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2019 Social Media Ethics Guidelines

By
**Mark A.
Berman**



The Commercial and Federal Litigation Section of the New York State Bar Association recently released its fourth update to its Social Media Ethics Guidelines (the Guidelines). As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, the Guidelines, predicated upon the *New York Rules of Professional Conduct* (NYRPC) and ethics opinions interpreting those rules, are the leading source in the United States for guiding principles in addressing social media issues. Illustrative ethics opinions from other jurisdictions are also referenced where, for example, a New York ethics opinion has not addressed a situation or where



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MARK A. BERMAN is a partner at Ganfer Shore Leeds & Zauderer and chair of the New York State Bar Association's Committee on Technology and the Legal Profession. He was the founding co-chair of the Social Media Committee of NYSBA's Commercial and Federal Litigation Section and has been involved with the drafting of the Guidelines since their inception

another jurisdiction's ethics opinion differs from the interpretation of the NYRPC.

The touchstone for ethical use by lawyers of social media is competence. When utilizing social media,

whether when communicating with clients, advertising, advising clients, investigating facts or monitoring juror communications, a lawyer needs to know how the social media platform works and to understand

fully the implications of how it functions in order not to violate ethical precepts. For instance, you need to know if a social media communication reveals an attorney's "fingerprint" so that the recipient of the communication can identify you as an attorney or even your location. You need to understand whether a social media application imports, accesses and/or shares confidential or proprietary client or law firm information contained on your electronic device. Competence requires that a lawyer understand the implications of social media advertising and that the technology of how social media operates alters the way an lawyer must communicate with his or her putative or actual client in order to ensure confidences are maintained, especially when using a connection at, for instance, a hotel, conference or airport that others may be able to gain access, and in light of the need to reduce the potential for an unlawful "hack."

Set forth below are each of the guidelines without the accompanying referenced commentary.

1. Attorney Competence

1.A: Attorneys' Social Media Competence: A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising, research and investigation.

2. Attorney Advertising and Communications Concerning a Lawyer's Services

2.A: Applicability of Advertising Rules: A lawyer's social media profile—whether its purpose is for business, personal or both, may be subject to attorney advertising and solicitation rules. If the lawyer communicates concerning her services using her social media profile, she must comply with rules pertaining to attorney advertising and solicitation.

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2.B: Prohibited Use of Term "Specialists" on Social Media: Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.

2.C: Lawyer's Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer's Social Media Page: A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and

recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she may wish to ask that person to remove it.

2.D: Attorney Endorsements: A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.

2.E: Positional Conflicts in Attorney Advertising: When communicating and stating positions on issues and legal developments, via social media or traditional media, a lawyer should avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on behalf of her clients and the clients of her firm.

3. Furnishing of Legal Advice Through Social Media

3.A: 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 media network because

a lawyer's responsive communications may be found to have created an attorney-client relationship, and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

3.B: Public Solicitation is Prohibited through "Live" Communications: Due to the "live" nature of real-time or interactive computer-accessed communications, which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not "solicit" business from the public through such means.

If a potential client initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and attorney communications via a website or over social media platforms, such as Twitter, may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client.

3.C: Retention of Social Media Communications 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.

4. Review and Use of Evidence from Social Media

4.A: Viewing a Public Portion of a Social Media Website: A lawyer may view the public portion of a person's social media profile or view public posts even if such person is represented by another lawyer.

4.B: Contacting an Unrepresented Party and/or Requesting to View a Restricted Social Media Website: A lawyer may communicate with an unrepresented party and also request permission to view a non-public portion of the unrepresented party's social media profile. However, the lawyer must use her full name and an accurate profile, and may not create a false profile to mask her identity. If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the unrepresented party or otherwise cease all further communications and withdraw the request if applicable.

4.C: Contacting a Represented Party and/or Viewing a Non-Public Social Media Website: A lawyer shall not contact a represented party or request access to review the non-public portion of a represented party's social media profile unless express consent has been furnished by the represented party's counsel.

4.D: Lawyer's Use of Agents to Contact a Represented Party: As it relates to viewing a party's social media account, a lawyer shall not order or direct an agent to engage

in specific conduct, where such conduct if engaged in by the lawyer would violate any ethics rules.

5. Communicating With Clients

5.A: Removing Existing Social Media Information: A lawyer may advise a client as to what content may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

5.B: Adding New Social Media Content: A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."

5.C: False Social Media Statements: A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that

a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion and if proper inquiry of the client does not negate that conclusion.

5.D: A Lawyer's Use of Client-Provided Social Media Information: A lawyer may review a represented person's non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain non-public information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

5.E: Maintaining Client Confidences and Confidential Information: Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media activities and a lawyer's website or blog must comply with these limitations.

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool or practice operates before using it and consider

whether any activity places client information and confidences at risk.

Where a client has posted an online review of the lawyer or her services, the lawyer's response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.

6. Researching Jurors and Reporting Juror Misconduct

6.A: Lawyers May Conduct Social Media Research of Jurors: A lawyer may research a prospective or sitting juror's public social media profile and public posts as long as it does not violate any local rules or court order.

6.B: A Juror's Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror: A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.

6.C: Deceit Shall Not Be Used to View a Juror's Social Media: A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or

sitting juror, nor may a lawyer direct others to do so.

6.D: Juror Contact During Trial: After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer or her agent or automatically generated by the social media network) with the juror.

6.E: Juror Misconduct: If a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror's social media profile or posts, or otherwise, she must promptly bring it to the court's attention.

7. Using Social Media to Communicate with a Judicial Officer

A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.

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**Ganfer Shore
Leeds & Zauderer LLP**

360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com