Ethical Implications of Social Media in Child Welfare Cases

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Why Should Attorneys who Practice in Child Welfare Care About Social Media?

- Impact on Clients
  - Parents
  - Children
  - Agency and their representatives
- Other Parties
- Lay Witnesses
- Expert Witnesses
- Other Attorneys
The ABA Model Rules of Professional Conduct

- Lawyers play a vital role in preservation of society.
- Fulfillment of this role requires understanding of that role.

  - Preamble (13)
Rule 1.1 Competence

- Lawyer shall provide competent representation to a client
- Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

- Comment 8: To maintain requisite knowledge and skills
  - Lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology
  - Engage in continuing study and education
  - Comply with all continuing legal education requirements
Attorneys should be able to help clients understand how social media can be used against them in child welfare proceedings.

Examples: Geo tags, photos, status updates, tweets, and correspondence with other parties.

Rule 1.2 Scope of Representation

Lawyer shall:

- Abide by client’s decisions on case
- Consult with client
- Abide by client’s decision re. settling a matter
Rule 1.3: Due Diligence

Lawyer shall act with reasonable diligence and promptness in representing a client

- Comment 1–Lawyer should pursue matter on behalf of client despite opposition, obstruction or personal inconvenience.
- Comment 2–Work load must be controlled.
- Comment 3–No professional shortcoming is more widely resented than procrastination.
Due Diligence and Social Media

- To satisfy due diligence, attorneys must recognize that social media plays a role in competent representation.
- “Deep diving” or “digital digging” are used to describe the process of combing or reviewing someone’s social media presence to learn more about that person.
- A quick scan of a social media profile can reveal how that person spends time, the company kept, and typically, the things that that person values.
Rule 1.4: Communications

- Promptly inform client of decision or circumstance re. clients informed consent
- Reasonably consult with client re. client’s objectives
- Keep client reasonably informed about status of the matter
- Promptly reply to reasonable requests for info
- Consult with client about relevant limitations on the lawyer’s conduct when lawyer knows client expects help not allowed by Rules of Professional Conduct or law
Rule 1.6: Confidentiality

- Lawyer shall not reveal info related to representation of client unless:
  - Client gives informed consent,
  - Disclosure is impliedly authorized

- Be careful about inadvertent disclosure by client online and IRL
- Lawyer cannot share confidential information online
- No posting about clients or info about cases
- Picture of files
Rule 2.1 Advisor

- Attorney shall exercise independent professional judgment and offer candid advice about law and other considerations such as:
  - Moral, economic, social and political factors
  - Relevant to client’s situation
Rule 3.2 Expediting Litigation

- Lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client
  - Comment 1–Dilatory practice brings administration of justice into disrepute
Rule 3.3: Candor Toward the Tribunal

Lawyer shall not knowingly:

◦ Make a false statement of fact or law to the court or fail to correct a previously made false statement
◦ Fail to disclose legal authority adverse to client and not disclosed by other counsel
◦ Offer false evidence
Rule 3:4 Fairness to Opposing Party and Counsel

- Lawyer shall not:
  - Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document having potential evidentiary value
  - Falsify evidence
  - Knowingly disobey an obligation of the court
  - In pretrial procedure, make frivolous discovery requests
  - In trial, allude to any matter not reasonably relevant or admissible

- What about social media? Area is in flux.
  - Can advise client about importance of privacy settings
  - Should not advise client to delete social media account which may be evidence
Rule 3.5: Impartiality and Decorum of the Tribunal

- Lawyer shall not:
  - Seek to influence a judge, juror, prospective juror or other official
  - Communicate ex parte unless allowed
When representing a client, a lawyer shall not knowingly:

◦ Make a false statement or material fact to a third person or
◦ Fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6
Rule 4.2 Communications with Person Represented by Counsel

- Lawyer shall not communicate with person represented by counsel in a matter without consent of other lawyer or authorized to do so.
  - Litigant on other side of case attempts to “friend” opposing attorney
  - Attempts to connect on LinkedIn
  - Let other counsel know
Rule 4.3 Dealing with Unrepresented Person

- Lawyer acting on behalf of a client shall not state that they are a disinterested person.
- Lawyer shall correct misunderstanding of unrepresented person re. the lawyer’s role.
- Lawyer shall not give legal advice to unrepresented person other than advice to secure counsel if that advice is in conflict with interest of client.

Can a lawyer use social media to gather information about unrepresented witness?
Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

- Partner in a firm and lawyer who manages in a firm, shall ensure all lawyers in the firm conform to Rules of Professional Conduct
- Direct Supervisor shall ensure other lawyer conforms to Rules of Professional Conduct
- Lawyer responsible for another lawyer's violation of rules where
  - If lawyers orders or ratifies behavior
  - Lawyer fails to take remedial action
Rule 5.2: Responsibilities of a Subordinate Lawyer

- Lawyer bound by rules even if acting at direction of another person
- Lawyer does not violate rules if acts in accordance with supervisory lawyer’s reasonable resolution of an arguable question of professional duty
Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

- Nonlawyer employed, retained by or associated with a lawyer
  - Lawyer who supervises shall make reasonable efforts to ensure efforts are compatible with obligations of lawyer
  - Lawyer may be held responsible of actions of nonlawyer
    - If knows or ratifies
    - Management authority and knows of conduct
It is professional misconduct for a lawyer to:

