



Social Media and Attorneys

Rachael L. Fletcher Cipoletti, Esquire
Chief Counsel
Office of Disciplinary Counsel

Social Media
and the
Rules of Professional Conduct

Social Media implicates various Rules, including the following:

Rule 1.1 (“COMPETENCE”)

Rule 1.6 (“CONFIDENTIALITY OF INFORMATION”)

Rule 1.18 (“DUTIES TO PROSPECTIVE CLIENT”)

Rule 3.3 (“CANDOR TOWARD THE TRIBUNAL”)

Rule 3.4 (“FAIRNESS TO OPPOSING PARTY AND COUNSEL”)

Rule 3.5 (“IMPARTIALITY AND DECORUM IN THE TRIBUNAL”)

Rule 3.6 (“TRIAL PUBLICITY”)

Rule 4.1 (“TRUTHFULNESS IN STATEMENTS TO OTHERS”)

Rule 4.2 (“COMMUNICATION WITH PERSONS REPRESENTED BY COUNSEL”)

Rule 4.3 (“DEALING WITH UNREPRESENTED PERSON”)

Rule 7.1 (“COMMUNICATIONS CONCERNING A LAWYER’S SERVICES”)

Rule 7.2 (“ADVERTISING”)

Rule 7.3 (“SOLICITATION OF CLIENTS”)

Rule 7.4 (“COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION”)

Rule 8.2 (“JUDICIAL AND LEGAL OFFICIALS”)

Rule 8.4 (“MISCONDUCT”)

L.E.O. 2015-02 Social Media & Attorneys

The Lawyer Disciplinary Board concluded:

1. Attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information;
2. Attorneys may connect with a client or former client on a social networking website;
3. Attorneys may not contact a represented person through a social networking website;

4. Although attorneys may contact an unrepresented person through a social networking website, they may not use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public;
5. Attorneys may use information on a social networking website in client-related matters;
6. Attorneys may accept client reviews but must monitor those reviews for accuracy;

7. Attorneys may generally comment on or respond to reviews or endorsements;
8. Attorneys may generally endorse other attorneys on a social networking website;
9. Attorneys may review a juror's Internet presence;
10. Attorneys may connect with judges on a social networking website provided the purpose is not to influence the judge in performing his or her official duties;

11. Attorneys may advertise on a social networking website provided such advertisement complies with the requirements of the Rules of Professional Conduct; and

12. A prospective attorney-client relationship may be formed on a social networking website.

What is Social Media??

“forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos)”
Interactive with intention to share.

In order to comply with Rule 1.1 (COMPETENCE) of the Rules of Professional Conduct, attorneys should both have an understanding of how social media and social networking websites function, as well as be able to advise their clients about various issues they may encounter as a result of their use of social media and social networking websites.

Comment 8 to Rule 1.1 provides that “[t]o maintain the requisite knowledge and skill, a lawyer must 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.”

Additionally, Rule 8.4 (MISCONDUCT) states that “[i]t is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Because of the ease of creating a false profile or posting inaccurate or embellished information, attorneys may find themselves at the risk of violating Rule 8.4(c) while using social media and social networking websites.

Although attorneys are not responsible for the information their clients post on the clients' social media profile, attorneys may and often should advise their clients about such information.

Attorneys should ensure that their clients are aware of the consequences of their actions via social media and social networking websites, as it is reasonable to expect that their clients' activities will be monitored by opposing counsel and others.

Additionally, attorneys may wish to monitor their clients' use of social media and social networking websites, as doing so may be helpful for attorneys to stay abreast of matters that may impact their clients' legal disputes.

Furthermore, attorneys should also be mindful of the consequences of their own actions when advising and instructing their clients about their clients' use of social media and social networking websites.

Attorneys may advise their clients to change the privacy settings of their social media pages so as to restrict or expand whom may see the information shared on such pages.

Attorneys may not, however, instruct their clients to destroy, alter or conceal any relevant content on their social media pages.

Although attorneys may instruct their clients to delete information from the clients' social media pages that may be damaging to the clients, provided the attorneys' conduct does not constitute spoliation or is otherwise illegal, attorneys must take the appropriate steps to preserve the aforementioned information in the event that it is deemed discoverable or becomes relevant to the clients' cases.

