



PROGRAM MATERIALS

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10 "Shocking" Tips for Attorneys to Stay Out of Trouble on Social Media

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10 *Shocking* Tips for Attorneys to Stay Out of Trouble on Social Media

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Introduction

- The influence and prevalence of social media has had a profound impact on the legal profession.
- Social media platforms (including online communities, networking sites, video and picture sharing sites, blogs and permissioned messaging and collaboration platforms) have provided attorneys with unique marketing and communication tools.
- Many, if not all, leading law firms, companies and regulators maintain an active presence on at least one form of social media.

Introduction

- This presentation discusses how attorneys can use social media to market themselves and their practices and presents **10** tips that are intended to help legal practitioners consider and think critically about ethical issues that can arise from the use of social media platforms.*

* B. Brockway, J. Sherer & B. Yantis, *After Reading These 10 Shocking Tips for Staying Out of Trouble on Social Media, You'll Never Post the Same Way Again*, 31 Intl. Prop. & Tech. Law Journal 11 (2019)

1 Know How Attorneys Are Using, or Should Be Using, Social Media

- Social media provides attorneys with unprecedented marketing capabilities, including the ability to connect with clients and quickly reach a global audience.*
- The challenge with social media is that we have become accustomed to using it for informal interactions making it easy to forget the complex set of ethics rules that apply to the legal profession.

* J. Sherer, M. McLellan & B. Yantis, *The (Social) Media Is the Message – Navigating Legal and Reputational Risks Associated With Employee Social Media Use*, PLI Course Handbook Series, 36 C&ILJ 5 (2019)

1 Know How Attorneys Are Using, or Should Be Using, Social Media

- Legal professionals must make thoughtful and informed choices in selecting social media platforms and posting content.
- Understanding social media platforms, how they operate and their terms of use is essential.*
- Social media profiles and posts (even those intended to reach a limited audience) can also raise a variety of reputational risks.

* Kevin O'Keefe, *Do Lawyers Warning Of The Perils Of Social Media Even Use Social Media?*, Above the Law (Oct. 5, 2016) (“...we have lawyers who know little, if anything, about social media teaching social media to lawyers. The bar association leadership is seemingly secure in their feelings that social media is beneath them and of little importance to most legal professionals.”)

2

Know Your Rules of Professional Conduct and Understand How They Apply to Social Media

- The ABA has adopted the Model Rules of Professional Conduct;* each state and the District of Columbia have adopted their version of these rules.*
- Many states have issued ethics opinions and other guidance addressing the use of technology and several have expressly addressed social media.*

* MODEL RULES OF PROF'L CONDUCT (2019)

* American Bar Association, Alphabetical List of Jurisdictions Adopting the Model Rules, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/

* *Virtual Law Office and Use of Executive Office Suites*, Virginia State Bar, Legal Ethics Op. 1872 (2013); *Communication with Client; Communication with Represented Person; Confidentiality; and Email*, Illinois State Bar Association, ISBA Professional Conduct Advisory Op. 18-01 (2018).

2 Know Your Rules of Professional Conduct and Understand How They Apply to Social Media

- Attorneys must understand the rules of professional conduct that could be implicated by their social media activities.*
- Given that social media is a dynamic and evolving space, monitoring changes to social media platforms and applicable bar association guidance is essential.

* Social Media Ethics Guidelines, New York State Bar Association (2017), *available at* <https://www.nysba.org/socialmediaguidelines17/>

3

Understand Benefits and Risks Associated with Relevant Technology, *Including* Social Media

- In 2012, the ABA added the following comment to Model Rule 1.1: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of the 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.”*

* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2019)

3

Understand Benefits and Risks Associated with Relevant Technology, *Including* Social Media

- Many states have adopted this change.*
- The revised comment suggests that practitioners should understand how social media platforms operate and the risks they present.

