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The Ethics of Social Media Use

I will be speaking about prudent social media practices for lawyers at a New York City Bar CLE program on January 29, 2013. As an ethics lawyer and active user of Facebook, LinkedIn, and Twitter, I have both a professional and personal interest in the subject. The way I see it, there are four general ways that lawyers can get into trouble using social media. *First*, they make a false distinction between their personal on-line interactions and their professional social media use. *Second*, even when they have their lawyer "hats" on, they can run afoul of ethics rules, employment policies, or other rules. *Third*, they misuse social media as an investigative or discovery tool. *Fourth*, they fail to advise their clients adequately regarding their own use of social media.

Category 1 – There is No Impenetrable Wall Separating Your Personal Social Media Use and Your Professional Reputation

An example of the first error is the notorious [incident](#) where a public defender posted a photo of her client's leopard-print underwear on her Facebook page. She naively thought it would not go beyond her inner circle of Facebook friends and family members. Not so. Someone notified the judge who declared a mistrial. The lawyer was fired.

I am amazed at some of the social media posts I see or hear about, usually - but not exclusively - from young, inexperienced lawyers. They complain about employers and working conditions, gripe about clients, deride judges or opposing counsel, and skirt close to the precipice of confidentiality. Ironically, people cling to the illusion that their social media activities are insulated from their professional lives, when in fact the opposite is true. You are more likely to be found out from posting a status update than from a private gripe session with a friend. Just ask Anthony Weiner.

To paraphrase the Bible, when you were a child, you posted like a child. When you become a lawyer, you put away childish posts. Don't get me wrong. I believe the internet was created primarily to share adorable cat photos. Here is one of mine:



I'm not suggesting you shouldn't have fun on Facebook or let your personality shine through. But, you should assume that anything you post on social media, particularly relating to your legal practice, is fair game. Don't risk your career or reputation for a cheap joke.

Category 2 – The Same Rules Apply to Social Media as to Other Marketing Activities

My completely unscientific view is that this second category causes the most problems for lawyers. When lawyers take to the internet to market themselves, perils abound. Simply completing one of those social media profiles they encourage you to fill out (“Your profile is 90% complete – Just add your skills”) is a trap for the unwary. Recently, a young lawyer [was publicly reprimanded](#) for, among other things, describing himself as a “specialist” and listing practices areas in which he had no experience.

Lawyers who use social media for professional development face any number of potential pitfalls. They risk being disciplined for making false statements, violating advertising and solicitation rules, breaching client confidentiality, inadvertently creating attorney-client relationships, committing UPL, violating the “no contact” rule, and more. It’s enough to make a lawyer throw up her hands and hire someone else to figure it out. Except don’t. Outsourcing your social media activities to marketing consultants is a huge risk, since they are unlikely to understand the ethics rules.

The debate continues to rage among lawyers about the ROI on social media use. But one thing is indisputable. If you are going to do it, you need to be vigilant about complying with the ethics rules, terms of service, employment policies, and other rules. Familiarize yourself with the growing number of

ethics opinions around the country, such as this recent California [opinion](#), which addresses social media and attorney advertising.

Category 3 – Social Media Can be a Powerful Discovery and Investigatory Tool; but With Great Power Comes Great Responsibility

A case in New Jersey illustrates the third category. *See* M. Gallagher, *Hostile Use of 'Friend' Request Puts Lawyers in Ethics Trouble*, N.J. Law Journal (Aug. 30, 2012). There, two defense lawyers in a personal injury case "caused" a paralegal to friend the plaintiff on Facebook and obtain information that they believed helped their defense. After they confronted the plaintiff at his deposition with copies of the Facebook materials, plaintiff's counsel filed a disciplinary complaint against them. He alleged, among other things, that the lawyers' use of subterfuge to gain access to the plaintiff's confidential Facebook information violated Rules 4.2 and 8.4(c). A number of states have issued ethics opinions cautioning lawyers against "pretexting" on social media (*i.e.* misrepresenting yourself or your motives when contacting a third party in an effort to dig up evidence). There is a useful list [here](#).

Lawyers can run into trouble, not only when they misuse social media as a discovery tool, but when they fail to use it in a timely manner. In *Guzman v. Farrell Building Co.*, a case involving a workplace injury, the defendant employer was precluded from obtaining social media discovery because it sought the materials after the note of issue had been filed. The growing receptivity of courts to social media discovery increases the burden on lawyers to understand how it works and incorporate it into their discovery plans. *See, e.g., Romano v. Steelchase*, 30 Misc.3d 426 (N.Y. Sup. Ct. 2010). Social media can no longer be an afterthought.

Category 4 – Counseling Your Clients About Their Social Media Use

The fourth category probably gets the least attention as a legal ethics issue, because media reports tend to focus on the client's behavior rather than the lawyer's. The classic example is the personal injury plaintiff who claims to suffer debilitating injuries while posting Facebook photos of themselves dancing, skiing or engaging in other boisterous activities. *See, e.g., Mark Niese, Twitter Sunk Woman's Award after Car Crash*, N.J. Law Journal (Jan. 2, 2013) (court reduced jury award after defendant introduced Twitter messages from plaintiff discussing traveling and partying after car accident).

These cases illustrate the need to counsel clients about using social media prudently and then to monitor their use to ensure they don't jeopardize their cases. By the same token, lawyers must caution clients against altering or destroying social media materials that may be relevant to their cases.

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