

## **Managing and Monitoring Your Firm's Social Media**

Laura Powers  
Director of Marketing and Development  
Philadelphia Bar Foundation

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## **Social Media, Lawyers, and Law Firms**

The online landscape of social media has changed the traditions of business development by broadening the opportunities to connect with existing and potential customers and reinforcing the internet as the central focus of a law firm's marketing presence. Websites serve as the hub of all our marketing and public relations efforts and are supported by a larger digital picture that involves web platforms in the social media, directory listing, ratings and reviews and content sharing mediums. Brochures, business cards, print advertising, and event sponsorship all still play a role, but they have been marginalized by today's modern online practices.

It wasn't that long ago that law firms first acknowledged that their company websites were a valid way to provide target audiences with information and access to attorneys. Traditionally, referral sources, the physical office and conventional advertising in channels such as the phone book were the trusted tactics for growing a practice. Firms today are inundated with opportunities to showcase themselves and their attorneys online. This extends beyond websites and social media to legal advice forums, review websites and ranking platforms such as Avvo.com, Lawyers.com and Martindale.com.

Many attorneys will assert that the number one way they receive new business is through referrals. But before a referral will call an attorney, they will conduct a search for credible validation online. They may start in Google, rather than at a firm website, searching for an individual's name or for the firm name. The search engine result pages may lead them to a social media profile or other online profile, which may be robust or may appear abandoned. While we don't have ultimate control over the journey of this validation process, we can attempt to control and manage the content they will find.

Many firms maintain a social media presence on at least one of the major platforms:

### **Facebook**

Since its launch in 2004, there has been a growing blend of personal use with professional use on Facebook. This mirrors the boom in technology which effectively blurred the division between our personal and professional lives by allowing us to work virtually, work at home after office hours, and be constantly available to others. Because of the sheer volume of users on this platform, many organizations have started to appreciate Facebook as a serious channel for marketing, public relations and business development activities.

### **Twitter**

Both individuals and firms can set up a Twitter account to post tweets – the exchange of short texts that can include photos and videos as well as links to other online content. Making the choice between using an individual Twitter

profile or using a profile for your business depends on the size of the organization and its strategic objectives. For example, if promoting the specific knowledge of an individual in a leadership position – perhaps focusing on a niche within a practice area – a personal profile makes sense. Whereas, if the objective is to demonstrate thought leadership of the firm’s collective knowledge, a business profile may be best. Of course, the two can run simultaneously if resources are available to manage both, unlike Facebook and LinkedIn where personal profiles must precede any organization profiles. In any case, establishing objectives for Twitter use, just like any other social media platform, must be a priority before engagement.

### **Instagram**

A relative newcomer to the social media space (2010), Instagram is an image-based platform for sharing photos and videos. Although it is available for desktop, most users access the app on a mobile device (since that’s where they’re most likely to be taking photos). The only way to drive an Instagram user over to your company’s website (aside from paid advertising) is through a link included in the short bio area on a profile. Many consumer brands and causes have adopted Instagram as part of their marketing strategy because of its skyrocketing popularity.

### **LinkedIn**

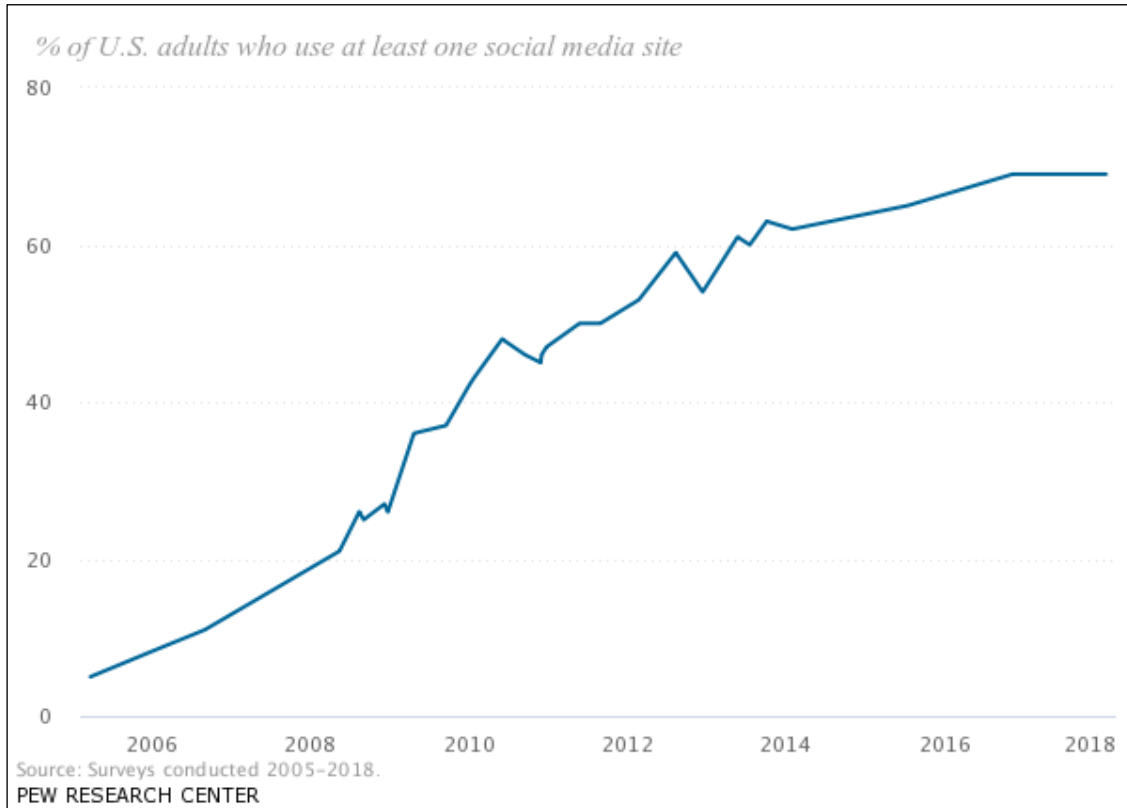
In addition to being one of the most well-established and credible social media tools, LinkedIn boasts nearly 550 million registered users (146 million in the U.S.) and is highly visible in search engine results when searching for people by name. The tools for making introductions, having conversations, developing relationships and building trust with your organization and individuals in your organization on LinkedIn are critical and valuable for business professionals.

### **Pinterest, Snapchat, WhatsApp**

Although these three platforms also dominate the social media space, Facebook and Twitter are still the preferred channels for many businesses and brands. Instagram has more users than Snapchat, and Pinterest has a pinpoint focus in the lifestyle niche. Messaging tools like WhatsApp will continue to grow in significance, but they are predominantly used today to communicate with audiences for customer service solutions, not marketing messages.

