personal lives, they must keep up with significant developments and understand how to ethically use social media.

First and foremost, to maintain competent representation lawyers must never divulge confidential client information over any medium, including social media. ABA Model Rule 1.6

requires lawyers to keep client information confidential unless the client provides informed consent.¹⁴ Any communications with clients over social media should be conducted through private messages to maintain privacy. If the lawyer is involved in active litigation, they should refrain from posting any information about the lawsuit that could violate the confidential attorney-client relationship. Clients should also avoid communicating about their case over social media in order to maintain a confidential attorney-client relationship. In addition, lawyers should only engage in social media communications with their clients over secure networks to lessen the risk of a damaging data breach.

As noted previously, lawyers sometimes use social media to offer information about legal topics to the public. According to the ABA, lawyers still must maintain confidentiality during these activities. In a recent opinion, the committee concluded that “lawyers who blog or engage in other public commentary may not reveal information relating to a representation that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules.”¹⁵ One situation where disclosure is ethical is when a client gives their informed consent to divulge certain information.

¹³ ABA Formal Opinion 477R* (May 11, 2017; Revised May 22, 2017)

¹⁴ Other exceptions are if disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted. ABA Model Rule 1.6(a), Confidentiality of Information.

¹⁵ ABA Formal Opinion 480 (March 6, 2018)

Conclusion

Social media is becoming more prevalent in the legal community because it provides an interactive way to connect with clients, other legal professionals, and the public. However, lawyers must consider potential ethics violations before posting or responding to social media content. When it comes to personal accounts, lawyers should make these accounts private and limit the legal material they share. When posting on personal accounts, lawyers still need to act professionally. If lawyers are using social media to conduct business or provide public commentary on a legal issue, they must maintain client confidentiality and avoid creating unintentional attorney-client relationships, amongst other things. Firms should consider implementing social media workplace policies and provide training courses about ethical social media practices. Any ethical violations can result in court sanctions or disciplinary action from the lawyer's state bar. While many jurisdictions adapt to the ABA's rules, some jurisdictions depart on certain issues or have published varied opinions. To stay on top of their ethical obligations, lawyers should become familiar with the rules and opinions of each jurisdiction in which they are licensed to practice law.

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