

**TO POST OR NOT TO POST:  
ETHICAL ISSUES IN ATTORNEYS' USE OF SOCIAL MEDIA**

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Scott Weatherford is an innovative trial attorney with a comprehensive business litigation practice focusing on technology and trade secret related disputes. He has represented Fortune 500 companies, start-ups, and local business owners in state courts, federal courts, arbitrations, and administrative agencies across the state of Texas.

Scott has represented both plaintiffs and defendants in a variety of disputes including:

#### Technology Litigation

- Obtained favorable settlement in “bet-the-company” litigation when client’s computer network was hacked due to faulty security software and integration.
- Represented Silicon Valley corporation in breach of contract action involving sale of domain names and other intellectual property.
- Prosecuted breach of contract and other claims resulting from poor design and implementation of enterprise resource planning system.
- Represented a local business owner in the prosecution of a breach of contract claim related to a dispute over personal property. Tried the case to a judge in state court in Travis County and obtained a favorable ruling awarding damages and attorneys’ fees.

#### Trade Secret/Non-Compete Litigation

- Successfully defended a former employee against allegations of trade secret misappropriation resulting from alleged violations of non-competition, non-solicitation, and non-disclosure obligations.
- Obtained temporary restraining order, temporary injunction, and favorable settlement when client’s business partner attempted to steal goodwill and trade secrets from the company.
- Successfully avoided preliminary and permanent injunctions sought against former franchisee for alleged violations of a non-compete agreement.
- Obtained temporary restraining order, temporary injunction, and favorable settlement when client’s competitor downloaded and misappropriated thousands of proprietary and confidential documents.

Mr. Weatherford also counsels companies on how to navigate workplace compliance and legal issues related to employee misconduct, personnel policies, and protection of proprietary business information. In that regard, Mr. Weatherford has:

- Resolved numerous discrimination, harassment and retaliation lawsuits.
- Successfully resolved a purported class-action involving allegations of widespread wage and hour violations resulting from misclassification of independent contractors.
- Defended an engineering and construction company throughout an extensive OSHA investigation conducted by the Department of Labor, resulting in a dismissal of the initial complaint and a finding of no violations.



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## TO POST OR NOT TO POST: ETHICAL ISSUES IN ATTORNEYS' USE OF SOCIAL MEDIA

Practicing lawyers in the digital age are faced with an uncomfortable choice: embrace technology or be left behind. While there is little doubt that technology has had a profound impact on the practice of law,<sup>1</sup> some lawyers and law firms remain resistant to this change.<sup>2</sup> “[M]any (if not most) law firms in today’s rapidly changing market for legal services [are] ignoring strong indicators that their old approaches—to managing legal work processes, pricing, leverage, staffing, project management, technology, and client relationships—are no longer working, [and] they choose to double down on their current strategies rather than risking the change that would be required to respond effectively to evolving market conditions.”<sup>3</sup>

The same is true for social media. Social media is defined as “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).”<sup>4</sup> Many lawyers remain resistant to embracing social media in their legal practice because of the inherent risk involved or fear of the unknown. Indeed, the Texas Center for Legal Ethics has remarked that “[t]he internet has many virtues as a forum of communication, but simultaneously presents certain dangers.”<sup>5</sup> Yet at the same time, the use of social media in the legal profession continues to expand.

The 2017 ABA Legal Technology Survey Report (the “2017 Survey”) found that only 23% of respondents report that their firms *do not* maintain a presence on any social networks.<sup>6</sup> Among law firms that use social media, the following platforms are most popular:<sup>7</sup>

Platform	% of Respondents
LinkedIn	53%
Facebook	40%
Avvo	20%
Twitter	19%

In the 2017 Survey, “the highest percentage of respondents in the last four years—81%—report maintaining a presence on social medial for professional purposes.”<sup>8</sup> Among individuals who use social medial for professional purposes, the use is similar to that of law firms:<sup>9</sup>

Platform	% of Respondents
LinkedIn	72%
Facebook	34%
Twitter	26%
Avvo	17%

Notably, many lawyers reported using social media for non-professional purposes, with 82% of respondents indicating they use Facebook for personal reasons.<sup>10</sup>

