

The Ethics of Social Media: How to Avoid Acting Like a Tweet — and Other Good Advice Your Mother Did Not Teach You

David P. Leibowitz, Moderator

Lakelaw; Chicago

Jerome E. Larkin

Illinois Attorney Registration & Disciplinary Commission; Chicago

Deborah L. Thorne

Barnes & Thornburg LLP; Chicago



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Ethics of Social Media

Deborah L. Thorne
David P. Leibowitz
Jerry E. Larkin

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IRCPs Implicated

- Revealing information relating to representation: 1.6
- Prospective client communications: 1.18
- False statements: 3.3, 4.1, & 8.4(c)

IRPCs

- Obstructing access to evidence: 3.4
- Ex parte contact with judge or juror: 3.5(a)
- Communications with represented and unrepresented persons: 4.2 & 4.3

RPCs

- Responsibility for non lawyer assistants: 5.3
- Sharing fees or practicing with non-lawyers: 5.4
- Unauthorized practice of law: 5.5
- Advertising & solicitation; 7, *et seq.*

Bar Association Guidance

- NYSBA Social Media Ethics Guidelines @ <http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547>
- ABA Formal Opinion 462: Judges' Use of Social Media @ http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf

Facebook

Matt represents Larry, president of a not-so-hot Silicon Valley start up. The company is sued on a venture capital deal gone bad. Matt looks at Larry's Facebook page. Larry's boasting that he's living large on venture capital.

Can Matt tell Larry to get rid of the post before Plaintiff's counsel sees it?

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

The Shoe Drops

Lester v. Allied fallout:

- Prominent Virginia plaintiff's lawyer
- Trial court sanction: \$542K
- Five year suspension
- *In the Matter of Matthew B. Murray*, VSB Docket Nos. 11-070-088405 & 088422

How to Handle Lester's Posts?

- What would you do?
- Lessons from Lester v. Allied:

Blog at Your Peril

In re Kristine Ann Peshek, M.R. 23794, 2009 PR 00089 (Ill. 2010). Ms. Peshek, a Public Defender, was suspended for 60 days.

She blogged:

- Client pled guilty to protect brother
- Client lied to judge about drug use
- Client high on cocaine when appearing in court
- Counseling clients against correcting misrepresentations



Juror Blog

- “Today I was impaneled along with 12 others ... in a felony ... in courtroom of Judge Smith, a stern attentive woman with thin red hair and long, spidery fingers.
- Nowhere do I recall the jury instructions mandating I can’t blog about the trial.
- So, being careful not to prejudice the rights of the defendant—a stout unhappy man by the first name of Donald...”
- Discipline??

Juror Blog

- Disclosed specific crimes, judge's name and defendant's name
- Violated applicable criminal statutes and RPC
- Judgment vacated by Ct. of Appeal and criminal case remanded
- *In re Wilson*, CSB No. 185591- 5 day suspension

Sex and Money

- Attorney represents Jane in a hotly contested divorce.
- Jane walks into attorney's office with a box filled with documents.
- She proudly tells attorney how she logged on to the family computer, using passwords she found in her husband's daily planner.
- She discovered sexually explicit emails and several Swiss bank accounts.

Sex and Money (Continued)

Attorney ponders:

- May I accept these documents to use against the spouse?
- Are these documents admissible as evidence in a court of law?
- Are we in more trouble than her cheating and lying spouse?

Father's USB Drive

- *Castellano v. Winthrop*, 27 So. 3d 134 (Fla., Jan 29, 2010)
 - Paternity action. Mother comes into possession of USB drive of father
 - Mother retains firm, which reviews drive
 - Files Petition to Vacate Final Order
 - Flash drive has confidential financial information of father's current wife, confidential business information of father, work product information of father's attorneys, attorney-client communications between father and counsel.

USB Drive

- Note Fla Bar Prof'l Ethics Formal Op. 07-1
- Where lawyer receives confidential documents he knows or reasonably should know were wrongfully obtained by client.
- ethically obligated to advise client that materials cannot be retained, reviewed, or used without first informing opposing party and attorney.
- If client refuses to consent to disclosure the attorney must withdraw from further representation.

USB Drive

- Despite receiving flash drive under "very, very suspicious circumstances, firm spent in excess of 100 hours reviewing its contents"
- Firm obtained improper informational and tactical advantage
- Firm disqualified
- Attorney may be required to advise client to consult with criminal defense lawyer

Friending the Enemy

- Attorney represents a Plaintiff former employee in a wrongful discharge action.
- Attorney seeks to “friend” two high ranking employees of the employer who attorney believes are dissatisfied with the employer and may have made comments to that effect on their social media profiles.
- OK?

