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A Practitioner's Perspective on Emerging Legal Trends | 2023 Issue 1

Hot Take, Not Hot Mess: How You Can Stay Ethical and Help Clients Communicate Effectively on Social Media During Disputes

For lawyers, social media and Internet communications can be wonderful (getting hired), horrible (receiving a negative online review)¹ or interminable (awaiting a response from a government agency).² It's all part of a day's work.

However, social media communications can be much more difficult for clients. Negative posts by an opponent can turn a basic business dispute into a reputational risk. An employment or family law matter may be far more difficult to resolve if old wounds are reopened online. The client's post might even undermine the entire deal or case.

Since social media is often publicly available even third parties can affect the matter, sometimes in unexpected ways. The Johnny Depp and Amber Heard trial became an Internet sensation. Content creators from lifestyle influencers to K-pop fans posted about the trial, mostly in favor of Depp, and affected the actors' reputations.³ Even attorneys can be outsiders influencing a party through social media and possibly running severe ethical risks.⁴

This article explains how attorneys can stay on the right side of the Rules of Professional Conduct while managing client social media practices during disputes.⁵

The Attorney Must Step Up & Keep Up with Relevant Technology

What is your first step? Embrace social media relevant to your matters. A prudent attorney will ascertain each client's level and type of social media use. Online tools and habits vary widely and may be entirely new to you.⁶

Next, keep up. Clients adapt and adopt. Although the *Depp v. Heard* case was an Internet sensation, social media did not appear to play a major role as evidence. A week after the Virginia jury's verdict, Johnny Depp joined TikTok.⁷ He eventually garnered 16.5 million followers.⁸ As both parties have appealed, it is likely both are now monitoring Depp's TikTok posts (and responses thereto) for information that could be useful should a new trial be granted.

In the longer term, watch the technology adopted by your clients and communities to best anticipate their future risks.⁹ You can even use the issue as an ice breaker with potential clients and contacts by asking "Have you started using any new apps lately?"

1 Responding to negative online reviews by clients raises ethical and practical challenges. See CNA's 2019 newsletter article by Tracy L. Kepler: [He Said What?!? Responding to Negative Online Reviews](#).

2 For simplicity we will use the term "social media" going forward, but the advice herein is equally applicable to communication activities like texting, messaging, emailing, using online tools that allow comments among users, as well as other communications between stakeholders or that discuss a client's matter.

3 Lorenz, T. (2022, June 2). [Who won the Depp-Heard trial? Content creators that went all-in](#). *The Washington Post*.

4 *In Re: Winston Bradshaw Sitton*, BPR #018440 (TN January 22, 2021)(attorney who advised a woman, via Facebook, on how to make hypothetical murder of ex-husband appear to be self-defense receives four-year license suspension. Ex-husband saw the attorney's post and reported the attorney to authorities).

5 This article cites the American Bar Association's Model Rules (ABA RPCs). The rules, ethics opinions, practices and customs in your jurisdiction may differ from the ABA RPCs. Prudent attorneys will review guidance from the relevant jurisdiction(s).

6 Attorneys may be tempted to immediately connect with clients on social media to solidify the relationship, stay apprised of client social media activity and facilitate the communications required pursuant to ABA RPC 1.4 (Communications). This can be risky as clients may expect immediate communication from the lawyer, such as overnight or weekend direct messages. If you connect with clients via social media, set communication rules, in writing, if needed. An attorney may place reasonable time and manner limitations on communications with a client. See NYSBA Comm. on Prof'l Ethics Op. 1144 (2018)(Communications with Client; Withdrawal from Representation of Difficult Client).

7 Bitsky, L. (2022, June 7). [Johnny Depp joins TikTok after Amber Heard trial, thanks fans in first video](#). Page Six.

8 [Johnny Depp TikTok](#) homepage (reviewed November 2022).

9 Lawyers have a duty to be aware of how technology works. See ABA RPC 1.1, Comment 8: "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..."

Explain the Risks of Speaking or Posting to Clients

When attorneys discuss the use of social media with clients, the focus is generally preventing harmful posts or communications. The most common advice is simple: “Don’t say or post anything!”