## How Crowded Is It?

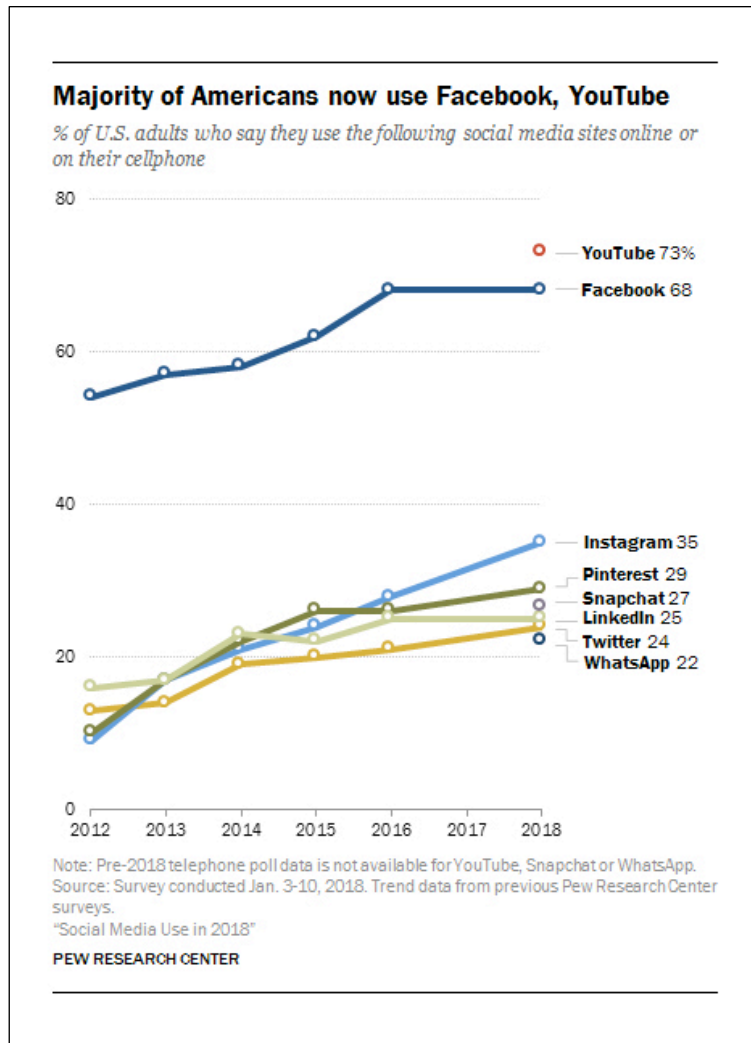
Business development relies on networks, and social media is purpose-built to foster large and small relationships with diverse geographies and demographics. A majority of Americans who are online use social media (69%).



The increase in our social media use is partially due to the dedication of each platform to continually improve its functions and cross-posting capabilities. For example, Facebook owns Instagram and WhatsApp.

There has been a rise in the availability of and access to mobile devices which has fostered our general 24/7 culture of connectedness. Combined with the declining interest in traditional media (live TV and printed newspapers), most Americans are likely to read some brand messaging on social media in the midst of sharing and reading personal posts. This provides professionals with the opportunity to deliver content in social channels to a large quantity of fairly diverse Americans.

Among all the social media platforms, Facebook is used by the majority (68%) of Americans while other dominant platforms hover between 22%-35%.



Currently there is a backlash against Facebook and much conversation around whether people will be deleting their accounts in protest of the perceived privacy breaches over recent Cambridge Analytics news. For now, the platform is going strong. Most companies and organizations realize they don't have many other choices that are as powerful in their ability to reach audiences as Facebook. Facebook reports "2.13 billion monthly active users as of December 31, 2017" on their company's information page.

The number of users on Instagram has been rapidly growing since its inception. Instagram reported in November 2017 that "...800 million use Instagram each month..." around the globe. In the United States, 35% of adults are using Instagram which is a huge increase of 30 percentage points from the 2016 data.

*% of U.S. adults who use each social media platform*

	<b>Facebook</b>	<b>Instagram</b>	<b>LinkedIn</b>	<b>Twitter</b>
Total	68%	35%	25%	24%
Men	62%	30%	25%	23%
Women	74%	39%	25%	24%
Ages 18-29	81%	64%	29%	40%
30-49	78%	40%	33%	27%
50-64	65%	21%	24%	19%
65+	41%	10%	9%	8%
White	67%	32%	26%	24%
Black	70%	43%	28%	26%
Hispanic	73%	38%	13%	20%
High school or less	60%	29%	9%	18%
Some college	71%	36%	22%	25%
College graduate	77%	42%	50%	32%
Urban	75%	42%	30%	29%
Suburban	67%	34%	27%	23%
Rural	58%	25%	13%	17%

Source: Source: Survey conducted Jan. 3-10, 2018.