With the increasing use of social media—for both professional and personal reasons—along with the inherent risk associated with such use, it is essential that the practicing lawyer be familiar with the governing ethical rules and standards of appropriate conduct. At the core of social media ethics is the lawyer’s duty of competence: “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>11</sup> In 2012, the comments to ABA Model Rule 1.1 made clear that 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.*”<sup>12</sup> As social media continues to permeate

<sup>1</sup> ABA COMMISSION ON THE FUTURE OF LEGAL SERVICES, *Report on the Future of Legal Services in the United States* (Aug. 2016), available at <http://abafuturesreport.com/#download-full-report> (“[T]echnology, globalization, and other forces continue to transform how, why, and by whom legal services are accessed and delivered. Familiar and traditional practice structures are giving way in a marketplace that continues to evolve.”).

<sup>2</sup> GEORGETOWN LAW CENTER FOR THE STUDY OF THE LEGAL PROFESSION AND THOMSON REUTERS LEGAL EXECUTIVE INSTITUTE AND PEER MONITOR, 2018 Report on the State of the Legal Market: Transformation of Legal Services Market is Accelerating—Are Law Firms Ready?, at 3 (Jan. 2018), available at <http://www.legalexecutiveinstitute.com/2018-legal-market-report/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Social Media*, Merriam Webster (11th ed. 2003).

<sup>5</sup> Tex. Comm. on Prof’l Ethics, Op. 671 (2018).

<sup>6</sup> See Allison Shields, *2017 Social Media and Blogging*, American Bar Association Tech Report (2017), available at [https://www.americanbar.org/groups/law\\_practice/publications/techreport/2017/social\\_media\\_blogging/](https://www.americanbar.org/groups/law_practice/publications/techreport/2017/social_media_blogging/).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Model Rules of Prof’l Conduct r. 1.1 (AM. BAR ASS’N 2018).

<sup>12</sup> *Id.*, at r. 1.1 cmt. 8 (emphasis added).

the legal industry, attorneys should know and understand the benefits and risks associated with its use.

The use of social media in the practice of law also implicates the duty of confidentiality and the rules related to advertising. Against this backdrop, “lawyers must find a balance between using common sense and acknowledging the warnings from state ethical guidelines and advisory opinions seeking to bridge the gap between the existing rules of professional conduct and the ethical use of social media in the legal profession.”<sup>13</sup> The remainder of this article will review several hypothetical scenarios and assess the ethical concerns associated with each.

## RESPONDING TO ONLINE NEGATIVE COMMENTS

*Hypothetical:* A former client posted negative comments about a Texas lawyer on an internet review site. The lawyer believes that the client’s comments are false. The lawyer is considering posting a public response that reveals only enough information to rebut the allegedly false statements.<sup>14</sup>

When a former client posts a negative review about a lawyer, the lawyer’s duty of confidentiality limits the information the lawyer may reveal in a public response. In general, Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct defines the scope and extent of a Texas lawyer’s duty of confidentiality. Rule 1.05(a) broadly defines “confidential information” to include not only information protected by the lawyer-client privilege but also “all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.”<sup>15</sup>

As such, “[a]bsent an applicable exception found in Rule 1.05, a lawyer may not post a response to a negative review that reveals any information protected by the lawyer-client privilege, or otherwise relating to a client or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client.”<sup>16</sup> There is no exception in Rule 1.05 that allows a lawyer to reveal such information in a public forum in response to a former client’s negative review.<sup>17</sup>

Accordingly, a lawyer may not reveal confidential information, as that term is defined in Rule 1.05, merely to respond to a former client’s negative review on the internet. “A lawyer may, however, post a response to a former client’s negative review so long as the response is proportional and restrained and does not reveal confidential information or violate any other provision of the Texas Disciplinary Rules.”<sup>18</sup>

