Agenda

Effective and Ethical Use of Social Media
- Ethical rules
- Bar association and other opinions
- Practical guidance

Social Media In Practice
- Hypothetical scenarios
- Guidance under the applicable rules and opinions

Questions
A Federal Judge And His Twitter Account: A Cautionary Tale
By DAVID LAT

Do you think this judge crossed the line in his use of social media?

12 Comments / 264 Shares / Nov 18, 2015 at 4:48 PM

Biglaw Partner’s Tweets Spark FBI Interest
By KATHRYN RUBINO

Everyone loves to tweet, but try not to flout court rules while doing so.

14 Comments / 111 Shares / Nov 11, 2015 at 1:16 PM

Biglaw Partner’s Social Media FAIL
By KATHRYN RUBINO

When a partner goes public with controversial views, that can impact the firm’s overall reputation and recruitment.

75 Comments / Share / Jul 7, 2015 at 4:01 PM
Effective & Ethical Use of Social Media

Ethical rules
Bar association and other opinions
Practical guidance
Ethical Implications of Social Media

- Competence
- Attorney Advertising - Specialization
- Furnishing Legal Advice
- Communication with Clients
- Communication with Unrepresented Parties
- Social Media in the Courtroom
Guidance on Social Media for Lawyers

Articles and Resources
- Virginia State Bar, Quick Facts about Legal Ethics and Social Networking (last updated Feb. 22, 2011)
- N.H. Bar Ass'n, Ethics Corner (June 21, 2013)
- Texas Young Lawyers Association Pocket Guide: Social Media 101

Ethics Opinions

Formal Guidelines
Competence

• ABA Rule 1.1: *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
  
  – Comment 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...."

• NYSBA Guideline No. 1: Attorneys' Social Media Competence.
  
  – 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.
Competence (continued)

  - Duty to use social media.

  - Duty to conduct Internet search.

  - Duty to use Internet resources as part of due diligence.

  - Noting increased responsibilities "[i]n light of advances in technology allowing greater access to information."
Attorney Advertising - Specialization

• ABA Rule 7.4: *A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless: (1) the lawyer has been certified as a specialist by an organization that has been approved . . . and (2) the name of the certifying organization is clearly identified in the communication.*

• NYSBA Guideline 2B - Prohibited use of the term "Specialists" on Social Media.
  – Lawyers shall not advertise areas of practice under headings in social media platforms that include the term "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.
Furnishing Legal Advice

• ABA 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.
  – Comment [2]: a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information...

• NYSBA Guideline 3A - Provision of General Information.
  – A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social network...

• Ohio Rules of Professional Rule 5.5 - Unauthorized Practice of Law.
  – Comment [4]: Advertising in media specifically targeted to OH residents . . . could be viewed as a systematic and continuous presence.
Communication with Clients/Preserving Evidence

- ABA Rule 1.0: "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing...

- NYSBA Guideline 3C - Retention of Social Media Commc'ns with Clients.
  - If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

- TX Opinion No. 648.
  - Some circumstances, may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email.
ABA Rule 1.2(d): *A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client...*

NYSBA Guideline 5A/B - Removing Existing Social Media Information / Adding New Social Media Content.

- A lawyer may advise clients as to what content to have on their social media accounts, including advising or changing their privacy settings and as to what content may be "taken down" or removed as long as there is no violation of common law or statute, rule, or regulation relating to the preservation of info.
- Lawyer may advise as to posting new content.
Viewing Social Media Accounts (Guidelines 4A-D)

- Lawyer may view the public portion of a person's social media account.
  - Beware of auto-generated messages (unintentional communications) sent to a represented party (or juror!).
- Lawyer may request permission to view the restricted portion of an unrepresented person's social media account.
  - But the lawyer cannot use deception in doing so.
  - In NY, the lawyer is not required to disclose the reasons for making the friend request.
- Lawyers shall not order or direct an agent to friend another where it would violate ethics rules for the lawyer to do so.
Viewing Restricted Portions of Accounts (Guideline 5D)

• Lawyer may review contents of a restricted portion of a represented person's social media profile that was provided by the client.
  – So long as: lawyer did not (i) cause or assist the client to inappropriately obtain the content, (ii) invite the represented person to take action without the advice of his lawyer, or (iii) otherwise overreach.

• Overreaching
  – NY interprets as conduct by the lawyer that converts a communication initiated or conceived by client into a vehicle for the lawyer to communicate directly with non-client.
  – ABA permits a lawyer to give substantial assistance to client regarding substantive communications.
Client Confidentiality (Guideline 5E)

• Maintaining client confidences.
  – Including communications made on lawyer's website.
  – Unless client gives informed consent.

• When transmitting a communication, lawyer should take reasonable precautions to prevent the info from coming into the hands of unintended recipients.
  – No special security measures required if the method of communication affords reasonable expectation of privacy.
  – Client may require lawyer to use heightened measures.

• Lawyer may respond to negative online reviews, but must be accurate and truthful, and not disclose confidential information.
Researching Jurors (Guidelines 6A-C)

- Lawyer may research a prospective or sitting juror's public social media profile and posts.
  - No access requests may be sent by lawyer or her agent.
  - NY draws a line between public and private juror info.
- No communication with prospective or sitting juror (whether initiated by the lawyer, her agent, or auto-generated by the social media network) with the juror.
- No deception or misrepresentation in order to view.
  - Non-deceptively viewing a private social media account visible by being a "friend of a friend" or through an alumni social network not yet addressed.
Monitoring Jurors (Guidelines 6D-E)

• Lawyer may view or monitor a juror's social media account during trial, provided no communication initiated by lawyer, her agent, or auto-generated.
  – "[L]awyer must exercise extreme caution when 'passively' monitoring a sitting juror's media presence."
  – Shall not burden or embarrass the juror or burden or delay the proceeding.
  – Consider asking the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties.