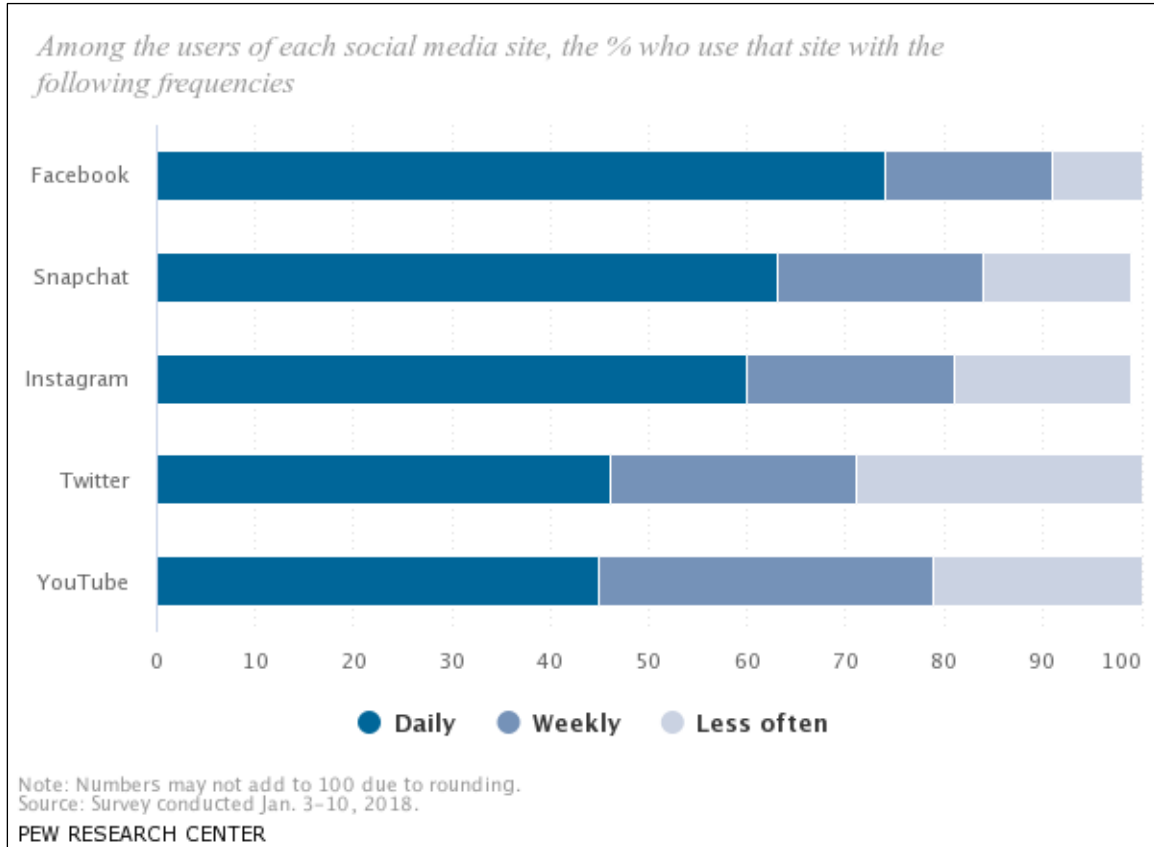
PEW RESEARCH CENTER

Across a wide demographic, Facebook is used by the majority of adults in the U.S. with the exception of those over age 65. But other platforms are more appealing for particular populations throughout the country. For example, LinkedIn is most popular with individuals who have completed college.

Americans age 18 to 29 are considerably more likely to use Instagram than Twitter, however, Americans ages 50 to 64 are equally distributed between the two platforms.

## When We Use Social

Social media has become part of a regular, and even daily, routine for many people.



There is a distinct difference between the daily use of Facebook, Twitter and Instagram. Facebook is visited most often on a daily basis by users, while the majority of Instagram and Twitter users return to check their feeds, profiles, or the profiles of others, once a week or less.

In managing your content strategy, posting frequency, and team's resources, this data can be strategically advantageous. For example, you'll want to be considerate in rotating types of content on Facebook because of the platform's feed and because three-quarters of users may see you there every day.



## Social Media Strategies

Individuals and firms should not engage on any social media platform without considering the overall marketing strategy that will drive engagement. Presenting a professional, ethical and effective presences online doesn't mean just having a well-designed, user-friendly and content-rich website; it means engaging and interacting in a purposeful way with target audiences ethically and effectively.

The most effective way to determine where to invest time and energy on social media is to review the platform demographics research to ensure that your target audiences are active there. Target audiences may include:

- Alumni
- Business leaders
- Community leaders
- Clients
- Colleagues
- Competitors
- Experts
- Family members
- Friends
- Government officials
- Judges
- Jurors
- Opposing counsel
- Media
- Prospects
- Referral sources
- Thought leaders

Best practices should always be employed for the setup, use and maintenance of online tools – as well as the strategy for engagement. You don't have to use all of the social media platforms just because they exist. It is critical to determine which social media platforms and which approach is right for you, your firm and your career.

Individuals will conduct research on the platforms where they are most comfortable. A professional who spends a lot of time using LinkedIn will have a tendency to reside on that website and initiate or continue research there. A common idiom in sales and networking is, "People do business with people, not companies," and we all want to work with people we know, like and trust. Social networking provides the perfect stage for building these relationships because of the natural conversations that develop on these platforms. This is where we share our knowledge – from how we preserved this year's tomatoes, to photos of our kids and families, to sharing news of a

parent's declining or improving state of health. It's also where we ask trusted members of those communities for referrals when we are searching for products and services.

### Define Communication Goals

For strategic social media engagement, begin by defining your social media objectives. These should align with your overall business objectives and marketing strategies and will also help the team measure successful outcomes. Communication goals for social media engagement may include such things as:

- Building a network through thought leadership
- Client relations
- Community / internal relations management
- Crisis management
- Event awareness
- Growing your business / increasing revenue and PPP
- Increased name recognition
- Issue advocacy management
- Marketplace differentiation
- Referral and lead generation
- Reputation and brand management

### Determine Key Messages

Aside from sharing event, media and industry news from other sources, what are your firm's core key messages that should be incorporated through social media? In tandem with blogging and article writing efforts, among other things, firms can make purposeful decisions about subject matter and content when key messages have been defined. Consider the following points strategically when crafting posts:

- Audiences served
- Benefits offered
- Practice area promotion
- Problems solved and avoided
- Types of matters handled
- Unique selling propositions

### Roles and Responsibilities

Strategic and holistic firm social media efforts typically need a team to foster engagement, rotate responsibilities, and create content. Aside from determining what you will share, the firm's social media marketing committee should determine who will

be responsible for sharing content as well as what days and times they should engage. An editorial calendar (a simple Excel spreadsheet) can assist with management.

## **A Note About Social Media Policies**

It is not only leadership and marketing teams disseminating corporate messages on social media. Employees are here too, casually, but also as passive firm representatives by nature of their employment. Most employees don't start their day with the intention to damage the reputation of their company, however, if they haven't been educated to understand how their behavior can affect public perceptions, that may happen. In today's electronic climate, the guidelines and expectations about company-sanctioned behavior absolutely need to be communicated clearly. It is up to the employer to provide this education and communication via a thorough social media policy and training. Since technology often outpaces the law, your policy needs to be reviewed and revised on a regular basis. For more guidance, see the "Social Media Policy Checklist" article included herein.

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Social media policies should be consistent with a firm's culture and attitude towards online technology use. Allow the nature of the policy to be reflective of the firm, and provide distinct guidelines and expectations for use.

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## Ethical Engagement

The ethical standards for the practice of law with regard to social media engagement and use are outlined below from the Pennsylvania Rules of Professional Conduct. Examples are included as well.

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Inadequate understanding of the scope and consent of information shared on the Internet along with the policies and issues associated with the content can lead to professional pitfalls.

These pitfalls include breaches of confidentiality, inadvertent attorney-client relationships, unauthorized practice of law, violation of advertising rules, and creation of issues or positional conflicts with clients.

(Ragusa, 2016)

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### Rule 1.1 Competence - Comment (8) 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.

Lawyers have an obligation to understand the technology they use, not only in business development but in the practice of law. Clients are using social media, businesses are using social media and there is an ethical duty to understand these technologies, even if attorneys personally choose not to engage in social media.