Facebook Firing

Prosecutor Facebook chat with two alibi witnesses. Poses as former girlfriend of Defendant & mother of his kids. Women "go crazy." He interviews both, not divulging that was their Facebook chat partner.

- Dishonest?
- Unrepresented Party issues (R. 4.3) ?

Pre-texting Issues & Technology

- San Diego County Bar Assoc. Legal Ethics Op. 2011-02
 - May not make *ex parte* request to a represented party to elicit information about the subject matter of representation.
 - Attorney's duty not to deceive prohibits him from sending a friend request to an unrepresented witness without disclosing the purpose of the request.
 - Missouri Informal Advisory Op. 2009-03
- "Friending" issues – Rules 4.2 and 4.3

Pre-texting Issues & Technology

- Facebook – "Friending" a witness on the opposing side
 - Philadelphia Bar Ass'n Professional Guidance Comm., Op 2009-02 (March, 2009) – employing a third person to befriend an adversarial witness through an online social network so as to obtain access to the witness' personal pages on Facebook and MySpace constitutes unethical pre-texting.
 - New York City Bar Association 2010-02 - Lawyer may not attempt to gain access to social networking website under false pretenses, either directly or through an agent



Friending the Judge

- Attorney spends substantial time at the gym and plays basketball in a league with Judge.
- Judge and attorney have a few beers after each game.
- Attorney becomes familiar with Judge's family.
- Attorney friends Judge on Facebook and connects with him on LinkedIn.

Friending the Judge? (Continued)

- When Judge is assigned to a newly filed case by attorney, is he required to recuse himself, disclose his friendship with attorney, or do nothing?
- If judge does nothing, is attorney required to disclose his relationship with Judge?
- Was it ethical for attorney to friend Judge initially?
- Should Judge be on Facebook? LinkedIn?
- Can attorney ethically write on Judge's Facebook Wall?
- Can attorney comment on Judge's skills on LinkedIn?

Can judges and lawyers be “friends?”

- Yes.
 - Maintain impartiality and dignity
 - No comments on any pending matter
 - No legal advice
 - Stay abreast of changes in social media site and policies
 - Be extremely cautious
 - ABA Formal opinion 462 (2/2013)

Can judges and lawyers be “friends”?

- Yes
 - No reference allowed to judge's office. If lawyer tries anything improper like *ex parte* communication, judges needs to “de-friend”
 - Fla. Op. 2010-04)3/2010)
- No.
 - Conveys impression that the lawyer “friends” are in a special position to influence the judge.
 - Can be “friends” with lawyers not appearing before him/her
 - Can post material on Facebook as long as it is within the Rules.
 - Fla. Op. 2009-20 (11/2009); 2010-06

Ex Parte E-Mails

In re Barringer, M.R. 25465, 2011PR00079 (Ill. Sept. 17, 2012)

&

In re Nadenbush, M.R. 25622, 2011PR00077 (Ill. Jan. 18, 2013)

&

In re O'Sullivan, M.R. 24972, 2011PR00078 (Ill. Jan. 13, 2012)

&

In re Teague, M.R. 25817, 2011PR00076 (Ill. March 15, 2013)

E-mail from Arbitrator to Petitioner's Counsel

“Seriously????????? I cannot believe they are bringing this on themselves!” (by disputing compensability)

Responsive email from counsel:

“I think so too. The defense appears to be that he was acting so recklessly it takes it out of ‘arising out of’. But by that argument, any goofus who pulls a guard off of a machine and then gets his hand chomped off is out of WC too. I don’t get it. I recommended a pretrial on the issue of compensability, but [opposing counsel] said it would not help.”

Social Media Gone Bad

- Lawyer represents debtors.
- Particularly ugly end to a case. Client’s “hidden” assets are found and attached.
- Lawyer’s Facebook account is populated with negative comments about her practice, some from purported former clients.
- Lawyer notices that third party websites like Yelp and Avvo also contain negative similar comments about her.
- Recourse?

Recent Case

- Client fires Lawyer.
- Client posts negative reviews of Lawyer on consumer websites.
- In response, Lawyer reveals personal and confidential information about client on sites.
- Georgia Supreme Court reprimanded attorney, citing Illinois & Oregon precedent.
- Oregon lawyer suspended 90 days for posting to listserv personal and medical information about a “difficult” workers' comp client who was unwilling to accept a “very fair” offer.