Yet, social media can be a hard habit for clients to break. It is more effective for an attorney to explain the pitfalls of social media and detail the risks for your client.¹⁰ Describe how social media posts about or relevant to the dispute, especially inflammatory posts, create challenges such as: increased eDiscovery costs, delayed resolution because of more complex discovery demands and motion practice, potential harm to the poster’s substantive legal position and damaged relationships and/or reputations. Caution the client that inflammatory posts or rebuttals reduce the likelihood of resolving the matter quickly.

Don’t forget that third parties may post private information! Remind your client that discussing attorney advice with others can lead to the loss of attorney-client privilege. A client, or family member, sharing attorney advice, documents or the terms of a confidential settlement may put the settlement at risk.¹¹

When Silence is Not an Option

Clients must communicate with the opposing or interested parties during a variety of disputes: employment or educational discrimination claims, family law matters, business disputes during a service agreement, contested ownership of a pet and many others. If a client must communicate, the standard lawyer advice will be to keep statements brief and factual (e.g., “Just say when you will pick up the kids, don’t fight about school”) – and to capture anything untoward the other side posts!

In these situations, a lawyer may wish to provide the client with specific examples of how a post may affect a matter or suggest language that reduces risk. “No Comment,” although dated, is probably the most famous example of a standard response designed to reduce risk.¹²

¹⁰ An attorney should consider several steps to reduce future, relevant client social media posts including: addressing client social media practices in an engagement letter, having a staff member monitor client social media, utilizing social media monitoring software, reviewing posts before publication and sending automated reminders to clients that social media is subject to preservation and discovery obligations. The volume, frequency, and variety of post formats (e.g., video, image, text, etc.) may make such tracking laborious and costly. Clients should also be reminded monitoring takes time and money away from effective legal preparation and that posts by family, friends, employees and others may be found by opposing parties or subject to discovery requests.

¹¹ Stucker, M. (2014, March 4). *Girl Costs Father 80,000 with ‘SUCK IT’ Facebook post*. CNN.

¹² For an example of a suggested response to a negative online review of a lawyer by a client see language suggested by Pennsylvania Bar Formal Op. 2014-200 (2014)(Lawyer’s Response to Client’s Negative Online Review): “A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.”

Remember, despite your strongest admonitions, some clients will be outspoken. Such clients may wish to settle the matter directly with the opposing party,¹³ feel they must discuss the matter on social media or fervently hope the dispute will make them online famous. If clients must post, attorneys should encourage empathy over hostility. Usually, it will work in your client’s favor. Also, keep reminding the client of the risks. Revisit the above issues with your client, especially in writing. Your advice may not eliminate the client’s negative behavior, but the client will be better prepared for future problems.

Innate Elements of Social Media May Reduce a Client’s Ability to Resolve a Dispute

Beyond providing potential evidence, social media can affect a client’s perspective and influence substantive decisions. Social media’s innate properties may also undermine a party’s ability to reach a collaborative, or even reasonable, resolution in several ways:

1. The mere act of posting on social media can be emotionally fulfilling for creators and recipients. If an employee experiences unfavorable treatment or criticism from an organization’s leaders or customers, writing a post or creating a TikTok can give the employee a sense of power over a perceived injustice. Receiving likes, positive comments, media attention and/or seeing the post go viral adds to that sense of fulfillment. Curbing these emotional benefits can be an extremely difficult task for an attorney.
2. Many successful creators prefer emotional content; it is generally more engaging and more likely to go viral.
3. Anger or outrage may be the emotion of choice. Tools such as one-sided descriptions, simple and or simplistic framing, *ad hominem* attacks, coarse language and other techniques may promote user engagement. They also are highly likely to anger, frustrate or humiliate the subject of the post and encourage similar responses. Again, if your client must post, encourage empathy over hostility. In most situations, it will work in your client’s favor.
4. Online tools are required for modern life. For example, low-cost airline Frontier recently discontinued all telephone support. Customers must use chat or social media tools.¹⁴ One of your authors has used Twitter direct messages as an alternative method to connect with organizations that were unresponsive to phone messages. Attorneys telling clients to abjure these tools is unrealistic.