### Rule 1.6 Confidentiality of Information – (a)

A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Lawyers have been disciplined for online comments about former clients, for posting personal and humiliating content about clients, and more. Remember that the rules that govern offline behavior also apply to online behavior.

#### 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; or
- b. fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Attorneys may not pose as someone else online in order to influence matters regarding a case or a client. Social media use should be transparent and authentic. Don't ask others to do what you cannot.

#### Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- a. a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.
- b. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- c. a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  1. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  2. the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Lawyers are responsible for making sure nonlawyer employees or those associated with or retained by a lawyer or law firm are compliant with the same professional obligations

of the lawyer. This extends to marketing consultants, advertising agencies, public relations professionals, web developers, etc. If you hire a nonlawyer to engage in social media on your behalf, be aware of their conduct and their level of familiarity with the Rules for the state(s) in which you practice law.

#### Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

This includes all communications about a lawyer's services on any platform – whenever and wherever services are described or advertised. Even a truthful statement that omits facts can be misleading if it leads a reasonable person to make a judgment about expectations for legal services that may be unsubstantiated.

#### Rule 7.2 Advertising – (c)

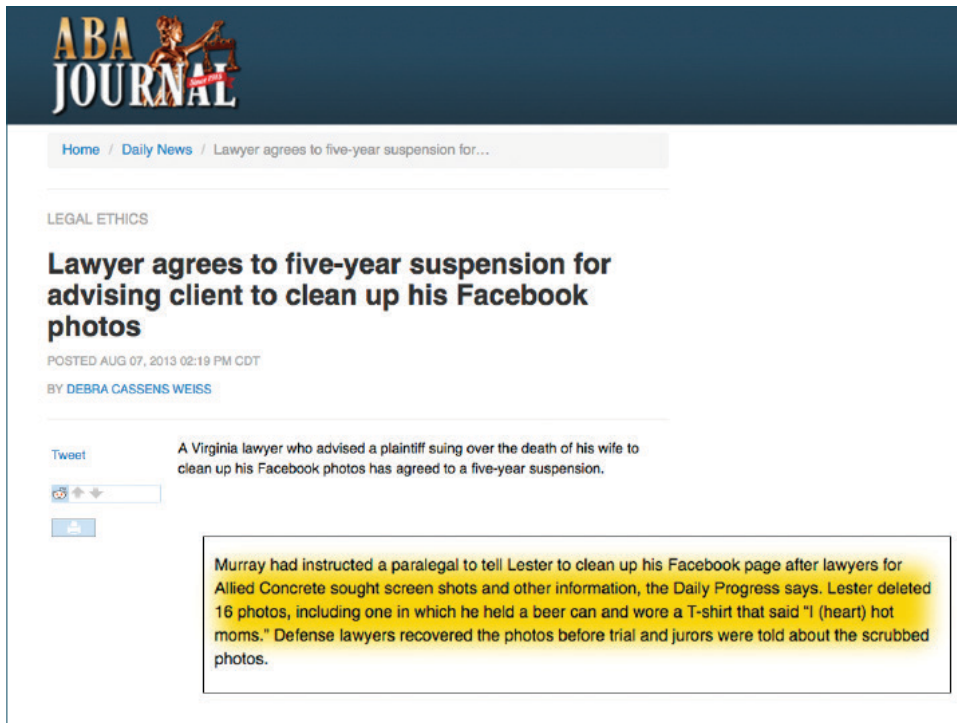
A lawyer shall not give anything of value to a person for recommending the lawyer's services...

#### Rule 7.3 Solicitation of Clients – (a)

- (a) A lawyer shall not solicit in-person or by intermediary professional employment from a person with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. The term "solicit" includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

Social media may not be used for the direct solicitation of individuals with whom there is no prior relationship. (Communications positioned to speak to the general public are not considered solicitations.) The functions within social media platforms facilitate the ability to have conversations. This guideline primarily concerns making contact with someone who is currently known to be in need of legal services.

Example: Suspension for violation of ethics rules governing fairness to opposing counsel. (1.1)



The screenshot shows the ABA Journal website. The article title is "Lawyer agrees to five-year suspension for advising client to clean up his Facebook photos". The author is Debra CasSENS Weiss. The article text states: "A Virginia lawyer who advised a plaintiff suing over the death of his wife to clean up his Facebook photos has agreed to a five-year suspension." A highlighted excerpt reads: "Murray had instructed a paralegal to tell Lester to clean up his Facebook page after lawyers for Allied Concrete sought screen shots and other information, the Daily Progress says. Lester deleted 16 photos, including one in which he held a beer can and wore a T-shirt that said 'I (heart) hot moms.' Defense lawyers recovered the photos before trial and jurors were told about the scrubbed photos."


Example: Uncovered through a Facebook post – plaintiff failed to sue doctors within the statute of limitations. (1.1)



The screenshot shows a legal article titled "Facebook Post Dashes Woman's Med Mal Suit" by Max Mitchell from The Legal Intelligencer, dated December 27, 2016. The article includes a photo of a Facebook logo. A highlighted excerpt reads: "As underscored by the trial court, on Feb. 14, 2010, Mrs. Nicolaou posted, 'I had been telling everyone for years i thought it was lyme....' to which one of her Facebook friends responded, '[Y]ou DID say you had Lyme so many times!'" Shogan said. "Mrs. Nicolaou's Facebook post, indeed her own words, bear on the fallacy of her claim on appeal that 'she didn't believe it.'" Nicolaou filed her suit in Feb. 10, 2012, nearly two years after her Facebook post indicated she suspected she had Lyme disease sooner."

*Example: Termination for inappropriate use of social media. (1.1)*

EDITION: UNITED KINGDOM

 REUTERS

U.S. | Wed Nov 21, 2012 | 5:48am EST

## Kansas court lawyer fired for inappropriate tweet

A state appeals court attorney in Kansas was fired on Monday for inappropriate comments on Twitter about former Kansas Attorney General Phill Kline, who faces a state Supreme Court ethics review over cases he handled against abortion providers while in office.

As Kline's case was heard before the state Supreme Court last Thursday, Sarah Peterson Herr, a research attorney for the Kansas Court of Appeals, tweeted about the expressions on his face, writing "Why is Phil Klein (sic) smiling? There is nothing to smile about, douche bag."

Ron Keefover, a spokesman for the Kansas Supreme Court, said Herr was originally suspended Friday pending further investigation and dismissed on Monday.


Herr could not be reached for comment on Monday.

Kline, a conservative crusader against abortion, could have his law license indefinitely suspended if he is found to have acted unethically.

A Kansas disciplinary panel for lawyers has ruled that Kline, who was attorney general from 2003 to 2007, had committed "ethical misconduct" and recommended suspension of his license.