* ILLINOIS RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2010); NEW YORK RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2018); VIRGINIA RULES OF PROF'L CONDUCT R. 1.1 cmt. 6 (2018)

4

Adhere to Attorney Advertising Rules on Social Media

- Under Model Rule 7.1, a lawyer is not permitted to make false or misleading communications about themselves or their services.*
- Even truthful communications about a lawyer's achievements on behalf of a client or former client could be misleading if presented in a manner that leads a reasonable person to form an unjustified expectation that the same result may be achieved for other clients.*

* MODEL RULES OF PROF'L CONDUCT R. 7.1 (2019)

* MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt 3 (2019)

4 Adhere to Attorney Advertising Rules on Social Media

- All statements included in the social media profile of a law firm or attorney should be factual, accurate and consistent with the applicable ethics rules.
- Attorneys should refrain from or exercise caution in listing specialties or accepting recommendations or endorsements on social media.
- Failing to adhere to applicable ethics requirements related to communications on social media has led to sanctions and public reprimands.*

* *In re Dickey*, 722 S.E.2d 522 (S.C. 2012)

An Example of Improper Advertising

- An attorney in South Carolina was publicly reprimanded for, among other things, maintaining public internet profiles (including LinkedIn) that contained:
 - Material misrepresentations of fact by overstating and exaggerating the attorney's reputation, skill, experience and past results;
 - A form of the word "specialist" even though the attorney was not certified as such;
 - Statements likely to create unjustified expectations about the results the attorney could achieve; and
 - Descriptions and characterizations of the quality of the attorney's services.

5

Confidentiality and Conflicts of Interest Also (or Still) Apply to Attorneys' Social Media Activities

- Maintaining the confidentiality of information provided by a client is the foundation of an attorney-client relationship and an important aspect of the rules of professional conduct for attorneys.*
- In general, a lawyer may not reveal information related to the representation of a client or former client without the client's informed consent.*

* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2019)

* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt 2 (2019)

5

Confidentiality and Conflicts of Interest Also (or Still) Apply to Attorneys' Social Media Activities

- The conflict of interest principles set forth in the model rules provide, *inter alia*, that a lawyer may not use information relating to the representation of a client to its disadvantage.*
- Attorneys should carefully consider the rules related to confidentiality and conflicts of interest before posting, blogging or tweeting about clients, prospective clients or, for in-house counsel, your employer.

* John G. Browning, *Don't Be "Socially" Unacceptable: Avoiding Ethical Issues with Lawyers' Use of Social Media*, The Arkansas Lawyer (2017), https://cdn.ymaws.com/www.pldf.org/resource/collection/370BDA06-7DC5-4667-B278-EFB8FEB482C1/Social_Media_Ethical_Issue_Avoidance.pdf

6 Stop and Think Before You Tweet (or Post) About Trials

- Freedom on social media is limited by the tight discourse of the legal profession as well as attorney ethics rules.*
- Under Model Rule 3.6, a lawyer that has participated in the investigation or litigation of a matter is prohibited from making extrajudicial statements that she 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 in the matter.*

* John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, NYTimes.com (Sept. 12, 2009), <https://www.nytimes.com/2009/09/13/us/13lawyers.html>

* MODEL RULES OF PROF'L CONDUCT R. 3.6 (2019)

6 Stop and Think Before You Tweet (or Post) About Trials

- Several exceptions to this prohibition are set forth in the Model Rules, including an exception allowing a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity.*
 - An attorney should carefully consider the facts and circumstances of a particular case and make an informed decision about whether it is appropriate to use social media to post or tweet about a particular matter.*
 - Attorneys should also refrain from violating court rules by posting or tweeting about a case.
- * MODEL RULES OF PROF'L CONDUCT R. 3.6 (2019)
- * *See Fla. Bar v. Conway*, 996 So. 2d 213 (Fla. 2008) (holding that the duty to be respectful trumps an attorney's constitutional right to say what he wants in public)

Five Attorneys That Needed Tip 6

- A Florida attorney was reprimanded and fined for firing off a heated blog post calling a judge an “evil, unfair witch.”
- An Illinois public defender lost her job for criticizing “judge clueless” and revealing confidential details of a case.
- A lawyer in Texas requested a trial delay for a death in the family – the judge found that Facebook posts showing the attorney partying all week told a different story.
- A judge in Iowa granted an emergency motion to postpone a trial over concerns that an attorney’s Facebook post may have tainted the jury pool.
- A Chicago attorney observing a trial in federal court posted nine tweets with pictures of evidence. A prominent sign in the courtroom indicated that photographing, recording or broadcasting was prohibited. The attorney was sanctioned, required to make a \$5,000 donation, complete a CLE program on ethics in social media and complete 50 hours of pro bono at a pro se assistance desk.