¹³ Remember, although the “no contact with a represented party” rule applies to you as an attorney, it does not forbid represented parties from communicating directly. See ABA RPC 4.2, Comment 4: “Parties to a matter may communicate directly with each other...”

¹⁴ Heyward, G. (2022, November 26). *Frontier Airlines drops its customer service line*. NPR.

These social media factors, especially when communicating with an opponent, reduce all parties' ability to see the dispute dispassionately and work collaboratively toward resolving the matter. The steps below address these challenges.

Conscious Conversations and Techniques to Limit Harmful Communications

In situations where the parties or others are likely to communicate in an unhelpful manner, consider the following ADR processes to foster conscientious and cautious communication.¹⁵

- 1. Purpose Over Posturing.** When speaking with your client accentuate the importance of "getting it right" over "being right." Emphasize that the goal for any communication should be to find a way forward in the dispute – not to score points on the other side. You might ask clients "Are you posting to listen, or to talk?" If the latter, then the client may wish to reconsider the post and the attorney should consider the steps below.
- 2. Employ a Conflict Coach.** A conflict coach is a certified professional who helps a client effectively "vent." The conflict coach teaches the client to become a better communicator. Specifically, to clarify and reframe communications so the client's views and needs can be clearly appreciated and understood by the recipient.

The coach does not directly assist the client in resolving the underlying dispute. The coach resembles a filter; helping the client see matters in an objective manner. A coach also identifies a client's "triggers" (usually known by the client's opponent) and provides the client with tools to diminish or eliminate a triggered response, thereby preventing a potential opponent's thrill of setting off the client.

A conflict coach cannot affect posts made by an opponent or others so additional tools may be necessary.

- 3. Engage a Mediator.** Neutral mediators enable disagreeing parties to have a constructive discussion in a confidential setting.

If social media posts are harming one or more disputing parties, the parties can agree to bifurcate party social media practices from the underlying dispute and mediate problems arising from social media practices.

There are three key benefits of using such mediation.

First, the parties build confidentiality into their process because mediation is inherently confidential. For example, the mediator will require the parties to agree that they will not discuss or share information about the dispute or what is said in the mediation. As a result, parties can experience that NOT speaking (or posting) has benefits as well as see that the opponent is also trying to resolve the dispute.

Second, the mediator can suggest actions that prevent relevant future posts. For example, the mediator might get assurances from the parties that they will not post about the dispute for a certain time period.¹⁶ Or the parties may agree to actively discourage third parties from posting about the matter.¹⁷ The mediator can also explore with all parties immediate social media problems (e.g. business disruption, emotional distress, etc.) as well as potential consequences of negative posts.

Third, where helpful, the parties can design a process for a mediator to "check in" after a successful mediated settlement. This enables the parties to ensure that the solutions agreed upon still satisfy the parties' needs. If not, it is a means for continued conscious conversation.

- 4. Choose Arbitration.** If the parties are intractable or social media use by the parties or others creates a major hindrance to resolving the underlying dispute, the parties may choose arbitration of social media issues.

Arbitration of social media disputes must be carefully designed. Generally, arbitrators are limited by the powers given in an arbitration agreement, cited rules, statutes and the understood sense of fairness. Defining what powers an arbitrator might possess (such as directing removal of a post or setting damages), how parties are to act across multiple social media platforms, ensuring the First Amendment is respected and operating the arbitration process at the speed of social media, will be difficult.

Conclusion

Social media is inextricably part of our lives. Don't allow it to become a harmful part of your client's dispute or expose you to ethical risks. Use the techniques above to ensure your clients create conscientious and helpful communications during disputes that get it right, rather than try to be right.

¹⁵ Before engaging a professional such as a conflict coach or mediator, counsel should determine if such services are permitted and covered by any applicable insurance policy, other contract, party practices or similar.

¹⁶ Such a test can help refine the terms of a final non-disparagement or nondisclosure agreement.

¹⁷ Note, third parties are unlikely to be litigants in a dispute or may be beyond the reach of a court with jurisdiction.

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