



A New Age: How Social Media Impacts Ethical Conduct

September 19, 2017
Scott Conference Center, Omaha, NE

A New Age

How Social Media Impacts Ethical Conduct



3-501.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.

3-501.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

According to a New York Bar Association opinion:

Preliminarily, we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients use of social media. New York formally reprimanded and sanctioned an attorney for failing to investigate a client's Facebook activity.

Your Clients Use of Facebook

- Review your client's social media postings, and
- Advise your client about:

Content

- What things should be removed from their social media accounts
- What things should/should not be posted on social media
- Publish truthful information that is favorable to your client

Privacy Settings

- You can advise using the highest possible settings

Discovery

- Duty to maintain evidence
- Duties if discovery requests are already seeking Social Media information
- Opposing party or counsel can obtain this information - it is public

Use in Court

- How information from social media may be used in court

What advice can you give about Facebook Posts?

- Prior to discovery requests you may instruct your client to delete materials from their Facebook or other social media accounts.
- You may review materials that the client plans to publish on Social Media and advise the client about it.
- You may NOT advise the client to post false, misleading or defamatory information.
- Be careful that a client's Facebook or other postings do not contain information that would show the client's claims are frivolous or assert materially false factual statements.
- Caution clients about posts that might violate a court order or a contractual agreement.

Citation: *Allied Concrete Co. v. Lester* 736 S.E. 2d 699, 703 (Va. 2013) and in the *Matter of Matthew B. Murray*, Virginia State Bar Disciplinary Board Docket No. 11-070-068405 (July 17, 2013).

Example

"Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

Keep in mind that "many social media users are oblivious or indifferent to what may happen when their "travel logs, photographs, streams of consciousness, rants, and all manner of [postings] find their way into the hands of family, potential employers, school admission officers, romantic contacts, and others."

3-501.2 Scope of Representation

How much information can you provide in response to an email inquiry without creating an attorney-client relationship?

- Communication on social media are sufficient in some cases to create a attorney-client relationship
- If such a relationship is established, the attorney owes that client all of the duties owed to any other client.
- If you want to avoid this by use of a disclaimer, the disclaimer must be PROMINENT

3-501.4 Communications

Meeting the responsibility to keep the client well-informed and answer questions. Are Short Emails Enough?

- You MUST keep your client adequately informed about his or her case.
 - Emails make it very easy to avoid providing a substantive response.
- Recent Nebraska Disciplinary Decision
 - Attorney communicated with clients almost exclusively with brief emails
 - Attorney was also not properly handling the clients case

3-501.6 Confidentiality of Communications

Addressing Metadata in Document.

There are some conflicting opinions.

ABA

- It is not unethical to scrub a document of metadata before sending it to opposing counsel
- It is not unethical to search metadata in received documents

New York County Lawyers' Assoc.

- It is unethical to search received documents for metadata

California

- A California rule requires metadata that might contain client confidential information of other clients be scrubbed before turning the information over to a current or former client or counsel

Electronic Data Breaches

- You have a duty to implement sufficient security and training protocols to prevent electronic data breaches.
 - Firewalls
 - Security Software
 - Staff training and reminders
 - Some ransom malware has targeted law firms
 - Beware of new client requests for representation sent only by email and subsequent requests to deposit a very large check in the trust account and then ask for a refund of the balance
 - If you are breached, there are requirements that you notify your clients of the breach and potential loss of confidentiality
 - Cyber insurance policies are available that offer a variety of issues

Using Work Email

You have a duty to warn your clients that if they use a work email, they should not use the work email to communicate with you.

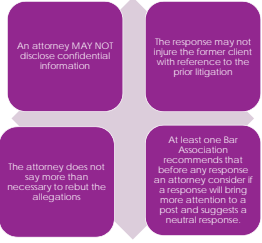
Most employers have policies that anything on their computers is the employer's property and may negate privilege.



Responding to Attacks on Social Media

Client Confidentiality

Guidelines for Responding



If you do reveal confidential or privileged information defending yourself against internet reviews you likely will be subject to discipline. Lawyers have been disciplined for this in several states, including Washington D.C., Illinois, and Georgia. This is *not* an exhaustive list.

Example of How NOT to Respond

This is simply false.

The person did not reveal all the facts of his situation up front in our first and second meeting. [sic]

When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do is [sic]).

Despite knowing that he would lose he chose to go forward with a hearing to try to obtain benefits. I dislike it very much when my clients lose but I cannot invent positive facts for clients when they are not there.

I feel badly for him but *his own actions in beating up a female coworker are what caused the consequences he is now so upset about.*



Responding in Self-Defense

- According to the Restatement (Third) of the Law Governing Lawyers § 64:
A lawyer may act in self-defense, . . . only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification Imminent threat arises not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or an aggrieved potential litigant.
- Generally a post on a website (absent prior unrelated waiver of confidentiality) is not the kind of proceeding which allows an attorney to use confidential information to defend against an on-line post
- If the statements go beyond mere opinion, you can sue the client

Blake v. Giustibelli

A former client made very detailed allegations against an attorney in on-line posts. In upholding the damages awarded to an attorney in a suit for libel against the former client and finding the posts went beyond expressions of opinion, the court said:

[A]ll the reviews contained allegations that Giustibelli lied to [the client] regarding the attorney's fee. Two of the reviews contained the allegation that Giustibelli falsified a contract. These are factual allegations and the evidence showed they were false.

Waiver of Duty of Confidentiality

What constitutes a "controversy" between lawyer and client sufficient to waive the lawyer's duty of confidentiality?