(This story corrects state to Kansas throughout) (Reporting By Kevin Murphy; Editing by Todd Eastham)

*Example: Termination and mistrial for inappropriate use of social media. (1.6)*



Home / Daily News / Lawyer Puts Photo of Client's Leopard-Print...

CRIMINAL JUSTICE

## Lawyer Puts Photo of Client's Leopard-Print Undies on Facebook; Murder Mistrial, Loss of Job Result

POSTED SEP 13, 2012 09:16 PM CDT  
BY MARTHA NEIL

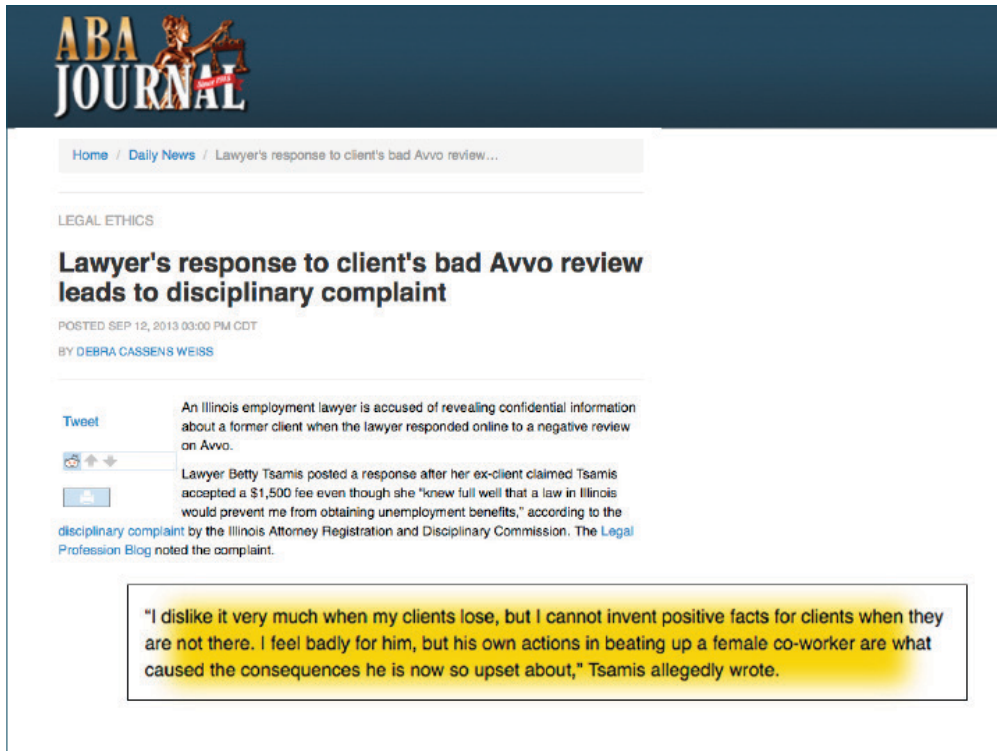
Cintron Stern reportedly snapped the photo of the briefs as a corrections officer held them up for a quick inspection while going through a bag of clothing that Recalde's family had brought for him to wear at trial.

Although she posted it on a personal Facebook page, along with a caption about "proper attire for trial," someone who saw it notified Judge Leon Firtel, the article recounts.

"When a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and it gives the appearance that he is not receiving a fair trial," Martinez said.



Example: Response to client Avvo review results in disciplinary complaint. (1.6)



The screenshot shows the ABA Journal website. The article title is "Lawyer's response to client's bad Avvo review leads to disciplinary complaint". It is categorized under "LEGAL ETHICS" and posted on September 12, 2013. The author is Debra Cassens Weiss. A tweet is included, stating that an Illinois employment lawyer is accused of revealing confidential information about a former client. The article text mentions lawyer Betty Tsamis and a disciplinary complaint filed by the Illinois Attorney Registration and Disciplinary Commission. A highlighted quote from Tsamis reads: "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 co-worker are what caused the consequences he is now so upset about," Tsamis allegedly wrote.

Example: Breach of settlement confidentiality announced on Facebook. (1.6)




The screenshot shows a CNN article titled "Girl costs father \$80,000 with 'SUCK IT' Facebook post". The author is Matthew Stucker, CNN, and it was updated on March 4, 2014. The article text states that the former head of a private preparatory school in Miami, Florida, is out an \$80,000 discrimination settlement after his daughter boasted about it on Facebook. A highlighted quote from the daughter reads: "But before the ink could dry on the deal, Snay's daughter took to Facebook, boasting, 'Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.'" The article also mentions that Gulliver Schools sent a letter to Snay's attorneys stating that Snay had broken a confidentiality agreement and that he would not be receiving the \$80,000 settlement.

Example: Impersonating another individual online leads to suspension. (4.1)

**Brooklyn Daily Eagle**

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### Suspension for lawyer who created fake online profile



By Charisma L. Miller, Esq.  
Brooklyn Daily Eagle

The suspension of a Staten Island attorney who went on a lesbian dating website posing as a woman he once knew has been issued by the Appellate Division, 2nd Department.


James O'Hare went to an online dating site for lesbians and created a false profile impersonating a woman he had previously known. According to court documents, he used both his home and work computers for this activity, aware that the fake profile would likely cause embarrassment to the woman, who was a mother of three.

The Appellate Courthouse, 2nd Department, on Monroe Place, Brooklyn Heights. Eagle photo by Don Evans

Though he had already been suspended from practicing law for over a year, in its July 17 unsigned opinion, a panel of Appellate Division, 2nd Department, judges ordered a one-year suspension for O'Hare, noting that his "conduct was highly inappropriate and adversely reflects on the legal profession."

Example: Opaque activities of paralegal could lead to ethics investigations. (5.3)

### Don't Get Tagged - Avoiding Ethical Missteps with Social Media Investigations



**INTELLECTUAL PROPERTY AND TECHNOLOGY LITIGATION**

BY: MICHAEL KOLCUN | NOVEMBER 29, 2016

Attorneys should also remember their ethical obligations are imputed to their agents. Just a few months ago, the Supreme Court of New Jersey considered a case where attorneys directed their paralegal to submit a friend request and monitor an opposing party's Facebook profile. See *Robertelli v. N.J. Office of Atty. Ethics*, 134 A.D.3d 963 (N.J. 2016). Even though the paralegal did not use a false identity, her friend request did not disclose that she was working for the other side. The New Jersey Supreme Court went so far as to allow the state's Office of Attorney Ethics to investigate the matter even after a local ethics committee declined to pursue the potential attorney misconduct.