7

Exercise Diligence and Care When Considering Social Media Record Retention and Discovery

- Regulatory books and records requirements and litigation holds likely need to cover social media platforms.
- Advising clients to remove posts on social media may also have record retention and attorney ethics implications.*

* See, e.g., *Advising a Client Regarding Posts on Social Media Sites*, New York County Lawyers Association, Ethics Opinion 745 (2013); see also *Lester v. Allied Concrete Company*, 736 S.E.2d 699 (Va. 2013) (imposing five-year suspension, sanctions, and cutting plaintiff's damages award in half for spoliation resulting from plaintiff's attorney directing client to "clean up" his Facebook page)

7

Exercise Diligence and Care When Considering Social Media Record Retention and Discovery

- As a matter of professional competence, attorneys must use publicly available information from the internet and take the time to investigate social media sites.*
- As the New York State Bar Association has observed, however, adding a friend or connection on social media to gather information under false pretenses violates rules prohibiting deceptive conduct, false statements, and, if a third-party is used, unethical conduct by non-lawyers acting at the direction of a lawyer.*

* *See, e.g., Griffin v. Maryland*, 995 A.2d 791, 801 (Md. Ct. Spec. App. 2010); *Munster v. Groce*, 829 N.E.2d 52, 61, n. 3 (Ind. Ct. App. 2005)

* Lawyer's access to public pages or another party's social networking site for the purpose of gathering information for client in pending litigation, New York State Bar Association Committee on Professional Ethics, Opinion 843 (2010)

8

Establish and Enforce Social Media Policies and Procedures

- Social media policies should balance protections for the organizations intellectual property and proprietary or confidential information with appropriate consideration of employees' privacy.*
- For market participants in the regulated industries, social media policies and procedures should be designed to achieve compliance with applicable regulatory requirements.*
- Law firms and attorney supervisors should also consider the rules of professional conduct applicable to supervisory relationships.

* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2019)

* Joseph Domenick Guarino, *Drafting Advice: Developing Social Media Policies*, Lexis Practice Advisor Journal (Nov. 25, 2015) available at <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/drafting-advice-developing-social-media-policies>

9 Understand User Agreements and Privacy Policies, Configure Privacy Settings, and Exercise Caution

- Attorneys that use social media should understand the features, tools and privacy policies of those platforms.*
 - This is particularly important for attorneys that use social media to communicate with clients or potential clients.*
- * Social Media Ethics Guidelines, New York State Bar Association, p. 25 (2017)
 - * Kevin O'Keefe, *Do Lawyers Warning Of The Perils Of Social Media Even Use Social Media?*, Above the Law (Oct. 5, 2016)

9 Understand User Agreements and Privacy Policies, Configure Privacy Settings, and Exercise Caution

- Attorneys have an obligation to maintain the confidentiality of client information, and, as the D.C. Bar Legal Ethics Commission observed, “Messaging and electronic mail services provided by social networking sites may lack safeguards sufficient for communicating with clients or prospective clients.”*
- * Social Media I: Marketing and Personal Use, D.C. Bar Legal Ethics Commission, Ethics Opinion 370 (2016)

10

Anything Posted is Potentially a Permanent Public Record that You Will Not Be Able to Control

- The materials that you post on social media should be considered a permanent, public record.*
 - Even if privacy settings are configured and a post is ultimately deleted from a particular platform, it may be archived and could be used by the platform or potentially anyone who recorded or captured an image of the post.
- * As one judge observed, “We have become the most connected nation with our cell phones, smart phones, tablets, computers, and social media, while simultaneously becoming the most disconnected nation because of our cell phones, smart phones, tablets, computers, and social media. In trying to one up the next guy at his expense, we fail to realize that we harm ourselves in the process. Once you hit “Send,” it is out there forever, and you cannot take it back.” *In re Callaghan*, 796 S.E.2d 604 (W. Va. 2017) (Matish, J. dissenting)