## SEEKING LEGAL ADVICE FROM AN ONLINE FORUM

*Hypothetical:* A Texas lawyer is a member of an online discussion group consisting of Texas lawyers. The lawyer has encountered a challenging issue in connection with the representation of a client, so the lawyer posts a request for comments from members of the online discussion group.<sup>19</sup>

Informal lawyer-to-lawyer consultations happen with frequency every day. The inquiring lawyer must be careful not to reveal confidential information as defined by Rules of Professional Conduct. Most of the time, confidential information will not be revealed in these consultations; for example, a “general or abstract inquiry that does not identify the client and does not disclose information relating to the representation does not implicate Rule 1.05 and does not require client consent.”<sup>20</sup> But in some cases, it may be necessary and appropriate for the inquiring lawyer to provide a certain amount of context to frame the issue and obtain useful feedback. The exceptions to Rule 1.05 provide a means to accomplish this.

Rule 1.05(d)(1) provides that a lawyer may reveal unprivileged confidential information “[w]hen impliedly authorized to do so in order to carry out the representation.”<sup>21</sup> Rule 1.05(d)(2) makes clear that a lawyer may reveal unprivileged confidential information when the lawyer has reason to believe it is necessary to do so in order to “carry out the representation effectively.”<sup>22</sup> As such, “a lawyer may reveal a limited amount unprivileged client information in a lawyer-to-lawyer consultation, without the client’s express consent, when and to the extent that the inquiring lawyer reasonably believes that the revelation will benefit the inquiring lawyer’s client in the subject of the representation.”<sup>23</sup> The inquiry should be in the

<sup>13</sup> Jessica Weltge and Myra McKenzie-Harris, *The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology*, A.B.A. Section of Labor and Employment Law (March 24, 2017).

<sup>14</sup> See Tex. Comm. on Prof’l Ethics, Op. 662 (2016).

<sup>15</sup> Tex. Disciplinary Rules Prof’l Conduct R. 1.05(a).

<sup>16</sup> Tex. Comm. on Prof’l Ethics, Op. 662 (2016).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Tex. Comm. on Prof’l Ethics, Op. 673 (2018).

<sup>20</sup> *Id.*

<sup>21</sup> Tex. Disciplinary Rules Prof’l Conduct R. 1.05(d).

<sup>22</sup> *Id.*

<sup>23</sup> Tex. Comm. on Prof’l Ethics, Op. 673 (2018).

form of a hypothetical scenario that does not identify the client, and the inquiring lawyer may not reveal confidential information protected by the lawyer-client privilege without the client's express, informed consent.<sup>24</sup> Finally, no confidential information may be revealed whatsoever if the client has expressly instructed the lawyer not to do so.<sup>25</sup>

## RESEARCHING THE JURY

*Hypothetical:* After a week-long trial, a jury convicts a criminal defendant. After the verdict, the defendant asks his lawyer to search social media for information on the jurors.

Given the pervasive nature of social networking, it is unsurprising that a number of cases and opinions address juror misconduct arising from the use of social media. As a result, "researching the social media activity of prospective jurors, and continuing to monitor social media activity during trial, can be vital to seating an honest, unbiased jury, and to ensuring that any online misconduct is promptly brought to the court's attention."<sup>26</sup>

The rules regarding jury research vary by jurisdiction, so it is wise to first consult the rules (and orders) in the judicial district where trial will occur. For ethical guidance, the American Bar Association has addressed certain issues that might arise throughout the course of juror research. In Formal Opinion 14-466, the American Bar Association ("ABA") outlines three types of potential juror research: (1) passive review of public (non-protected) information, when the juror is not aware the information has been reviewed; (2) passive review of public (non-protected) information when the juror is aware that the information has been reviewed; and (3) active review where a request for access is required.<sup>27</sup> According to the opinion, type one and type two are permissible communications with a juror.<sup>28</sup> Type three, on the other hand, is impermissible as it amounts to "driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past."<sup>29</sup>

The next issue becomes what to do with problematic discoveries during jury research and, specifically, a lawyer's obligation to notify the court of information discovered through social media research. Pursuant to ABA Model Rule 3.3, "[a] lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions."<sup>30</sup> Notably, this duty is triggered by actual knowledge of the conduct and does not depend on the lawyer's subjective belief regarding how the court will address the conduct at issue.<sup>31</sup>