**In the Matter of Margrett A. Skinner,
No. S13Y0105 (Georgia, May 19, 2014).**

Rule 1.6 & Confidentiality

- Obligation to take reasonable efforts to prevent unauthorized disclosure or unauthorized access to confidential information
- Mere fact that information gets out does not make a discipline case.
- See *When Lawyers Use Others' Websites for Marketing, Ethics Rules Follow Them*, by Helen Gunnarsson, 30 Law. Man. Prof. Conduct 151.



Meanwhile,
in Illinois....

“This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting...I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about.”

In re 2013PR00095
(ARDC Hg.Bd. Jan. 14, 2014)

Options

1. Let it be.
2. Deal with the site.
3. Respond, but do not violate 1.6.
4. Create a positive internet presence.
5. See what Civil Remedies are Available.
or
6. Blast Away and Become a Test Case.

Growing the Practice

- Attorney wants to grow fledgling immigration practice.
- Consultant: Create a Facebook presence with the following “catchy” themes: “No one does it better” and “We specialize in results not promises.”
- Include testimonials from famous people. Recruit clients to tweet about your success rate.
- Problems?
- Rule 7.1

Success breeds...

- Attorney has phenomenal track record.
- Posts case descriptions to website and chats.
- Includes case citations and parties' names.
- OK?

Client References

- In re Horace F. Hunter, Va. State Bar, Va. Supreme Court VSB (February 28, 2013).
- Names of clients and details of their cases posted on his law firm's blog. Clients did not consent to the disclosure.
- Reprimand for violating Rule 7.1(a)(4) & 7.2(a)(3)
- 1.6 violation reversed based upon commercial speech analysis.

The Daily Double

- Attorney is looking to grow his practice.
- Groupon's pitch would solve his cash flow problem.
- OK?
- How about clients' rights?
- IRPCs?

Deals of the Day

- New York State Bar Association Com on Professional Ethics Op. 897 (12/13/11)
- OK, but may not mislead.
- Must make clear that no lawyer-client relationship formed until conflicts and competence check.
- If the lawyer is unable to provide the offered service, full refund.
- If the coupon buyer terminates the representation, the buyer is entitled to a refund subject to the lawyer's *quantum meruit* claim.
- See also, ABA Ethics Opinion 465 (2013).
http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_465.authcheckdam.pdf

Advertising-Rules 7.1 -7.3

- Beware
- Misrepresentations
- Relationships with .com sites
- Sharing legal fees with nonlawyers
- Unintended attorney client relationships

To Claim or Not to Claim

- Success rate of 99%
- Debt discharged
- Thousands of Clients
- Only 2 criminal referrals
- Only 5 denials of discharge
- Only 5 dismissals for failing to attend 341 meeting.

Truthful but misleading statements are not permitted. Comment 2 to Rule 7.1

Truthful but not misleading

- 20 years of experience
- Representation of over 2000 clients

Testimonials

- Don't disclose private client information without consent
- Don't use client's name without consent

Expertise and specialization

- Can't claim to be an "expert"
 - Illinois Code 7.4
- Can claim certification with caveat
 - Not required to practice in Illinois
 - Not a recognized in Illinois
 - Illinois Code 7.4(c)
- Can you claim to have been accredited as an expert witness in a legal proceeding?

Reviews

- Soliciting a review is likely permissible
- Paying for a review or giving a gift card is not

Friending Clients

- The fact of representation might be privileged
- Friending a client may violate attorney client privilege

Networking with Adverse Parties

- Eager can utilize information gained from Disgruntled's social network – no privilege, simply evidence gathering
- Eager's social networking with Creative's friends?
 - Attorney trustee?
 - Non-attorney trustee?
- Eager's trustee assistant?

Social Media and Debtor's Attorney

- Can Dudley research Creative Client on the "Internet"?
- Should Dudley research Creative Client on the "Internet"?
- Dudley's duties when discovering dirt on Creative?

"Tech" Rules

- Word "technology" does not appear anywhere in Rules or comments.
- Illinois CPR Committee studying ABA Ethics 20/20 tech revisions ABA changes:
- Rule 1.1-Competence: To remain competent, lawyer needs to stay abreast of changes in technology.
- Rule 1.4-Communication, Comment 2: Lawyers have a duty to respond to communication from a client (not just "telephone calls.")

"Tech" Rules

- Rule 1.2(d)-Scope
- Rule 3.3-Candor to tribunal
- Rule 3.4-Fairness to Opposing Party and Counsel
- Rule 4.4-Respect for Rights of Third Persons
- Rule 8.4(c) and (d)-Misconduct

Deborah L. Thorne
dthorne@btlaw.com
(312)214-8307



David P. Leibowitz
dleibowitz@lakelaw.com
(847)856-7979



Jerry Larkin
jelarkin@iardc.org
(312)565-2600