*Example: If you have “Tax Law” listed as a skill on your LinkedIn profile and a client “endorses” you for that skill on LinkedIn, and you indeed have that skill, you are within the bounds of ethical practice. However, if you make your own endorsement of a skill on someone’s LinkedIn profile contingent or conditional on receiving their endorsement in return (or vice versa), then you would run afoul of the rules. (7.1, 7.2)*



## Works Cited

"Best Times to Post on Social Media: 2018 Industry Research." SproutSocial.com. Sprout Social. 13 March 2018. Web. 27 March 2018.

Black, Nicole. "Social Media for Lawyers." Web. 3 February 2015. <<http://www.mycase.com/blog/2015/02/lawyers-social-media-2015-infographic/>>

"Celebrating a Community of 25 Million Businesses." Instagram-Press.com. Instagram. 30 Nov. 2017. Web. 26 March 2018.

Facebook. "Statistics." Web. 8 January 2017 <<http://newsroom.fb.com/company-info/>>

Jackson, Dominique. "10 Ways Marketers Can Increase Facebook Engagement." Web. 21 March 2016. <<http://sproutsocial.com/insights/facebook-engagement/>>

"LinkedIn Workforce Report | United States | March 2018." EconomicGraph.Linkedin.com. LinkedIn. 7 March 2018. Web. 27 March 2018.

Ragusa, P., Diehl S. "Social Media and Legal Ethics – Practical Guidance for Prudent Use." September/October 2016. IP Litigator, Volume 22, Number 5, pages 12-14.

"Social Media Fact Sheet." PewInternet.org. Pew Research Center. 5 Feb. 2018. Web. 26 March 2018.

"Social Media Use in 2018." PewInternet.org. Pew Research Center. 1 March 2018. Web. 27 March 2018.

Twitter. "Company." Web. 8 January 2017 <<https://about.twitter.com/company>>

"Why Every Marketer Should Be Keeping Up with the Evolution of Messaging Apps." Adweek.com. Adweek. 6 March 2016. Web. 27 March 2018.

## Four Steps to Protect Your Brand on Social Media

*By J. Tucker Barr, Esq., Arnall Golden Gregory LLP*

*Reprinted with permission.*

*<http://www.agg.com/Four-Steps-to-Protect-Your-Brand-on-Social-Media-12-15-2016/>*

Howard Schultz, the CEO of Starbucks, once said that, “If people believe they share values with a company, they will stay loyal to the brand.” With the rapid proliferation and acceptance of social media over the past decade, businesses now have unprecedented opportunities to share their values with customers and develop brand loyalty.

Of course, social media is a double-edged sword. Just as a business can instantaneously deliver positive brand messaging through social media, social media also is fertile ground for infringement and other misconduct. In an instant, anyone with a smart phone can create a phony social media account bearing your company’s name and logo to post unflattering or politically-charged remarks, lure your customers to other sites with fake coupons, or communicate false information. To make matters worse, the parties responsible for such mischief are often impossible to identify, and even if they could be identified, they may be beyond the reach of U.S. courts.

Below are four simple steps every company can take to protect itself and its image on social media:

### **1. Don’t Be the Source of the Problem**

Businesses can create problems for themselves on social media that pale in comparison to those created by the worst of infringers. For example, the Seattle Seahawks football team created a stir by Tweeting “We Shall Overcome” during its 2015 playoff run, suggesting that the Seahawks’ struggle to win the Super Bowl was on par with the struggle of African-Americans during the civil rights movement. Blackberry subjected itself to ridicule when it used an iPhone to send Tweets to its customers. And in one of the worst social media gaffes in history, an apparel company intending to post an image of Fourth of July fireworks on its Tumblr stream mistakenly used an image of the space shuttle exploding.

Companies can avoid such problems by placing tight controls on their social media accounts. Consider requiring internal approvals of all social media posts, preferably by multiple people, because any one person— no matter how intelligent, experienced, well-meaning, and loyal— could miss potentially controversial implications of any given post. Also, legal counsel should clear any unique phrases or images that the company plans to post to avoid infringing the intellectual property rights of others.

## **2. Implement a Social Media Monitoring Program**

All too often, companies that encounter infringements on social media discover that their problem is not an isolated incident, and that multiple infringing uses have proliferated through social media. Companies can proactively protect their brands with the assistance of vendors who provide subscription-based services that identify and track all social media mentions of a company's brands and trademarks. These vendors frequently are able to alert companies to potential problems before any major damage occurs.

Companies also can designate an employee or engage legal counsel to periodically conduct searches for the company's trademarks on social media websites. While this approach is less comprehensive and takes more effort, it allows the company to customize its social media monitoring to focus on unique or recurring threats—for example, by searching for key words in tandem with the company's name and/or trademarks.

## **3. Develop Criteria for Identifying True Threats**

Most businesses simply do not have the resources to respond to every social media infringement. And, responding to every infringement might not be in the best interests of the company. In some cases, taking a heavy-handed approach can backfire, resulting in more harm to the company's brand than that posed by the infringement. While each company must assess its own pain tolerance and act accordingly, here are the two key questions to ask when evaluating a potential threat: (1) is anyone likely to believe that the social media content comes from or is associated with the company? and (2) is the content likely to harm the company? If the answers to these questions are both "yes," then take action.

## **4. Use the Complaint Procedures Offered by Social Media Outlets**

Social media outlets are aware that infringers may sometimes misuse their platforms to inflict harm on brand owners. Hence, virtually all such platforms provide a streamlined mechanism for brand owners to submit infringement complaints. Complaint forms are simple to complete and are submitted electronically. For instance, in a typical trademark infringement complaint, the brand owner simply identifies the registration number of the infringed trademark, notes the URL where the infringement occurs, and provides a brief description of the infringement. Social media outlets generally respond quickly to complaints, often within a matter of hours.

In clear cases of infringement, the remedy is swift and complete – the infringing content, page, or post is removed. Aside from efficiency, addressing infringements directly with social media platforms eliminates the hassle (and, many times, the impossibility) of identifying the infringer.

Below are links to the complaint procedures and forms of the most popular social media platforms:

Facebook: <https://www.facebook.com/help/contact/634636770043106>

Twitter: <https://support.twitter.com/forms/trademark>

Instagram: <https://help.instagram.com/535503073130320>

Pinterest: <https://about.pinterest.com/en/trademark>

By following these steps, your company can enjoy the benefits of social media while minimizing the risk of harm to its brand.

## **Don't Get Tagged – Avoiding Ethical Missteps with Social Media Investigations**

*By Michael A. Kolcun, Esq., Robins Kaplan LLP*

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*<http://blog.robinskaplantrialattorneys.com/2016/11/29/dont-get-tagged-avoiding-ethical-missteps-social-media-investigations/>*

As the number of people who interact on social media surpasses the one billion mark, attorneys are catching-on and turning to various platforms for investigative purposes and as informal discovery tools. We all know that the Model Rules of Professional Conduct require competent representation, but now some of the more progressive bar associations are mandating aptitude in social media.