Moreover, it is important to perform research and disclose potentially disqualifying conduct *before* the trial concludes. In *U.S. v. Villalobos*, a juror made multiple potentially disqualifying statements on Facebook, but the defendant's attorney did not discover the statements until after the trial.<sup>32</sup> Before the trial began, the juror posted on Facebook: "Got summoned to jury duty to U.S. district federal court on my birthday. That's gotta suck. Thanks Uncle Sam!!!"<sup>33</sup> A friend commented on the post by stating that the juror should "tell them, IF THEY GOT ARRESTED THEN THAT MEANS THEY ARE GUILTY!!! And also tell them you are Pro-Law Enforcement and I can guaranty [sic] you will not get chosen...Lol."<sup>34</sup> In reply, the juror commented, "I am pro-law enforcement."<sup>35</sup> Because the attorney did not discover these statements during voir dire or trial, the defendant was limited to arguing the point in a motion for new trial. Ultimately, the Fifth Circuit upheld the trial court's denial of the motion for new trial (on an abuse of discretion standard) because the trial court was "not clearly erroneous in finding that [the juror's] pre-trial email and Facebook status were attempts to avoid jury duty, rather than manifestations of bias."<sup>36</sup> Had the statement been discovered during voir dire or during trial, it is more likely that he juror would have been disqualified or struck.

## FACEBOOK-FRIENDING THE JUDGE

*Hypothetical:* A lawyer is friends on Facebook with Judge Doe. The two exchange courteous messages on Facebook Messenger every few months. On the day of trial, the

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Jan L. Jacobwitz and John G. Browning, *Legal Ethics and Social Media*, American Bar Association (2017).

<sup>27</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see also Model Rules of Prof'l Conduct r. 3.3(b) (AM. BAR ASS'N 2018) ("A lawyer . . . who knows that a person intends to engage, is engaging or has engaged in criminal or

fraudulent conduct related to the [adjudicative] proceeding shall take remedial measures, including, if necessary, disclosure to the tribunal.").

<sup>31</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

<sup>32</sup> *U.S. v. Villalobos*, No. 14-40147 (5th Cir. Feb. 11, 2015).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

*lawyer's case gets assigned to Judge Doe, who will preside over the trial.*

Texas has limited ethical guidance regarding social media interaction between judges and lawyers. Fortunately, a Texas appellate case provides an outline of how to approach the precarious world of Facebook friendship. In *Youkers v. State*, the defendant appealed the revocation of his community supervision and eight-year prison sentence for his conviction of assaulting his girlfriend, contending that the trial judge lacked impartiality or neutrality based on *ex parte* communications, including a Facebook friendship with the girlfriend's father.<sup>37</sup> The appellate court first noted that although there is no rule, canon of ethics, or judicial ethics opinion in Texas proscribing the use of a judge's social media, "the general premise [is] that judges are not prohibited from using social media."<sup>38</sup> Then, the court held that "[m]erely designating someone as a 'friend' on Facebook 'does not show the degree or intensity of a judge's relationship with a person,'" and such "designation, standing alone, provides no insight into the nature of the relationship" and was not grounds for recusal.<sup>39</sup> Finally, the court remarked that the judge's behavior served as a perfect example of how to respond when potential *ex parte* communications are involved:

The judge responded online formally advising the father the communication was in violation of rules precluding *ex parte* communications, stating the judge ceased reading the message once he realized the message was improper, and cautioning that any further communications from the father about the case or any other pending legal matter would result in the father being removed as one of the judge's Facebook "friends." The judge's online response also advised that the judge was placing a copy of the communications in the court's file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required.<sup>40</sup>

The takeaway from this particular case indicates a broader principle: "[W]hile the internet and social media

websites create new venues for communications, our analysis should not change because an *ex parte* communication occurs online or offline."<sup>41</sup>

## STARTING A BLOG

*Hypothetical:* A lawyer is interested in emerging legal fields such as artificial intelligence and cryptocurrency. The lawyer wants to start an online blog with weekly posts about the developments of these legal fields.