10

Anything Posted is Potentially a Permanent Public Record that You Will Not Be Able to Control

- Consider using a modified version of the New York Times/Wall Street Journal to assess your posts or tweets – assume that you are talking to a reporter when asking yourself, would I be comfortable with this post or tweet being featured on the front page of the New York Times or Wall Street Journal?*

* Axel Bruns, *The Library of Congress Twitter Archive: A Failure of Historic Proportions*, Digital Media Research Centre (Jan. 1, 2018), available at <https://medium.com/dmrc-at-large/the-library-of-congress-twitter-archive-a-failure-of-historic-proportions-6dc1c3bc9e2c>

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After Reading These 10 Shocking Tips for Staying Out of Trouble on Social Media, You'll Never Post the Same Way Again

By **Blake J. Brockway**, **James A. Sherer**, and **Brittany A. Yantis**

According to recent reports, Facebook has over two billion monthly users,¹ Twitter has over 300 million monthly users² and LinkedIn has over 600 million total users.³ Neither the legal profession nor most industries is immune from the influence and increasing prevalence of social media. And this prevalence is only growing within those professions,⁴ leading many law firms, market participants, and regulators to maintain an active presence on one or more forms of social media, and even more to opine on their use.⁵

Blake J. Brockway is assistant general counsel at National Futures Association, **James A. Sherer** is a partner at and chairs the Information Governance and Artificial Intelligence Teams for BakerHostetler, and **Brittany A. Yantis** is an associate at BakerHostetler. The views expressed herein are solely those of the authors; they should not be attributed to their places of employment, colleagues, or clients. This article is not intended to provide a comprehensive review of all potential ethical issues that may arise from social media and should not be construed as legal advice. The intention of this article is simply to identify and provide pragmatic tips for addressing certain ethical issues that may arise for attorneys that use social media in connection with their practice. This article was presented in limited form as part of the proceedings of the Futures Industry Association 41st Annual Law & Compliance Division Conference (May 10, 2019). Please note the hyperbole in the title normally associated with certain social media posts and do not take the title seriously.

Social media platforms are designed to capture attention,⁶ elicit rapid fire responses (so-called “engagement”),⁷ and disseminate those responses quickly and *permanently* to a worldwide audience.⁸ While these platforms convey several benefits for the practice of law, they also raise certain ethical considerations for attorneys. Given the audience reach, ease of use, and low bar to entry, social media sites like – but not limited to – LinkedIn, Twitter, and Facebook provide attorneys with unprecedented opportunities to market themselves and their practices, and to engage in client development. However, on social media, attorneys must be careful to maintain the professional standards for the practice of law and understand that what they post can be equally as harmful as it can be powerful.

Tip 1 – Know How Attorneys Are Using, or Should Be Using, Social Media

Truly mastering the legal and reputational risks associated with the use of social media begins by actually using⁹ and defining the platforms and understanding what social media means for the practice of law. This, in turn, requires practitioners to determine the reality of the platforms (what’s already happening) and its aspirational aspects (the plan or

strategy).¹⁰ Many practitioners divide the marketplace of social media into different segments including network building tools in the form of “online communities,” such as social networking sites or even dating sites.¹¹ Other sites are much less involved, like Twitter, video and picture sharing applications, or now-integrated platforms such as Yammer or Slack.¹² These platforms have provided attorneys with unprecedented marketing tools and ways to quickly reach a global audience. Online communities like LinkedIn and Facebook have also become critical marketing tools for attorneys to market themselves and their practice, and connect with clients. Microblog sites like Twitter provide attorneys an instantaneous feed of information and news and a platform to express their own opinions.

Attorneys and supporting professionals should focus on understanding social media’s operation and capabilities against the backdrop of the attorney’s use, needs, and requirements. Attorneys should also engage in active discussions with their peers, organizations, and clients to determine how social media is being or should be used in the practice of law (even if such use is aspirational depending on the generation). The attorneys should then continue to monitor and update which social media platforms feature representations of the attorney, the firm, or its clients in order to understand where the risks may be highest.