• Report any juror misconduct promptly.
ORACLE AMERICA, INC.,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

ORDER RE VOIR DIRE

A prior order stated that if both sides consented to a ban against Internet research on the venire or the empaneled jury until the trial has concluded, an enlargement of time to conduct voir dire would be granted (Dkt. No. 1573). Both sides have consented to such a ban (Dkt. Nos. 1589, 1590). Each side shall have forty minutes of voir dire subject to enlargement for good cause if issues develop with particular prospective jurors.

IT IS SO ORDERED.

Dated: April 1, 2016.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE
Communications with Judicial Officers

- Lawyer shall not communicate with a judicial officer over social media if lawyer intends to influence the officer.
  - "Intent" is judged by a subjective standard in NY.
  - Including whether retweeting a judge's own tweets would be proper.
SOCIAL MEDIA IN PRACTICE

Hypothetical scenarios
Guidance under the applicable rules and opinions
Fact pattern 1

• True or false:
  – Lawyer does not use Facebook but his client does. Lawyer does not have to familiarize himself with how Facebook works.
    • False
Fact pattern 2

• True or false:
  – Lawyer tweets: "So excited! Another great victory in court today! My client is delighted. Who wants to be next?" The tweet is improper.
    • True
  – Lawyer's tweet cannot be made proper.
    • False
So excited!!! Another great victory in court today! My client is delighted. Who wants to be next?!

#AttorneyAdvertising
Fact pattern 3

- True or false:
  - Patent Lawyer lists under the heading "Skills & Expertise" on his LinkedIn page that he is a "Patent Attorney." This is improper.
    - False*
  - Real Estate Lawyer accepts an endorsement on his LinkedIn page for "Intellectual Property." This is improper.
    - True.

*Assuming Lawyer has a reg. number
http://erikanapoletano.com/blog/how-to-turn-off-linkedin-endorsements/
Fact pattern 4

• True or false:
  – On a discussion board, one user comments asking a question about open source licenses for the code user is developing. Lawyer asks, "do you want to have improvements on your code sent back to you?" User replies, "yes."
  – Lawyer then posts that user "should release under EPL, CDDL, or MPL licenses." Lawyer's comment is proper.
    • False.
@jillthelawyer want improvements to my code sent back...

jillthelawyer commented on Oct 16, 2015

Then you should release under the EPL, CDDL or MPL. These are known as "reciprocal" OSS licenses. EPL is really only popular for eclipse releases. I'm an IP lawyer, so I know the differences.
Fact pattern 5

• True or false:
  – Lawyer is in litigation and learns that he and the represented opponent went to the same high school. They are both members of the Facebook group for Highschool Class of 2002. It is improper for Lawyer to view the opponent's potentially restricted/private profile through this group.
    • False.
  – Lawyer can "friend" the opponent to get access to the opponent's profile.
    • False.
Fact pattern 6

- True or false:
  - Lawyer's client is in trouble and it is foreseeable that she will be sued for posting offers for sale of false products on her Instagram account. Lawyer advises Client to change her Instagram settings from "Public" to "Private." Lawyer's advice is proper.
    - True
  - Lawyer can counsel Client to publish truthful information favorable to her on her Instagram account.
    - True
Fact pattern 7

• True or false
  – Lawyer creates and publishes a legal blog as a resource providing information on recent developments in his practice area. Lawyer's blog is subject to the rules on attorney advertising.
    • False (not if the blog is educational, informational, editorial, or political).
# ALICESTORM FOR HALLOWEEN: WAS IT A TRICK OR A TREAT?

By: Robert R. Sachs

Alice has been busy the last two months, continuing to haunt the federal courts and the Knox and Randolph buildings at the USPTO. Here are the latest #AliceStorm numbers through the end of October 2016.

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There have been 34 district court decisions in the past two months, but the percentage of invalidity decision is holding constant at 70.5%. The number of patent claims invalidated is now over 11,000, but also holding steady at around 71%.

There have been no new Federal Circuit Section 101 decisions, but we’re going to see a flurry of activity in the next couple of months, as the court has recently heard oral argument in a number of patent.
Fact pattern 7 (continued)

- Legal blogs are popular.
  - Provides legal resources and increases the lawyer's visibility.
- Other rules apply.
  - Maintaining confidentiality (NY 1.6).
  - Candor towards tribunal (NY 3.3).
  - Trial publicity (NY 3.7).
  - Truthfulness in statements to others (NY 4.1)("In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person").
  - Conduct involving fraud or deceit (NY 8.4)("A lawyer or law firm shall not... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...").
Fact pattern 8

• True or false
  – Lawyer "friends" Person on Facebook. An attorney-client relationship now exists.
    • False
  – Lawyer has about 500 "friends" who are a mix of personal and professional acquaintances. She updates her Facebook status to share: "Just published an article on wage and hour breaks. Let me know if you would like a copy." This is subject to attorney advertising rules.
    • False -- according to CA Formal Op. 2012-186
Fact pattern 9

• True or false
  – Lawyer decides to use Dropbox to save and store Client confidential files. This is impermissible.
    • False -- at least 5 states have addressed cloud computing and have approved this technology in the practice of law.
QUESTIONS?