

Successfully Navigating the Ethical Minefield of Social Media in the Legal Profession



By David J. Oberly

Why It Matters

Social media platforms such as Facebook, Twitter, and LinkedIn have fundamentally transformed the way in which people communicate and share information. In addition, the rising use of social media is also changing the face of the practice of law. Given the ubiquitous nature of social media today, it should not come as a surprise that social media evidence has arrived on the scene as a major player in litigation, where in many instances a single social media post, by itself, possesses the power to make or break a case. In addition, legal professionals now rely heavily on social media as an integral facet of attorneys' and law firms' marketing and business development campaigns.

Importantly, the increasing prevalence of social media in the day-to-day operations of the legal profession has ushered in a host of new ethical obligations on the part of attorneys. If not addressed properly, these unique, oftentimes complex ethical issues can land the unsuspecting legal professional in hot water for running afoul of the Rules of Professional Conduct. With the appropriate amount of attention and care, however, attorneys can successfully navigate the ethical minefield of social media to steer clear of any ethical lapses while harnessing the power of social media as a key practice and business development tool for their legal practices.

Duty of Competence

Rule 1.1 of the Ohio Rules of Professional Conduct provides that "a lawyer shall provide competent representation to a client." To satisfy Ohio's version of Rule 1.1, the attorney must maintain "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" and "keep abreast of changes in the law and its practice." Moreover, just recently the scope of ABA Model Rule 1.1 was expanded to require not just competence in an attorney's areas of practice, but also with respect to "the benefits and risks associated with relevant technology."

Taken together, and with the profound significance that social media has on all aspects of the practice of law today, competence in the digital age now requires attorneys to maintain an understanding of social media both in terms of how it impacts their cases and the practice of law as a whole. Consequently, incompetence in the area of social media will not only place counsel at a severe disadvantage in attempting to successfully litigate his or her case load, but will also cause the attorney to violate his or her ethical obligations as well. As such, attorneys must maintain a working knowledge of the basics of all social media platforms and the legal issues that commonly arise at the intersection of social media in the practice of law, including the various privacy settings of the major social platforms and how posts and other data are managed and obtained from those sites. Moreover, attorneys who lack the necessary technical competence in the area of social media must confer with qualified individuals who maintain such expertise.

Investigation & Discovery of Social Media Evidence

Many ethical problems stem from the manner in which attorneys utilize social media to view the profiles of opposing parties, witnesses, and other individuals. Courts across the country are in unison that viewing publicly available portions of a user's social media accounts is clearly permissible, making everything that is publicly available online fair game. However, attorneys frequently run into significant trouble when attempting to view private social media profiles.

In particular, attorneys must tread extremely carefully when seeking to "friend" individuals in order to gain access to the private portions of their social media accounts. In this regard, while no Ohio court has addressed the issue, other jurisdictions have held that it is a violation of Rule 4.2 to contact or "friend" an individual represented by counsel. Other jurisdictions have also held that it is a violation of Rules 4.1 and 8.4(C) to enlist a third party to make a friend request as a pretext to gain access to a represented individual's private account. While attorneys may contact unrepresented individuals directly through social media, some jurisdictions require attorneys to disclose the reasons for "friending" an unrepresented individual or the intended purpose of the sought-after social media information so as to avoid the appearance that the attorney is an uninterested party. Similarly, attorneys are barred from using any pretextual basis for accessing an unrepresented individual's social media profile that would otherwise be shielded from view to the general public.

Clients' Use of Social Media and the Duty to Preserve Evidence

In addition to utilizing social media for obtaining evidence, attorneys' ethical duty to preserve evidence and the related issue of spoliation of evidence are also matters of critical importance in today's highly digital social media age. Ohio Professional Rule 3.4 requires attorneys to oversee the preservation of relevant evidence and bars attorneys from obstructing another party's access to evidence. In addition,

Rule 3.4 bars attorneys from modifying or destroying evidence or assisting clients in doing so.

Without question, this ethical obligation extends to electronically stored information and evidence from social media sites. Accordingly, attorneys must take reasonable measures to preserve and produce any relevant evidence that is contained on a client's social media platforms. In doing so, attorneys must not only clearly notify their clients of their preservation obligations but must also take an active role themselves throughout the course of litigation to ensure that all social media posts are preserved and accessible in the event they are sought during litigation. With that said, attorneys are generally permitted to advise clients to control their privacy settings to prevent any posts from being publicly available, so long as those posts are not altered or deleted in any fashion.

Use of Social Media as a Legal Marketing and Business Development Tool

Social media has rapidly developed into an integral tool for attorneys in the area of legal marketing and advertising. As with any method of legal marketing, lawyers must proceed with caution to avoid any ethical lapses when utilizing social media as a marketing and business development tool.