Tip 2 – Know Your Rules of Professional Conduct and Understand How They Apply to Social Media

The American Bar Association (ABA) has adopted and periodically updates the Model Rules of Professional Conduct (the Model Rules).¹³ All 50 states and the District of Columbia have adopted some version of the Model Rules.¹⁴ Each state may implement a modified or amended version of the Model Rules or issue ethics opinions establishing specific guidance and requirements for attorneys licensed in that state.¹⁵ Many states have issued legal ethics opinions addressing the use of technology¹⁶ and several states have issued opinions addressing a variety of ethical issues arising from the use of social media.¹⁷

Attorneys who use social media in connection with their practice should consider how the rules of

professional conduct could be implicated by their activities on social media and should monitor related ethics opinions in the state(s) in which they are registered. But such attorneys should also understand that the advice given through such august bodies may be subject to change, not only because of the individuals giving the advice,¹⁸ but also due to the rapid changes inherent in the technologies themselves¹⁹ as well as the societally acceptable *uses* of those technologies.²⁰

Tip 3 – Understand the Benefits and Risks Associated with Relevant Technology, Including Social Media

In 2012, the ABA added the following comment to Model Rule 1.1, “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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”²¹ This comment has been incorporated into the rules of professional conduct of many states including, among others, Illinois,²² New York²³ and Virginia.²⁴ As indicated above, this may mean understanding both how social media operates technically and how people are actually using it.²⁵

Tip 4 – Adhere to Attorney Advertising Rules on Social Media

Social media by nature is intended to facilitate communication between individuals. For the practice of law, that often means between attorneys and clients. However, under the Model Rules, certain representations made by an attorney on social media may be considered “advertising material” and subject to restrictions. Under Model Rule 7.1, a lawyer is not permitted to make false or misleading communications about themselves or their services.²⁶

Even truthful communications about a lawyer’s achievements on behalf of a client or former client could be misleading if presented in a manner that leads a reasonable person to form an unjustified expectation that the same result may be achieved for other clients.²⁷ And while Model Rule 7.2 allows an attorney to communicate information regarding his or her services through any media, it restricts attorneys from paying for recommendations or stating

(or implying) that they are certified as a specialist in a particular field.²⁸

All statements included in the social media profile of a law firm or attorney should be factual, accurate, and consistent with the applicable ethics rules. Attorneys should refrain from – or exercise caution in – listing specialties or accepting recommendations or endorsements on social media. And for good reason: failing to adhere to applicable ethics requirements related to communications on social media has led to sanctions and public reprimands.²⁹

Tip 5 – Remember That the Duties of Confidentiality and Conflicts of Interest Also (or Still) Apply to Attorneys’ Social Media Activities

Maintaining the confidentiality of information provided by a client is the foundation of an attorney-client relationship and an important aspect of the rules of professional conduct for attorneys.³⁰ In general, a lawyer may not reveal information related to the representation of a client or former client without the client’s informed consent.³¹ The conflict of interest principles set forth in the model rules provide, *inter alia*, that a lawyer may not use information relating to the representation of a client to its disadvantage.³²

While social media provides attorneys with new ways to gather information about a party or witness on publicly available sites, several states have made it clear that “friending” someone to gain access to privacy-restricted portions violates the rules of professional conduct.³³ Additionally, lawyers may not use social media and “false friending” to deceive third parties. In at least one example, an Ohio assistant prosecutor was fired after posing as a murder defendant’s fictional “baby mama” on Facebook in order to try and persuade two alibi witnesses not to testify.³⁴ Similarly, Model Rule 4.2 prohibits communications with a represented party, including on social media.³⁵ Two New Jersey defense attorneys faced disciplinary action for directing a paralegal to “friend” the plaintiff in a personal injury lawsuit to gain access to his private profile.

Attorneys should carefully consider the rules related to confidentiality and conflicts of interest before posting, blogging, or tweeting about clients, prospective clients or, for in-house counsel, their employer.

