



**PROGRAM MATERIALS**

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## **10 "Shocking" Tips for Attorneys to Stay Out of Trouble on Social Media - in 2021 and Beyond**

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*Shocking* Tips for Attorneys to Stay Out of  
Trouble on Social Media –  
in 2021 and Beyond

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# Introduction

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- 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

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- 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

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- 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

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- 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

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- 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/](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

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- 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*

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- 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*

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- 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

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- 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

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- 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

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- 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

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- 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)

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

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- 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](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

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- 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

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- 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

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- 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

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- 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)

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# 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

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- 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

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- 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

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- 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)



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

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- 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](https://medium.com/dmrc-at-large/the-library-of-congress-twitter-archive-a-failure-of-historic-proportions-6dc1c3bc9e2c), 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>*