- Violate or attempt to violate Rules of Professional Conduct
- Criminal Act that reflects adversely on honesty, trustworthiness or fitness
- Engage in conduct that is dishonest, fraudulent, deceitful
- Engage in conduct prejudicial to administration of justice
- State or imply ability to improperly influence government agency or official
Rule 8.3 Reporting Professional Misconduct

- Lawyer who knows another lawyer committed a violation of Rules of Professional Conduct that raises substantial question to lawyer’s honesty, trustworthiness or fitness as a lawyer

- Lawyer who knows a judge has committed a violation of judicial conduct, shall inform the appropriate authorities
Rule 7.1: Communications Concerning Lawyer’s Services

- Lawyer shall not make false or misleading communication about the lawyer or lawyer’s services
- Communication is false or misleading if it contains material misrepresentation of fact or law or omits a necessary fact
Rule 7.2: Advertising

- Lawyer may advertise services through written, recorded or electronic communication, including public media
- Must include name and office address of at least one lawyer or law firm
Rule 7.4: Communication of Fields of Practice and Specialization

- Lawyer shall not imply or state lawyer is certified as a specialist unless:
  - Lawyer has been certified
  - Name of certifying organization is clearly identified
Rely on Rules 4.2 and 4.3

National Ethics Opinion Consensus:
- Okay to view public posts by parties & witnesses
- No friend requests to represented persons
- No deception to gain access to private posts
- Some states require disclosure of connection with legal matter when sending friend request

Source: Chris McLaughlin, Assoc. Professor, UNC School of Government
LinkedIn Endorsements

LinkedIn Endorsement
- ABA Journal 5/21/13 (Robert Ambrogi) cites Rule 7.1
  - Lawyer cannot make false or misleading claims about services
  - Is someone posts something or endorses lawyer and lawyer knows its false–could be issue
  - Can hide endorsements
Don’t Freak Out Over Bad On-Line Reviews!

“I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about.”


In re: Skinner, 740 S.2d 171 (Ga. 2013)

Source: Chris McLaughlin, Assoc. Professor, UNC School of Government
Tsamis’s attorney:

“The public feels entitled to slander a lawyer and they don’t realize they’ve blown their privilege when they do. In this case I think Ms. Tsamis had the right to vigorously defend herself.”

Source: Chris McLaughlin, Assoc. Professor, UNC School of Government
Judicial Use of Social Media

- ABA Formal Opinion 462–2/21/13
- Rule 1.2 ABA Mode Code of Judicial Conduct
  - Avoid conduct that would undermine judicial independence, integrity, or impartiality or create appearance of impropriety
### Relevant Decisions

- **In re. Skinner (Georgia 2014)**
  - Attorney published personal and confidential information about former client.
  - Info included, name, employer, and that former client had a boyfriend.
  - Attorney reprimanded.

- **In re. Pesheck (Wisconsin 2011)**
  - Attorney blogged confidential information about clients.
  - Implied client perjured self.
  - Suspended in IL and WI for 6 months.

  - Attorney posted info on blog about former clients without their permission.
  - Information was not confidential and a matter of public record.
  - Attorney not punished.
  - Other states have held the opposite.
Relevant Decisions

- **In re. Gamble (Kansas 2014)**
  - Attorney contacted mother of client’s child (she was unrepresented and had surrender a child for adoption)
  - Sent an unsolicited document about undoing voluntary surrender
  - Attorney gave false and misleading advice
  - Attorney suspended for six months

- **Sangary on Discipline (Ca. 2015)**
  - Attorney photo shopped pictures of herself into pictures with celebrities as part of advertisement and solicitation of work
  - Suspended for 6 months

- **In re. Joyce Nanine McCool (Louisiana, 2015)**
  - Attorney took to social media to protest rulings of Judges
  - Filed petitions and urged public to contact the court
  - Did not show up for contempt hearings
  - Was disbarred
Ethics Decisions

- CA, Draft Formal Opinion Interim No. 10–0001
  - Attorney posted personal and professional info on her Facebook page
    - Just won another case, who wants to be next?
    - Case finally over, unanimous verdict, who’s next?
    - Just published a new article, let me know if you want a copy
  - Decision: can post info about practice but it must meet requirements for advertising

- MA, Ethics Opinion 12–03
  - Lawyer can store and synchronize electronic work files containing confidential client info across platforms (ie. Google Docs)
    - Undertake reasonable efforts to ensure the provider’s terms and conditions are compatible with lawyers rules of professional conduct
Privacy of Information on Social Media

- Search warrant, court order or subpoena or good faith belief that disclosure is required by law
  - Will access, preserve and share information
- Can include US and International requests
- Can access, preserve and share info with good faith belief that it’s necessary to:
  - detect, prevent, and address fraud or other illegal activity
  - To protect provider, account holder, others
  - Part of investigation
  - Prevent death or bodily harm
Conclusion

- So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

ABA Model Rules of Professional Conduct (preamble)
Resources

- Clash of the Titans: Mixing Personal and Professional On Social Media, ABA Webinar, (July 2013)
- ABA Ethics Opinions
- Chris McLaughlin, Associate Professor, UNC School of Government
Legal Ethics and Social Media: It’s Complicated, John Browning, Dallas Bar Association (Jul. 1, 2015)

Tips for Young Lawyers: Ethics and Social Media, A.B.A. SEC. COMM. & BUS. LITIG. (Feb. 23, 2015), Angela M. Scafuri

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