Tip 6 – Stop and Think Before You Tweet (or Post)

The Florida bar issued a reprimand and a fine to an attorney for firing off a heated blog post calling the judge an “Evil, Unfair Witch.”³⁶ An Illinois public defender lost her job for criticizing “Judge Clueless” and revealing confidential details of a case.³⁷ And a lawyer in Texas requested a trial delay for a death in the family, but the judge found that her Facebook posts of partying all week told a different story.³⁸

For attorneys, social media’s freedom is limited by the tight discourse of the legal profession and the ethical rules. Courts and bars are increasingly applying the same codes of conduct to social media as they have to traditional legal correspondence. Unfortunately for professionals, the informality of social media makes the line between personal and professional less clear than desired. Whether posting through a pseudonym or their own name, attorneys must think twice before firing off a post. The freedom to gripe and express opinions on social media does not supersede the duty to be respectful.³⁹

Attorneys should also exercise diligence and caution in using social media to post or tweet about trials. Under Model Rule 3.6, a lawyer that has participated in the investigation or litigation of a matter is prohibited from making extrajudicial statements that she or he 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 in the matter.⁴⁰ Note however that several exceptions to this prohibition are set forth in the Model Rules, including an exception allowing a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity.⁴¹

Regardless, before sharing information, an attorney should carefully consider the facts and circumstances of a particular case and make an informed decision about whether it is appropriate to use social media to post or tweet about a matter. This issue has been presented in at least one relatively recent case. In 2015, a judge in Iowa granted an emergency motion to postpone trial due to concerns that an attorney’s Facebook post shortly before the start of the trial may have tainted the jury pool.⁴²

Attorneys should additionally refrain from violating court rules by posting or tweeting about a

case. A Chicago lawyer observing a spoofing trial in federal court posted nine tweets with pictures of evidence. A prominent sign in the courtroom indicated that photographing, recording, or broadcasting was prohibited. The attorney was sanctioned, was required to make a \$5,000 “donation,” had to complete a CLE program on ethics in social media, and then had to complete 50 hours of *pro bono* at a *pro se* assistance desk.⁴³

Tip 7 – Exercise Diligence and Care When Considering Record Retention and Discovery Involving Social Media

Regulatory books and records requirements as well as legal or litigation holds likely need to cover social media platforms. Advising clients to remove posts on social media may also have record retention and attorney ethics implications.⁴⁴ As a matter of professional competence, attorneys must use publicly available information from the internet and take the time to investigate social media sites.⁴⁵ As the New York State Bar Association has observed, however, adding a friend or connection on social media to gather information under false pretenses violates rules prohibiting deceptive conduct, false statements, and, if a third party is used, unethical conduct by non-lawyers acting at the direction of a lawyer.⁴⁶

Preserving or (re)storing social media carries with it an additional set of challenges, which include specific types of expertise needed to capture the information in an authentic and supportable format.⁴⁷ The ownership of the social media information might also be debatable, at least when seeking to access your own or another’s posting history.⁴⁸

Tip 8 – Establish and Enforce Social Media Policies and Procedures at Your Company or Firm

For market participants in regulated industries (e.g., the financial services industry), social media policies and procedures should be designed to achieve compliance with applicable regulatory requirements. Law firms and attorney supervisors should also consider the rules of professional conduct applicable to supervisory relationships when implementing social media policies and procedures.⁴⁹ Such policies should balance protections of the organization’s intellectual property and proprietary or confidential information with appropriate distance from employees and those employees’ privacy rights.⁵⁰

Tip 9 – Understand the User Agreements and Privacy Policies of Any Social Media Platforms That You Use, Configure Your Privacy Settings, and Exercise Caution in Communicating with Clients Through Social Media

Attorneys that use social media should understand the features, tools, and privacy policies of those platforms.⁵¹ This is particularly important for attorneys that use social media to communicate with clients or potential clients, but also for those attorneys supervising or directing the work of others.⁵² Attorneys have an obligation to maintain the confidentiality of client information, and, as the D.C. Bar Legal Ethics Commission observed, “Messaging and electronic mail services provided by social networking sites may lack safeguards sufficient for communicating with clients or prospective clients.”⁵³ Reading the End-User License Agreements or “EULAs” (despite the toll such an effort takes⁵⁴ and the ultimate dismay it might engender⁵⁵) may therefore be critical to defensible practices, especially where the uses of social media platforms are novel in the area of legal practice.