Importantly, any social media profile utilized by an attorney that articulates information about his or her legal practice must comply with the array of different ethical rules that bar attorneys from making false or misleading communications about the attorney or the attorney's services. Pursuant to Professional Conduct Rule 7.1, attorneys are prohibited from "making or using" a false, misleading, or unverifiable communication about his or her services. This rule strictly prohibits an attorney from misrepresenting his or her skills or experience on the attorney's social media sites or accounts. Moreover, this rule also creates additional ethical problems for attorneys in the area of client endorsements where the endorsements suggest skills or experience that the attorney does not possess. Accordingly, attorneys must regularly monitor client

reviews to ensure they are accurate representations of the legal professional's skills and experience.

Rule 1.6's duty of confidentiality is another area of significant concern that arises in the context of digital legal marketing and business development. Rule 1.6 provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Under this Rule, attorneys have an ethical obligation to prevent the inadvertent or unauthorized disclosure of access of client information when using social media. Because social media is heavily geared towards making routine, causal comments about a user's day-to-day activities—including work-oriented endeavors—attorneys must proceed with extreme caution when discussing any of the attorney's cases or other work matters on social media in order to avoid posting any information that would violate the attorney's confidentiality obligations, as even cursory, off-hand comments are sufficient in many circumstances to constitute a violation of Rule 1.6.

Similarly, attorneys must also exercise caution to avoid providing legal advice while communicating or interacting with others on social media, as doing so could inadvertently lead to the creation of an unwanted attorney/client relationship with another social media user, as well as all of the responsibilities and significant liability that arise with such relationships. For example, an attorney may unwittingly create an attorney-client relationship if an individual "reasonably relies" on what that person believes to be the attorney's legal advice that he or she has supplied through social media. In addition, participation in question-and-answer sessions on social media platforms such as Twitter may potentially create a prospective attorney-client relationship under Rule 1.18—which provides that a person who discusses with a lawyer the possibility of forming an attorney-client relationship with respect to a matter is a prospective client—especially if the attorney expressly requests or invites the submission of inquiries concerning a potential legal matter.

To guard against the risk of forming unwanted attorney-client relationships, legal professionals should make clear that any social media interaction does

not form an attorney-client relationship. Importantly, attorneys should also limit their communications on social media to the discussion of generalized legal information (general legal principles and considerations) and must avoid crossing over the line to supplying specific advice and recommendations tailored to the unique facts of an individual's specific circumstances, as doing so will ordinarily form the basis for an attorney-client relationship. In addition, sticking solely to discussing legal information will also allow attorneys to avoid violating Rule 5.5's bar on the unauthorized practice of law, which arises when an attorney provides legal advice to other social media users who reside in jurisdictions in which the legal professional is not licensed to practice.

social media presents many significant opportunities for legal professionals to enhance their practices, these opportunities go hand-in-hand with an array of critical ethical obligations that legal professionals must adhere to in today's highly digital age. Accordingly, attorneys must exercise great caution when harnessing social media in the course of their legal practices to avoid the minefield of potential ethical pitfalls that lie waiting for the unsuspecting and inattentive legal professional. When utilized properly and with an eye towards adherence to one's ethical obligations, social media can be leveraged as an extremely powerful tool in the practice of law while at the same time steering clear of any potential ethical problems that may arise in connection with the use of today's technology.

The Final Word

Social media has quickly evolved into an essential tool for practicing law, and now operates as a mainstay in the day-to-day practices of many attorneys. While

Oberly is an associate attorney in the Cincinnati office of Blank Rome LLP. He focuses his practice on mass torts and complex litigation, toxic torts and environmental litigation, product liability, and insurance coverage litigation. He may be reached at doberly@blankrome.com.

Ethical Quandary?



The CBA is proud to offer ethical guidance to Greater Cincinnati attorneys through our Ethics Committee's hotline.

December

Michael J. Bronson (513) 977-8654
Samuel M. Duran (513) 357-9378

The members of the CBA Ethics & Professional Responsibility Committee listed above are available to help you interpret your obligations under the Ohio Rules of Professional Conduct. Questions posed should be framed hypothetically and should relate to your own prospective conduct. The committee also accepts requests for written opinions.

LCNB
National Bank

Discover the Difference

LCNB National Bank's Trust Department provides investment, wealth planning, and professional estate and trust services.

513-677-2203 | LCNB.com

Our experienced trust professionals are highly accessible and are committed to timely, face-to-face meetings.

NOT FDIC Insured No LCNB National Bank Guarantee May Lose Value