

Ask A Mentor: How Can I Use Social Media Responsibly?

By **Leah Kelman** (October 11, 2023)

Experts answer questions on career and workplace conundrums in this Law360 Pulse guest column series. Have a question you're afraid to ask your law firm chair, practice area leader or mentor? Submit it anonymously here.

In this installment, Leah Kelman at Herrick Feinstein LLP discusses the importance of reasoned judgment and thoughtful process when it comes to newly admitted attorneys' social media use.

Q: As a new attorney who is also an avid social media user and poster, what are the biggest ethics and professional pitfalls I should keep in mind?

— Incoming associate at BigLaw firm

As a newly admitted attorney, you have likely grown up in a world of technology.

We are surrounded by smartwatches, smartphones, smart TVs and tablets, and now, more than ever, increased artificial intelligence in so many aspects of our lives.

But just how intelligent are these devices when it comes to attorney ethics and professional responsibility?

While they may be able to aid you in your practice, they can never replace your sound judgment. Good judgment is the keystone of a great lawyer.

In your professional life, your organization, your colleagues and your clients will turn to you not only for your smarts — which cannot be undervalued — but for your careful and considered judgment.

In your personal life, your family and friends will seek your counsel for your thoughtful and deliberative judgment.

When it comes to the use of social media, as members of the bar, reasoned judgment and thoughtful process are imperative.

Putting in guardrails and speed bumps to slow down the speed of your next post may seem counterproductive in the realm of social media. You may feel pressure to be the first to post on an issue, to be spontaneous and inventive to gain interest, or to be rash and impulsive to garner more hits, likes or reposts.

However, these tendencies may need to be unlearned.

It's important to pause before you post: It could ultimately protect you, your organization



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and your clients.

You Will Be Judged

As an attorney, our license to practice law and our reputation in the industry is invaluable. Our esteemed profession is governed, in each jurisdiction, by the American Bar Association's applicable Model Rules of Professional Conduct.

The oft-forgotten preamble to the rules reminds us of our lofty responsibilities as lawyers: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."^[1]

In other words, you are not just a lawyer at work. As a private citizen, you have a special responsibility to the profession. As such, your organization and your bar will judge you for the materials you post online.

In this regard, it is important to remember that free speech is not a protected right when it comes to your private employment. Offensive or inappropriate conduct online can very well be grounds for disciplinary action, including termination.

For all of these reasons, be vigilant to keep your public profiles professional, and set your personal social media to private settings.

Years ago the adage was: "Don't write in an email anything you don't want to see on the front page of the New York Times." This principle is even more true today. Remember that anything you post or publish online will almost certainly live forever in some fashion.

The internet archives almost everything. Therefore, even deleted postings can be searched.

Your current employer and clients will certainly stumble upon it. Your adversaries are even more likely to dig it up.

And, the same is true for future potential employers, clients and adversaries. The modern pressures to move quickly, therefore, must not compromise deliberation and good judgment. Think twice, click once.

Finally, be honest and post with care. You don't want to be the associate who asks for more time to complete an assignment claiming that an illness prevented you from completing your work over the weekend, only to have weekend beach photos surface on your social media pages.

Know the Rules

If you are employed at a law firm, there is a strong likelihood that your organization has a formal social media policy. In order not to run afoul of these rules, consult your firm's policies early and often.

The firm's guidelines may likely remind you to always be respectful in your posts, to be honest and accurate, to abide by certain applicable laws, not to speak on behalf of the firm or its clients, not to disclose confidential information about the firm and its clients, guidelines for use of firm systems and devices, use of social media at work, and media contacts.

Even if you have not been informed that a social media policy exists, it does not hurt to ask.

Confidentiality and Privilege

Client matters and the business of your organization are confidential and should not be the subject of social media posts, absent explicit permission from your clients and organization.

Model Rule 1.6(a) instructs that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." This includes the identity of a client, a deal you have closed or a litigation victory, and everything in between.

Even attempts to anonymize posts have led to trouble for attorneys. Separate and apart from the obligations of attorney confidentiality is the sacred discovery protection of attorney-client privilege and attorney work product.

These protections belong to the client, and the speed and casualness of social media forums may lead to the careless or inadvertent disclosure of otherwise protected information.

Notably, the duty of confidentiality is broader than the privilege — the duty of confidentiality extends to all information related to the representation even if that information is contained in the public record or is otherwise known to or accessible by others.

Legal Conflicts, Positional Conflicts and Business Conflicts

Conflicts come in all shapes and sizes.

Before you post online about any topic, whether it is a personal interest topic or legal topic, imagine the potential fallout from a derogatory online post about a product only to find out that not only is your firm representing that company, but it is handling litigation relating to that very product.

Therefore, the prudent young lawyer will run conflicts before releasing a social media post, whether it be on LinkedIn or on a product review page.

Likewise, before issuing a thought piece or commenting on a recent court decision, for example, speak with leadership at your organization to determine whether the topic may cause a positional conflict as to matters your firm is handling or whether the business of your organization could be harmed.

Not only are attorneys ethically required to adhere to conflict of interest rules, but, as previously noted, free speech is not a protected right in your private employment.

Attorney Advertising

Your social media profiles may constitute attorney advertising, in which case your jurisdiction's rules concerning attorney advertising and solicitation apply.

For example, guidance in New York provides that if your profile contains only biographical information, the "attorney advertising" disclaimer is not required — while if it contains skills and endorsements, "attorney advertising" should be noted.[2]

Similarly, if the primary purpose of the post is to attract new clients for pecuniary gain, that

likely triggers the "attorney advertising" disclaimer requirement.[3]

Simply put, pay heed to your jurisdiction's rules and guidance on what constitutes attorney advertising and solicitation, and be guided accordingly in your online conduct.

Conclusion

These five pointers provide merely the most basic direction on social media use for newly admitted attorneys.

The benefits of social media competency as a lawyer are myriad. Social media is a terrific tool for client relations, business development and thought leadership.

Proficiency in social media is equally important in your practice in connection with security measures and discovery and trial practice, for example. Social media has become part of the fabric of our lives and it, therefore, exists prominently in many facets of our profession.

Young lawyers should also keep in mind a handful of other road markers along the way, including the following.

Responding to a request for legal advice online can potentially form client relationships. Therefore, take any requests for legal advice into the formal infrastructure of your firm process and system.

Be sure to connect online with care. If you have been invited to connect with someone you don't know or if you've received a cold outreach, proceed with extreme caution. You don't want to be the weak link in your organization.

Uncontrolled use of social media, including social media addiction and unhealthy social comparisons, may have detrimental effects on mental health and overall well-being.

As a new and developing attorney, knowing the rules of the road will help keep you both professionally and personally safe on the long social media journey ahead.

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[1] Model Rules of Prof. Conduct, Preamble [1].

[2] NYCLA Formal Op. 748.

[3] NYC Bar Op. 2015-7.