For example, the New York State Bar Association recently revised its nationally-recognized Social Media Ethics Guidelines to include a section on competency, opining that attorneys “need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use.”

As many ethics opinions recognize, the propriety of social media investigations primarily turns on whether the target – such as an opposing party or witness – maintains a social media page that is accessible to the public. As a general rule, public pages are fair game, and just like any other public information, they should be. The courts are even getting in on the action, with one finding that: “If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy.” See *People v. Harris*, 949 N.Y.S.2d 590, 595 (N.Y. Crim. Ct. N.Y. Cty. 2012). The same is also true with respect to viewing a potential or sitting juror’s public social media page unless the presiding judge specifically bars such conduct.

The liberal interaction of the benefits of social media and attorney investigations significantly constricts, however, in the instance of a private social media page of a represented party or juror. In most instances, attorneys can be guided by the familiar “no-contact” rule and the obvious prohibition of employing deceit.

Competence in the numerous social media platforms to be employed is of utmost importance to avoid any inadvertent contact that can lead to an ethical mishap. For example, caution must be taken in that some sites, like LinkedIn, send automatic notifications when a social media profile is viewed.

Attorneys should be especially wary with respect to sitting and potential jurors, as two local New York bar associations opine that such unintended contact may technically amount to an ethical violation.



Attorneys should also remember their ethical obligations are imputed to their agents. Just a few months ago, the Supreme Court of New Jersey considered a case where attorneys directed their paralegal to submit a friend request and monitor an opposing party's Facebook profile. See *Robertelli v. N.J. Office of Atty. Ethics*, 134 A.D.3d 963 (N.J. 2016). Even though the paralegal did not use a false identity, her friend request did not disclose that she was working for the other side. The New Jersey Supreme Court went so far as to allow the state's Office of Attorney Ethics to investigate the matter even after a local ethics committee declined to pursue the potential attorney misconduct.

As is clear from the proliferation of ethical opinions and judicial decisions, social media is becoming an integral part of the legal profession and it is here to stay. While social media is undoubtedly another weapon in your arsenal, attorneys must continue to be vigilant in abiding by all applicable ethical obligations when diligently representing their clients.

## Social Media and Practice: Questions Attorneys Should Ask Now

*By Michael A. Kolcun, Esq., Robins Kaplan LLP*

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*<http://www.robinskaplan.com/resources/articles/social-media-and-practice-questions-attorneys-should-ask-now>*

Social media users number in the billions. Facebook counts over 1.4 billion users, LinkedIn has 347 million members, Instagram has 300 million, Twitter has nearly 290 million, and YouTube reports more than a billion users.<sup>1</sup> And, like everyone else, attorneys have embraced social media in both their personal and professional lives. In fact, increasingly, an attorney's skill and finesse in navigating these networks can prove essential in professional responsibilities and client relationships.

Given social media's enormous reach, attorneys inevitably must determine what rules apply to social media use – and misuse – in a legal setting. Though the rules governing social media use continue to evolve, the time has come for attorneys to start considering the questions that surround the professional obligations social media creates.

### **1. What professional obligations to clients does social media actually create?**

Today, many attorneys look to social media for investigative purposes and as an informal discovery tool. So far though, when it comes to social media, no specific, stated standards have been created regarding a required attorney aptitude—but that may soon change.

Rule 1.1 of the New York Rules of Professional Conduct (“NYRPC”) requires competent representation of a client.<sup>2</sup> Earlier this year, the Commercial and Federal Litigation Section of the New York State Bar Association (“NYSBA”) updated its highly respected social media ethics guidelines to include a section on attorney competency. The update states that a “lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.<sup>3</sup> Further, according to the NYSBA guidelines, attorneys “need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use.”<sup>4</sup>

Given the undisputed popularity of social media, the NYSBA's analysis provides some guidance to attorneys with respect to using social media in properly serving the needs of their clients. Moreover, ethical rules could further expand more specifically to mandate an attorney's active engagement in social media, since free information through social media remains so available and easily accessible. NYRPC 1.1(c) provides that an attorney

shall not intentionally “fail to seek the objectives of the client through reasonably available means permitted by law and these Rules.” In fact, instances of attorney admonishment and sanctions for failing to do so already exist.

## **2. Why consider social media a “reasonably available means”?**

Social media provides nearly limitless information, and opportunities abound for gathering knowledge and evidence. In nearly any practice area, social media may reveal juror biases, provide material for impeachment, or assist in identifying a witness. For example, social media may benefit a client in a case concerning a person’s physical, mental or emotional state. It may impact a Fair Labor Standards Act matter involving a shared, non-work-related activity. Business marketing may reveal evidence of a breach of a non-compete. Infringing music or videos may be captured and preserved as evidence. Individuals willingly volunteer such information through the common practice by social media users of posting content, comments, and sharing opinions on nearly anything and everything.

## **3. What other ethical limitations does attorney social media use raise?**

When dealing with social media, attorneys must continue to comply with rules of ethics, including the prohibition against attorney deceit, and the “no-contact” rule with respect to represented parties and jurors. Bear in mind that ethical obligations extend to an attorney’s agents, investigators and even clients under NYRPC 5.3 and 8.4. Consider whether a person’s social media webpage appears in a public or private format, and accordingly, whether any contact with the social media user could be deemed prohibited.

Ethics rules allow for the review and use of evidence from a person’s public social media page. The NYSBA considers viewing the public portion of a person’s social media page as entirely permissible, just like any other public information.<sup>6</sup> Attorneys can and should comb through public social media on a client’s behalf. Given the intentionally public nature of such social media profiles or posts, no concerns of breaches of privacy arise. One court even likened posting a tweet to screaming out a window.<sup>7</sup>

Follow the same guideline in viewing a potential or sitting juror’s public social media webpage. The NYSBA, New York City Bar Association (“NYCBA”), and the New York County Lawyers’ Association (“NYCLA”) all extend an attorney’s investigative reach to public social media pages of potential and sitting jurors, the benefit of which continues even after a juror has been sworn in and throughout trial.<sup>8</sup> In doing so, the NYCBA opines that social media has “expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything possible to learn about the jurors who will sit in judgment on a case.”<sup>9</sup>

In some instances, even broader investigative latitude may be allowed when viewing and using evidence from private or restricted social media webpages. Both the NYSBA and NYCBA opine that an attorney may contact an unrepresented party to request access to a restricted social media webpage, as long as the attorney uses their full name and an accurate profile. The attorney must also do so in a manner that does not create any false profile to mask their identity, in order to avoid issues regarding NYRPC 4.3 and 8.4.<sup>10</sup> In this instance, the active engagement of social media can be an invaluable tool for obtaining information, particularly when an attorney's agent or investigator contacts an unrepresented party. Many social media users accept online connection requests even when they do not know the requesting party. But should the unrepresented party request information of the attorney in response to that kind of request, the NYSBA says that an attorney has the option to either accurately provide the required information or withdraw. The NYCBA, on the other hand, states that further disclosures are unnecessary.

