

TAKEAWAYS FROM A COMPREHENSIVE SET OF SOCIAL MEDIA ETHICS GUIDELINES



Sachin Java

The growth of social media use by lawyers and clients has given rise to a unique set of ethical issues. Disciplinary bodies across the nation have developed guidance to tackle some of these concerns. Of note, the New York State Bar Association has developed the most comprehensive analysis of these matters through their Social Media Ethics Guidelines (NY Guidelines). It is only a matter of time before disciplinary bodies in other states, including Ohio, develop such recommendations regarding social media. As a precursor, familiarity with the guidelines can assist practices across the nation to resolve some of these ethical dilemmas. This article presents some of the salient aspects of the NY Guidelines, last updated on May 11, 2017.

Attorney Competence

Described further in the sections below, social media is currently being utilized by attorneys and their clients for several purposes. Thus at minimum, to fulfill the competency requirements of the ethical rules, an attorney needs to be conversant with the basics of each social media network that a lawyer uses in connection with the practice of law, or that his or her client may use if it is relevant to the purpose or purposes for which the lawyer was retained.

Attorney Advertising

The NY Guidelines conclude that a lawyer's social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting, or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules. Hybrid accounts (such as Twitter account with law-focused posts along with some sports/politics) may also need to comply with attorney advertising and solicitation rules if the primary purpose is retention of the attorney.

Of note, any such profiles should restrict the use of "specialist" as described in the ethical rules.

Under the ethical rules related to communications and advertising, any testimonial that is false, misleading or non-verifiable is prohibited. As such, the attorney has a responsibility to monitor and remove such social media content. If removal is restricted, with caution, a lawyer may clear up the false or misleading characteristic of the review by responding to the testimony.

When posting on social media, prudence must also be taken not to create potential conflicts with current clients when communicating and stating positions on issues and legal developments.

Furnishing of Legal Advice Through Social Media

General responses to legal questions on social media may not be a problem. However, an attorney should tread carefully when answering such questions, as specific legal advice has the potential to create an unintended attorney-client relationship. If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications.

Review and Use of Evidence from Social Media

While utilizing information obtained from the public portion of a person's profile may not present an issue, acquisition and use of content from private or restricted sections presents its own set of ethical concerns. The NY Guidelines indicate that express consent from counsel must be sought prior to contacting or viewing the restricted social media of a represented party. Use of an agent to obtain social media information also gives rise to ethical concerns and must be dealt with according to the ethical rules.

Communicating with Clients

The attorney may advise a client as to what

content may be maintained or made nonpublic with regard to the client's social media account. In doing so, however, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, including applicable laws and regulations. Advice can also be proffered in regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer.

Overall, care must be taken to ensure client confidences are not compromised when utilizing social media.

Researching Jurors, Reporting Juror Misconduct

Researching jurors' public posts does not present an issue, but care should be taken that the lawyer does not communicate with the juror (including communications automatically generated by the social media network or through the lawyer's agent). Moreover, when the trial is ongoing, juror's public posts may be utilized to report juror misconduct.

Conclusion

Ethical issues faced by attorneys continue to grow as social media networks proliferate and become more sophisticated. The principals outlined in the NY Guidelines provide a good general overview to generate "best practices" for attorneys in relation to social media.

Sachin is an Associate at Gallagher Sharp LLP. A particular focus of his practice involves professional liability litigation, including defending attorneys in legal malpractice actions. Along with fellow Gallagher Sharp attorneys, Shane A. Lawson, Esq., and Paige M. Rabatin, Esq., he hosts "Debriefed: The Lawyers Podcast." He currently serves on the Ethics Committee and has been a CMBA member since 2011. Sachin can be reached at (216)522-1164 or SJava@GallagherSharp.com.