Accordingly, attorneys must respond to discovery requests regarding any relevant content their clients have posted on the clients' social media pages.

Finally, attorneys may not advise their clients to post false or misleading information on their social media pages, and if an attorney knows that the client has posted false information, the attorney may not present such information as truthful information in the client's case.

Lester v. Allied Concrete Co., 285 Va. 295 (2013).

During the pendency of the case, Lester sent a facebook message to Allied attorney– enabling Allied attorney to access Lester’s facebook page. Allied attorney sends a discovery request for facebook page screen shots, status updates and pictures. Plaintiff’s attorney after receiving a discovery request, sent an email to his paralegal telling her to instruct Plaintiff to “clean up” his Facebook page because “[w]e don’t want any blow-ups of this stuff at trial.” The following day, Paralegal told the client that there are also “some other pics that should be deleted” from his Facebook page. Client deletes facebook page. Lawyer answers discovery request by advising Allied that client does not have a facebook page. A few subpoenas and depositions later... Over \$500k sanction of attorney. Referred by the Judge to Virginia State Bar on three separate findings of wrongdoing.

Attorneys may connect with clients or former clients via social media or on a social networking website.

When doing so, attorneys should be mindful that their conduct must adhere to the Rules of Professional Conduct and that they should maintain a professional relationship with their clients.

Be careful though... any information you post on social networking websites may be seen by clients and former clients, regardless of whether you are connected to these individuals through your own social media page.

Should an attorney use social media to communicate with a client regarding the attorney's representation of that client, the attorney should retain records of such communications that relate to legal advice given to the client.

Attorneys must not reveal confidential client information via social media or social networking websites.

Office of Lawyer Regulation v. Peshek, 334 Wis.2d 373, 798 N.W.2d 879 (2011) Attorney posted client personal information/confidential case info on blog. Referred to some clients by either first name or a derivative of their first name. Made derogatory comments about judges. One entry stated that a client had lied to the court about drug use. 60 day suspension.

Attorneys must be sure to train their staff too.

Attorneys may not contact represented parties through social media.

Rule 4.2 (COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL) prohibits attorneys may from contacting a represented person through social media or through a social networking website, nor may attorneys send a “friend request” to represented persons.

Attorneys may not utilize the assistance of a third party to contact a represented person through social media or through a social networking website in order to gain access to the represented person’s social media page, as doing so would constitute a pretextual “friend request” and would violate Rules 4.1, 8.4(a) and 8.4(c).

Attorneys may access the public portions of a represented person’s social media page, as any information the represented person shares publically is akin to any public statement the person makes, and thus, access to such public information is not a prohibited communication pursuant to Rule 4.2.

See State ex. Rel. State Farm Fire & Cas.co. v. Madden, 192 W.Va. 155, 451 S.E.2d 721 (1994). Supreme Court held that lawfully observing a represented party’s activities that occur in full view of the general public is not an ethical violation.

Rule 4.3 (DEALING WITH UNREPRESENTED PERSON) Attorneys may contact an unrepresented person through social media or through a social networking website, but they may not use a pretextual basis for viewing information on an individual's social networking website that would otherwise be private or unavailable to the public, as doing so would violate Rule 4.3.

When contacting an unrepresented person through social media or through a social networking website, attorneys must use their actual and must also state their purpose for contacting the unrepresented person.

Again, Rule 8.4(c) which prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Attorneys may not utilize the assistance of a third party to contact an unrepresented person through social media or through a social networking website in order to gain access to the unrepresented person's social media page, as doing so would constitute a pretextual "friend request" and would violate Rules 4.1 and 8.4(c).

Attorneys may contact an unrepresented person through social media or through a social networking website, provided attorneys do not state or imply that they are disinterested, provided attorneys make reasonable efforts to correct any misunderstandings concerning attorneys' roles in a given matter, and further provided attorneys do not give legal advice to such unrepresented person.

Attorneys may use information obtained from a social networking website in client-related matters and legal disputes, provided such information was obtained ethically.

Beware and advise your clients that information posted via social networking websites may equally be used against their interests.

Information that is posted on social networking websites may be used in discovery.

Courts have granted motions to compel discovery of information contained on private social networking websites when the individuals' public profiles indicate that relevant evidence may be found on their private profiles.

McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010) (motion to compel discovery of individual's private Facebook page granted after opposing counsel provided evidence that individual may have misrepresented the extent of their injuries);

Romano v. Steelcase Inc., 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010). (Information sought from plaintiff's social network website was deemed necessary and material for defendant's defense to personal injury claims, that included a loss of enjoyment of life claim. Defense counsel sought not only public information, but private information from the site as well. No reasonable expectation of privacy in information published on social networking websites. Court considered the nature of the public portions of the site and determined that since the public portions contradicted her claims and prior testimony, the private portions may contain further evidence relevant to the defense.)

Some social networking websites, such as LinkedIn, permit users to “endorse” the skills another user has listed on their profile, as well as permit users to request that others endorse them for their specified skills.

LinkedIn permits users to remove or limit the endorsements on their profile.

Avvo, an online legal services marketplace, provides a rating scale for listed attorneys based on a proprietary algorithm, as well as includes attorney profiles, client reviews and peer endorsements.

Rule 7.1 (COMMUNICATIONS CONCERNING A LAWYER’S SERVICES) of the Rules of Professional Conduct provides: “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.”

Attorneys: (1) should monitor their social networking websites; (2) must verify the accuracy of any information posted on their social networking websites; and (3) must remove or correct any inaccurate endorsements. These obligations exist regardless of whether the information is posted by the attorney, a client, a former client or a professional colleague.

Attorneys should be mindful not to post and/or to allow information to be posted to their social networking websites that violates Rule 7.1.

Although attorneys may comment on and respond to reviews or endorsements on social media or social networking websites, they must be mindful not to disclose confidential client information without the client's consent, as doing so would violate Rule 1.6 of the Rules of Professional Conduct.

Although 1.6(b)(5) permits disclosure of confidential client information under certain circumstances such as to respond to an ethics complaint or a civil suit, attorneys may not disclose such information in response to a review or endorsement, positive or negative, on social media or social networking websites. Any information attorneys post on social media or social networking websites must not violate the confidentiality that exists between the attorney and his or her client.

Many times, however, this makes things much, much worse.

In RE: Skinner, 758 S.E.2d 788 (GA. 2014)

Client terminated representation and posted reviews on consumer websites. Attorney posted confidential information in response to client's negative reviews. She identified the client by name, identified the employer of the client, stated how much the client had paid her, identified the county in which the divorce had been filed, and stated that the client had a boyfriend. Special Master recommended public reprimand, but the Supreme Court rejected the same and remanded the matter. After a rehearing, the Court, taking into consideration mitigating factors, issued a public reprimand, as well as the additional condition that Skinner be instructed to take advantage of the State Bar's Law Practice Management services and recommendations with respect to internal office procedures, client files and case tracking procedures.

People v. Underhill, WL 4944102 (Col. 2015) (Westlaw cite only available)

A couple whom he used to represent posted complaints about him on two websites. Underhill responded with internet postings that "publicly shamed the couple by disclosing highly sensitive and confidential information gleaned from attorney-client discussions." Underhill also represented another couple in renegotiating of lease for their business. The couple eventually terminated Underhill and posted a complaint about him on a BBB website. Underhill publicly replied with attorney-client communications on the internet and making uncomplimentary accusations against the couple based on confidential information related to the representation. 18 month suspension.

Attorneys may generally endorse other attorneys on social media or social networking websites, they must comply with Rule 8.4(c)'s requirements to refrain from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Attorneys must be honest and only provide endorsements that are accurate and not misleading.

Attorneys should be mindful to conduct themselves as professionals while using social media and social networking websites— this admonition is critical particularly when an attorney is angry or disappointed with a ruling from the Court.

Although comments concerning other attorneys or judges may not rise to the level of a violation of Rules, attorneys should be cautious when commenting about other attorneys or judges via social media and social networking websites, and further advises that a better practice is simply to refrain from making such comments.

Attorneys may connect with judges on social media or social networking websites, they may not do so if the purpose of the contact is to influence the judge in performing his or her official duties.

Attorneys should also be mindful not to make statements on social media or social networking websites that would violate Rule 8.2, whether such statements are made when connecting directly with a judge or not.