- If a former criminal client being interviewed for a book alleges the attorney committed malpractice that is a controversy sufficient to release the attorney from the duty of confidentiality sufficient to defend himself
- Generally a negative client review is not considered a controversy sufficient to relieve the duty of confidentiality

3.501.16 Terminating Representation

Can you withdraw from representation of a client because of their publication of confidential matters on social media?

- Yes, if your engagement agreement says so.

Example

As part of this agreement you agree that you will not publish anything referring to or relating to this case, any persons involved or in any way related to this dispute or the underlying facts on social media, including but not limited to Facebook, Twitter, My Space, or a blog. If information relating to this case is found on social media, the Firm may choose to terminate its representation in this matter. You further agree that you will not provide information to any other person for publication on social media. In addition, if you are contacted by any newspaper, television station, or other outside entity, you agree you will direct them to contact this office before you speak with them.

3-503.4 Fairness to Opposing Party and Counsel

- You are not allowed to ask a third party to "friend" someone in order to gain access to non-public information.
- You may not create a different or misleading account to mask your identity
- What social media postings must be produced in response to discovery?

3-503.6 Trial Publicity

What are the limits of information you can provide on social media?

Using social media or traditional media outlets to publicize a suit may waive the litigation privilege for matters stated in a legal proceeding that would otherwise be privileged.

Multiple courts have found that sending a pleading to the press or posting it on the attorney's website waives the litigation privilege that otherwise attaches to material in a pleading.

3-504.2 Communication with Persons Represented

- Attorneys instructing a paralegal to send a friend request to the opposing party represented by counsel after he changed his Facebook settings to private violates this rule
- An attempt to gain access to the private portions of a website maintained by a person represented by counsel constitutes a communication with that person

3-507.1 Communications Concerning a Lawyer's Services


3-507.2 Advertising

3-507.3 Contact With Prospective Clients

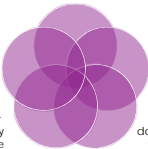
Can you use paid lawyer referral services?

- Nebraska Ethics Opinion No. 14-01 allows an attorney to use a non-profit referral service
- As of July 26, 2017, North Carolina explicitly allows use of AVVO and similar services provided that the consumer retains the ability to choose the attorney and provided information provided in AVVO is true
- As of June 2017 Ohio, South Carolina, Pennsylvania and New Jersey have explicitly found that use of AVVO is not permissible

Blogging and Law Firm Websites

- 
- According to the California Bar, a blog integrated into a law firm's website is a communication subject to the rules and regulations on advertising
 - In Nebraska an attorney is allowed to advertise on a web site that provides information about Social Security benefits. (NE Bar Opinion 19-03) This opinion would likely allow advertising that otherwise adheres to all rules and regulations for any other special interest web sites
 - A stand-alone blog by an attorney discussing legal or other issues is not a communication subject to the rules and regulations about advertising unless the blog directly or implicitly expresses the attorney's availability for professional employment
 - Any electronic posting for the purpose of "advertising by electronic media" is subject to the rules and regulations about advertising
 - The New York Bar Ass'n has a rule prohibiting solicitation through "live," "computer-accessed" communications, which includes instant messages through social media platforms and communications transmitted through chatrooms and on blog posts.

Examples



Case finally over.
Unanimous verdict!
Celebrating tonight.

Just published an article on wage and hour breaks. Let me know if you would like a copy.

Another great victory in court today! My client is delighted. Who wants to be next?

Won another personal injury case. Call me for a free consultation.

Won a million dollar verdict. Tell your friends to check out my website.

3-508.2 Judicial and Legal Officials

Issues created by intemperate posts to or from the judiciary

Social media may be even more of an issue for judges than attorneys.

Part-time magistrate judge in Florida resigned after posting remarks on Facebook about "snowflake" counterprotesters and "nut cases" who tear down Confederate statues.

A Texas judge may face disciplinary proceedings for responding to a friend's Facebook post about being sick. "I've had the worst cold but instead of staying home I'm being tortured by an attorney in a trial. So, I'm actually jealous of you."

A New Mexico judge was brought before the New Mexico Supreme Court to determine if his posts on his election Facebook page about his role in a case and his opinion of the result violated judicial ethics

A California judge was publicly admonished where he posted about a candidate opposing one of his colleagues, stating "[She] has sex with defense lawyer while [sic] shw [sic] is DA on his cases and nobody cares. Interesting politics."

Another judge was found to have detracted from "the dignity of the judiciary and the court system" by posting tweets containing an excerpt from an examination in which the defendant used profanity toward the judge and recounting an instance in which a defendant threw bottles of urine and feces at a judge following sentencing.

However, being Facebook friends with a judge does not necessarily constitute a friendship significant enough to require a recusal of a judge presiding over a trial in which the "friend" attorney was counsel

3-508.4 Misconduct

Electronic as well as personal contact with jurors is prohibited.

Jurors can be investigated via public social media posts as long as it is a site that does not send a notification to the juror

An attorney may not attempt to access the private portion of any social media of a judge presiding over a case the attorney is involved in

An attorney may not attempt to access the private portion of any social media of any jurors

Conduct prejudicial to the administration of justice may arise through impersonated tweets or emails.

It is not permissible to publish information about a case in an attempt to tip the public scales in favor of your client

An attorney may not attempt to access the private portion of opposing counsel's social media

Text, tweets, and Facebook messages may constitute ex parte communication with the court if they even vaguely reference an ongoing action

Examples

GIMME GIMME GIMME evidence? Want some? I got it. Think u can convince a judge to look at it? Sign this petition."



Judge Gambrell at it again - turned a 4 YO child over to a validated abuser - PLEASE TELL ME WHAT IT WILL TAKE FOR EVERYON [sic] TO SAY _ENOUGH.