#### **4. What about a represented party or juror?**

Attorneys must remain diligent in observing the no-contact rule while navigating the realm of social media, especially when it comes to the more constricted rules regarding access to the private social media page of a represented party or juror. Consistent with NYRPC 4.2, the NYSBA has specifically said that an attorney cannot contact a represented person to request access to their restricted site unless an express authorization to do so has been given.<sup>11</sup> An emerging trend exists, however, of courts deciding to permit disclosure of some, if not all, of those kinds of restricted or private social media webpage.<sup>12</sup>

In order to avoid violating the no-contact rule when working in social media platforms, attorneys should also be careful to not send any unintended communications. Some social media sites, such as LinkedIn, may send automatic notifications to the owner or operator of a webpage when viewed. Contact may be deemed to have occurred with a represented party upon receipt of such notification, or if the subject of investigation becomes alerted to the fact that opposing counsel viewed his/her social media webpage. Attorneys should be especially wary of such automatic notifications in the context of sitting or potential jurors, as such contact may be similarly prohibited under NYCPR 3.5. In fact, the NYCBA and the NYCLA have both expressed the opinion that even such inadvertent contact by automatic messages or notifications may be considered an ethical violation.<sup>13</sup>

#### **Conclusion**

Social media now plays an integral role in an attorney's relationships with clients. Judicial decisions will continue to develop more specific rules and guidelines for the ethical use of social media in a legal

context. Staying aware of the evolving obligations and restrictions expected of you while using social media will enable you to best serve your clients.

<sup>1</sup> See <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last accessed June 30, 2015); <https://www.youtube.com/yt/press/statistics.html> (last accessed June 30, 2015).

<sup>2</sup> See <http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>

<sup>3</sup> See <http://www.nysba.org/socialmediaguidelines/> (“NYSBA Guidelines”)

<sup>4</sup> Id.

<sup>5</sup> See, e.g. *Cajamarca v. Regal Entm’t Group*, 11-cv-2780 (E.D.N.Y. Aug. 31, 2012) (reprimanding and eventually sanctioning an attorney, in part, for failing to investigate a client’s Facebook activity, noting, “plaintiff’s lawyer should be roundly embarrassed. At the very least, he did an extraordinarily poor job of client intake in not learning highly material information about his client”).

<sup>6</sup> See NYSBA Guidelines, citing NYSBA Op. 843 (2010).

<sup>7</sup> See *People v. Harris*, 949 N.Y.S.2d 590, 595 (N.Y. Crim. Ct. N.Y. Cty. 2012).

<sup>8</sup> NYSBA Guidelines; NYCBA Formal Op. 2012-2 (2012); NYCLA Formal Op. 743 (2011).

<sup>9</sup> NYCBA Formal Op. 2012-2 (2012).

<sup>10</sup> NYSBA Guidelines; NYCBA Formal Op. 2010-2 (2010).

<sup>11</sup> NYSBA Guidelines.

<sup>12</sup> See, e.g. *Caputi v. Topper Realty Corp.*, 14-cv-2634 (E.D.N.Y. Feb. 25, 2015); *Glazer v. Fireman’s Fund Ins. Co.*, 11-cv-4374 (S.D.N.Y. April 4, 2012).

<sup>13</sup> NYCBA Formal Op. 2012-2 (2012); NYCLA Formal Op. 743 (2011).

## Social Media Policy Checklist

*By Orla O'Hannaidh, Womble Carlyle Sandridge & Rice, LLP*

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*<http://www.wcsr.com/Insights/Articles/2016/September/Social-Media-Policy-Checklist>*

A social media policy or a set of guidelines helps your employees make smarter decisions when marketing your brand, products and services online and may mitigate the risk of coming under the radar of the FTC or another regulatory agency or simply avoiding bad PR.

**Key Players.** Legal should play a key role in creating a social media policy or set of guidelines, but it is wise to involve personnel from marketing, IT, and HR. Also consider including representatives from a selection of departments to get valuable input from employees that the policy is intended to guide.

**Identify and Evaluate.** Before drafting a social media policy, the key players must carry out internal due diligence.

- Identify and evaluate the categories of confidential information that your employees have access to and may inadvertently share on social media.
- Identify and evaluate the type of content that employees post on social media platforms. Is the content generally created in-house? By an ad agency? From other third-party sources? Are social media campaigns usually text-only or do they include photos, music, videos, endorsements? Understand the legal issues associated with posting content online.
- Identify and evaluate other legal risks associated with the use of social media in your business, including third-party terms of use, employment laws, privacy claims, securities laws and other laws that may be triggered by the use of social media by employees. For example, the National Labor Relations Board has found overly restrictive social media policies to violate employees' protected rights.

**Purpose and Scope.** The policy should reflect the type of social media engagement that your company and employees actually use. For example, does your company maintain a Facebook® page or a blog? Use LinkedIn® to post articles? Run promotions on Instagram®? Do your employees use personal social media accounts to post on behalf of the company or only employer-created accounts? The answers to these questions will affect the types of social media guidelines that you should create for your employees.

**Be Practical, Positive and Consistent.** The policy should be easy to read and interpret. The intent is not to discourage social media use, but to make use smarter. Try to phrase

the guidelines as things employees “can” do rather than cannot do. Use terms that employees engaged in social media will understand. For example: avoid using terms from the Copyright Act such as “reproduce, distribute or display,” and instead use “post, tweet or pin.” The policy should also match the general values and culture of your company and the other policies that you may have in place that overlap with social media policies.

**Training.** Training is essential. Do not just add the policy to the employee handbook and hope that your employees will read it. Explain why social media guidelines are important to the company and the company’s reputation and relationship with customers, vendors and other third parties. Explain the legal risks of “social media posts gone wrong.” Arrange a lunch and learn to walk through the policies and provide examples of “Dos and Don’ts.” Create a short checklist of key takeaways from the policy and post the checklist in areas where employees who regularly post on social media work.

**Monitor and Re-visit.** Monitor compliance and ensure enforcement is uniform. Social media changes quickly, so the policy should also be re-visited frequently to make sure that new forms of social media engagement are captured.