Under the Texas Disciplinary Rules of Professional Conduct, the rules regarding attorney advertisements apply to social media communications. For example, the prohibitions in Rule 7.03(a) apply to "in-person contact, or by regulated telephone or **other electronic contact** . . ."<sup>42</sup> Rule 7.03(f) defines "other electronic contact" as "any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means."<sup>43</sup> Similarly, Rule 7.05 regulates certain "written, audio, audio-visual, **digital media**, recorded telephone message, or **other electronic communication** to a prospective client for the purpose of obtaining professional employment."<sup>44</sup> Comment 5 to Rule 7.05 makes clear that the rule applies to "digital media [and] the internet, and other comparable forms of electronic communications."<sup>45</sup> Finally, Interpretative Comment 17 directly addresses social media, noting that "[l]anding pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements."<sup>46</sup>

Blogs are becoming increasingly popular among lawyers as a way to develop and promote expertise in a particular legal field or industry. Blogs "serve the dual purpose of providing legal resources to the community and increasing the attorney's reputation."<sup>47</sup> According to Interpretive Comment 17, "Blogs or status updates considered to be educational in nature are not required to be filed with the Advertising Review Department."<sup>48</sup> The Comment warns, however, that "attorneys should be careful to ensure that such postings do not meet the definition of an advertisement subject to the filing

<sup>37</sup> 400 S.W.3d 200, 203 (Tex. App.—Dallas 2013).

<sup>38</sup> *Id.* at 205.

<sup>39</sup> *Id.* at 206 (internal citations omitted).

<sup>40</sup> *Id.* at 204.

<sup>41</sup> *Id.* at 206.

<sup>42</sup> Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a).

<sup>43</sup> *Id.* at R. 7.03(f).

<sup>44</sup> *Id.* at R. 7.05.

<sup>45</sup> *Id.* at R. 7.05 cmt. 5.

<sup>46</sup> Tex. Disciplinary Rules Prof'l Conduct Interpretive Comment 17.

<sup>47</sup> Pocket Guide: Social Media 101, Texas Young Lawyers Association (2013), available at [https://www.texasbar.com/AM/Template.cfm?Section=Lawyers\\_Home&Template=/CM/ContentDisplay.cfm&ContentID=25527](https://www.texasbar.com/AM/Template.cfm?Section=Lawyers_Home&Template=/CM/ContentDisplay.cfm&ContentID=25527).

<sup>48</sup> Tex. Disciplinary Rules Prof'l Conduct Interpretive Comment 17.

requirements.”<sup>49</sup> A blog post might be considered an advertisement if it is “commercial speech,” which is defined as a communication “related solely to the economic interests of the speaker and its audience.”<sup>50</sup> In other words, if the purpose of the blog post is to gain professional employment, then the Texas Disciplinary Rules of Professional Conduct will apply.

Still, a legal blogger must be cognizant of the Rules of Professional Conduct. This means that “attorneys must be concerned with maintaining confidentiality (Rule 1.05), candor towards the tribunal (Rule 3.03), trial publicity (Rule 3.07), truthfulness in statements to others (Rule 4.01); and conduct involving dishonesty, fraud, deceit or misrepresentation (Rule 8.04).”<sup>51</sup>

## CONCLUSION

Social media should not be ignored simply because it presents unique and possibly unresolved ethical challenges. A lawyer “who chooses to maintain a presence on social media, for personal or professional reasons, must take affirmative steps to remain competent regarding the technology being used and to ensure compliance with the applicable Rules of Professional Conduct.”<sup>52</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995).

<sup>51</sup> Pocket Guide: Social Media 101, Texas Young Lawyers Association.

<sup>52</sup> D.C. Bar Ethics Opinion 370, Social Media I: Marketing and Personal Use (November 2016); *see also* Jan L. Jacobwitz and John G. Browning, *Legal Ethics and Social Media*, American Bar Association (2017).

