

NAVIGATING THE ETHICS OF SOCIAL MEDIA
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INTRO:

Communication has drastically changed over the years. In past decades, the primary modes of communication between attorney, client, and court have centered around in person meetings, phone calls, and letters. While these three areas remain the practical choice, the expansion of social media has transformed the landscape. This expansion is drastically changing the ways in which we communicate and defend our clients. Despite the new technology, our practice is still governed by the same rules of professional responsibility in which we are accustomed. This handout provides a basic summary of the ethics regarding Social Media.

ATTORNEY COMPETENCE & SOCIAL MEDIA:
RULE 1.1: COMPETENCE

Rule 1.1 provides that an attorney “shall not handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.” In sum, an attorney must provide competent representation, which includes knowledge, skill, and preparation. As defense attorneys, we should familiarize ourselves with the various forms of Social Media and the rules that govern them so we can effectively represent our clients. Social Media is an opportunity to increase clientele and elevate our practice.

The most popular forms of Social Media include Facebook, Twitter, and Instagram. Currently, there are over 1 billion persons on Facebook, 975 million on Twitter, and 300 million on Instagram. Additionally, there are several Social Media sites for professionals such as LinkedIn, Avvo, and Lawyers.com.

ONLINE PRESENCE:

There are certain forms of Social Media that are personal, professional, and a hybrid of the two. An example of personal, would be a Facebook page wherein a person may highlight their family, food, or adventures. A professional platform could include a blog or firm website dedicated to promoting their law practice.

Lastly, a hybrid could be a Twitter page wherein a user shares both personal and professional information.

The Rules of Professional Conduct offer guidance on how attorneys may utilize each platform. For example, Rules 7.1, 7.2, and 7.3 govern communications regarding attorney services.

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

Under Rule 7.1, online communications must not make a material misrepresentation of fact or law, must not compare attorney services or ability in a manner that could mislead, nor can it create an unjustified expectation about results the attorney can achieve. Essentially, you should interpret Rule 7.1 to apply to whatever means of communication you choose to utilize. Tweets and Facebook posts must comply with this rule just as if the posts were traditional forms of communication. Even testimonials or promotions from others can trigger Rule 7.1. For example, LinkedIn allows other persons to endorse professionals in various skills. Attorneys are responsible for those endorsements and must ensure that they are accurate.

RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

Similarly, Rule 7.2 offers guidance regarding actual attorney advertisements. Specifically, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication." Attorney's practicing in New Jersey are also required to keep a copy of the advertisement for 3 years. Another highlight from Rule 7.2 includes a prohibition against an attorney paying others for recommendations except under certain circumstances such as general costs for advertising, costs of a legal service plan, or usual payment to a nonprofit organization or lawyer referral service. Online advertisements are no exceptions and must comply with Rule 7.2 Ensure that your online posts do not amount to an advertisement without adhering to Rule 7.2.

RULE 7.3: SOLICITATION OF CLIENTS

Rule 7.3 addresses solicitation of potential clients. Here the rule specifically mentions electronic communication. These include chatrooms, blogs, Tweets, and Facebook posts. One danger of Social Media is the blurred line between general communication and solicitation. Facebooks posts, blogs, and Tweets can be considered advertisements and solicitations. So exercise caution when using these and other online platforms. Attorneys cannot solicit persons when a significant motive is pecuniary gain unless the person has requested or has a familial or close relationship with the attorney.

PROFESSIONAL CONTACTS:

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

Social Media has increased our contacts with the community and professionals within our ciper such as other attorneys, judges, and court staff. We must be particularly careful with our online communications to make sure that we are not disrespecting the court, seeking influence, or discussing the merits of a case. Even our frustrations with justice, must be measured so as not to disrespect the court. Rule 3.5 touches on this matter.

Rule 3.5 prohibits attorneys from any attempts to influence court staff, the court, and jurors. This rule also governs ex parte communications to court staff, the court, and jurors. While seemingly innocent; direct messages, emails, texts, and other forms of electronic communications will be scrutinized for any of the above improprieties.

RULE 3.3: CANDOR TOWARDS THE TRIBUNAL

Online communications must also comply with an attorney's duty to remain truthful with the court. Any online attempts to hide information, mislead the court, or fail to disclose fraud upon the court can be violations of Rule 3.3. In some cases, the online communications have been used as evidence that the attorney has failed to uphold rule 3.3. Note, 3.3 also provides that "if the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures." Other jurisdictions interpret this to mean a prompt disclosure to the court unless it violates Rule 1.6.If the information would violate

the Attorney client privilege and the client does not consent to disclosure, then the lawyer may move to withdraw.

CLIENT CONFIDENTIALITY:
RULE 1.6: CONFIDENTIALITY OF INFORMATION

Client confidentiality is one of the most longstanding decrees of our profession. Rule 1.6 directs attorneys to preserve the private communications with clients. Social Media has proved tricky in this regards as attorneys have revealed sometimes innocent, but confidential information about our clients. Even bragging about a victory can be considered a breach of confidence if it reveals the identity of our clients without their permission. Also, keep in mind that Rule 1.18 provides that attorneys shall maintain the confidentiality of potential clients.

EXTRA JUDICIAL STATEMENTS
RULE 3.6: TRIAL PUBLICITY

Rule 3.6 governs the various aspects of online trial publicity in the same manner as it does a press conference or news statement. Under 3.6 attorneys are prohibited from revealing information that the lawyer knows or should know will become public and has a substantial likelihood of influencing a court proceeding. If one feels compelled to blog or post regarding a court proceeding, keep the information limited to the charge, basic defense, court schedules, info regarding an arrest, or the identities of adult persons involved.

DISCOVERY ISSUES
RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

Rule 3.4 offers guidance regarding certain actions an attorney may make in regards to discoverable evidence even when online. Attorneys are prohibited from blocking online access to otherwise discoverable evidence. For example, attorneys must not direct clients to delete material blogs, posts, statements or pictures which may be found online. This is no different than directing them to destroy evidence such as a weapon or drugs.

INVESTIGATION:

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

Rule 4.2 holds the same weight online as it does in the real world. Attorneys and their staff are prohibited from contacting persons known to be represented by counsel. This includes text messages, direct messages, Tweets, emails, and Facebook posts. Use caution when reaching out to witnesses and co-defendants who have counsel. During an investigation, an attorney may view public sites, but may not send “friend” requests to persons represented by counsel.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

An attorney or his staff may contact persons who are not represented by counsel. However, the communication must not be misleading nor confuse the attorney’s role in the matter. Attempts to contact persons online must comply with the above. An attorney or their staff may view the public sites of non-represented persons. Similarly, an attorney may “friend” a non-represented person as long as the attorney makes full disclosure of their interest in the case.

IN GENERAL

RULE 8.4: MISCONDUCT

As always, attorneys are expected to conduct themselves in a lawful manner and operate under the rules of professional responsibility. Attorneys who violate the Rules of Professional Conduct, operate in falsehood, or engage in dishonest practice are subject to sanctions including the loss of their law license. While it is incumbent for defense attorneys to zealously represent our clients with the highest level of passion, scholarship and skill, we must do so in accordance with the rules of ethics.