Tip 10 – The Front Page of *The New York Times* Test – Recognize That, Even with Your Privacy Settings Configured, Anything You Post on Social Media Is a Potentially Permanent and Public Record That You Will Not Be Able to Control

The materials that you post on social media should be considered a permanent, public record.⁵⁶ Even if privacy settings are configured and a post is ultimately deleted from a particular platform, it may be archived and could be used by the platform or potentially anyone who recorded or captured an image of the post. Consider using a modified version of a publication test to assess your posts or tweets – assume that you are talking to a reporter when asking yourself, would I be comfortable with this post or tweet being featured on the front page of *The Wall Street Journal* or *The New York Times*? Then, imagine that instead of the 1.7 million digital subscribers to the *Journal* or the 3.4 million for the *Times*,⁵⁷ you could reach 4.94 million people with a username of

@yousuck2020, or 3.48 million people when asking for a year's worth of free chicken nuggets.⁵⁸ The process (and math) is simple, but the results can be permanent (although will no longer be stored in the Library of Congress as a matter of course)⁵⁹ and require some foresight and strategy despite the ease of use.

Notes

1. Jason Abbruzzese, *Facebook Hits 2.27 Billion Monthly Active Users as Earnings Stabilize*, NBCNews.com, Oct. 30, 2018, <https://www.nbcnews.com/tech/tech-news/facebook-hits-2-27-billion-monthly-active-users-earnings-stabilize-n926391>.
2. Hamza Shaban, *Twitter Reveals its Daily Active User Numbers for the First Time*, The Washington Post, Feb. 7, 2019, https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/?noredirect=on&utm_term=.80533b9fad1d.
3. About LinkedIn, <https://about.linkedin.com/> (last visited May 4, 2019).
4. Alyce Zawacki, *Social media use in the legal profession*, *Alternative Law Journal* 43:2 (June 1, 2018).
5. Kevin O'Keefe, *Do Lawyers Warning Of The Perils Of Social Media Even Use Social Media?*, *Above the Law* (Oct. 5, 2016), <https://abovethelaw.com/2016/10/do-lawyers-warning-of-the-perils-of-social-media-even-use-social-media/> (last visited July 9, 2019).
6. Nathan Olson, *The Clickbait Problem*, *Your Charisma* (Oct. 9, 2017) available at <https://yrcharisma.com/2017/10/09/the-clickbait-problem-social-media-disaster/> (last visited July 1, 2019).
7. Hilary Sheinbaum, *What the Influencer Couple Has to Say About That Viral Proposal Scheme*, *The New York Times* (June 21, 2019) available at <https://www.nytimes.com/2019/06/21/style/what-the-influencer-couple-has-to-say-about-that-viral-proposal-scheme.html> (last visited July 3, 2019).
8. James A. Sherer, Melinda L. McLellan & Brittany A. Yantis, *The (Social) Media Is the Message: Navigating Legal and Reputational Risks Associated with Employee Social Media Use*, *The Computer & Internet Lawyer* (May 2019).
9. O'Keefe, *supra* note 5 ("...we have lawyers who know little, if anything, about social media teaching social media to lawyers. The bar association leadership is seemingly secure in their feelings that social media is beneath them and of little importance to most legal professionals.").
10. Sherer, McLellan & Yantis, *supra* note 8.
11. *Id.*
12. James A. Sherer, Aaron Singer & S. Benjamin Barnes, *Picking Up the Slack – Legal and Information Governance Considerations for New(er) Technologies*, 25 *RICH. J.L. & Tech.*, No. 4, 2019.
13. MODEL RULES OF PROF'L CONDUCT (2019).
14. American Bar Association, *Alphabetical List of Jurisdictions Adopting the Model Rules*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited May 1, 2019).
15. *See, e.g.*, Virginia State Bar Professional Guidelines, <http://www.vsb.org/pro-guidelines/index.php/rules/preamble/> (last visited May 1, 2019).
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