Lawyer Disciplinary Bd. v. Hall, 234 W. Va. 298, 765 S.E.2d 187, 190 (2014)

Statements made by Hall legal pleadings were unsubstantiated, made with a reckless disregard as to their truth or falsity, and impugned the integrity of a presiding adjudicatory officer and were prejudicial to the administration of justice. 3 month suspension.

“The Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. A lawyer's speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. Finally, statements that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection.” Syl. Pt. 1, Comm. on Legal Ethics v. Douglas, 179 W.Va. 490, 370 S.E.2d 325 (1988).

Syl. Pt. 4, Lawyer Disciplinary Bd. v. Hall, 234 W. Va. 298, 765 S.E.2d 187, 190 (2014)

“Within the context of assessing an alleged violation of Rule 8.2(a) of the West Virginia Rules of Professional Conduct, a statement by an attorney that such attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office is not protected by the First Amendment as public speech on a matter of public concern where such statement is not supported by an objectively reasonable factual basis. The State's interest in protecting the public, the administration of justice, and the legal profession supports use of the objectively reasonable standard in attorney discipline

West Virginia Judges have equally been reminded by the Court....

Code of Judicial Conduct

Rule 3.1 Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality;*

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

See Comment 6

[6] The same Rules of the Code of Judicial Conduct that govern a judicial officer's ability to socialize and communicate in person, on paper, or over the telephone also apply to the Internet and social networking sites like Facebook.

Attorneys increasingly use social media platforms to screen jurors prior to jury selection

Although attorneys may review the public sections of a juror's social networking websites, attorneys are prohibited from attempting to access the private sections of a juror's social media page, as doing so would violate Rule 3.5 of the Rules of Professional Conduct.

Attorneys may not utilize the assistance of a third party to contact a juror through social media or through a social networking website in order to gain access to the private sections of a juror's social media page, as doing so would also constitute an ex parte communication in violation of Rule 3.5.

If you monitor jurors social media during trial, Attorneys may have an obligation to report juror misconduct.

Attorneys should be mindful of their obligations pursuant to Rule 3.6 regarding trial publicity. Rule 3.6 prohibits attorneys from making extrajudicial statements that the attorney knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding

If an attorney's account is publically accessible, it falls squarely under the parameters of Rule 3.6.

However, even if an attorney's social networking website contains privacy settings, it is subject to Rule 3.6, as any posts or comments shared are disseminated to those with whom the attorney is connected via such social networking website.

Attorneys may and do advertise via social media or on a social networking website, but they must do so in compliance with the Rules of Professional Conduct.

Rule 7.2 (ADVERTISING) of the Rules of Professional Conduct provides, in pertinent part: “(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.” Rule 7.2(c) provides that “[a]ny communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.” Advertising via social media or social networking websites is permissible, as it constitutes advertising via the Internet and/or via electronic communication.

Comment 3 to Rule 7.2 pointedly notes that “[t]elevision, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public.”

Rule 7.1 (COMMUNICATIONS CONCERNING A LAWYER’S SERVICES) provides that attorneys shall not make false or misleading communications about the attorney or the services they provide. Attorneys should be mindful about communicating jury verdicts and other results obtained on behalf of clients via social media or social networking websites. Comment 3 to Rule 7.1 notes that “an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.” When making such comparisons, attorneys should consult Comment 3, which provides that “[t]he inclusion of an appropriate

Pursuant to Rule 7.4 (COMMUNICATIONS OF FIELDS OF PRACTICE AND SPECIALIZATION), West Virginia does not recognize specialization in the practice of law. Attorneys may not state or imply that they are certified as a specialist in a particular field of law. Attorneys may communicate the fact that they do or do not practice in a particular field of law, and may do so via social media or social networking websites, as well.

Rule 7.3 specifically references “real-time electronic contact” and such contact arguably includes contact via social media and social networking websites in the forms of live chats and comments to individual’s posts. Unless they have a relationship as described within Rule 7.3, attorneys must be mindful not to solicit clients by real-time electronic contact, among other forms of media discussed, as doing so would violate the Rules of Professional Conduct.

Rule 1.18 (DUTIES TO PROSPECTIVE CLIENT) “(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.” A prospective attorney-client relationship may be formed via social media or on a social networking website if an individual’s electronic communication with an attorney is determined to be a consultation.