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Into the Deep: Social Media Policies and Procedures in the Firm Setting
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Thomas G. Wilkinson
Jennifer Ellis
ITINERARY

• Lawyers’ Response to Negative Online Reviews
• Ethical Obligations for Attorneys Using Social Media
• Giving Advice on Client’s Social Media Content
• Lawyer Reviewing Jurors’ Internet Presence
• Exposure to defamation claims via aggressive criticism of opposing side’s claims or veracity
• When does social media constitute lawyer advertising?
• Suggested firm policies and procedures for social media use in the firm setting
LAWYER’S RESPONSE TO NEGATIVE ONLINE REVIEWS


• A negative online review does not trigger the “self-defense” exception to client confidentiality under RPC 1.6(b)(5).
• Not a “controversy” or “proceeding” within the meaning of the rule so as to permit disclosure of client confidential information in response.
• Lawyer’s duty of confidentiality does not cease with termination of representation.
RESPONSE TO CLIENT'S NEGATIVE ONLINE REVIEWS

PBA FO 2014-200 summary:

“While it is understandable that a lawyer would want to respond to a client’s negative online review about the lawyer’s representation, the lawyer’s responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer. We conclude that a lawyer cannot reveal client confidential information in a response to a client’s negative online review by a client absent the client’s informed consent.”
LAWYER'S RESPONSE TO CLIENT'S NEGATIVE ONLINE REVIEWS

Conclusion:

[T]he lawyer’s responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that a lawyer cannot reveal client confidential information in response to a negative online review without the client’s informed consent.”

“[A]ny decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, “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.”
NEGATIVE ONLINE REVIEWS

• Be careful how you respond!
• Best to respond politely (or not at all)
• Do not reveal privileged or confidential client information in any responsive post.
• Response should not exceed what is necessary to respond to the review.
LAWYERS’ RESPONSE TO CLIENT’S NEGATIVE ONLINE REVIEW

Q: Does this leave lawyers to defend themselves and their reputations with one hand tied behind their backs?
Q: What other options does the lawyer have?
A: File a lawsuit of course...
SUING OVER NEGATIVE REVIEWS?

Triggers “Streisand Effect”

• Creates publicity and draws attention to client’s concerns
• Could result in malpractice suit or ethics complaint
• Lawsuit creates the requisite “proceeding” under RPC 1.6(c)(4).
• May share confidential information as necessary to pursue or defend against claim
• Texas law firm sued a client over a negative Yelp review, posted after the firm sued for fees –
• Former client complained in review that “this firm not only won’t help you – they intend to do you harm if they can’t extract enough money of you[.] They are disorganized, deceptive, manipulative and largely disrespected….”
LAWYER REPRIMANDED FOR REVEALING TMI IN REPLY TO BAD AVVO REVIEW

• Chicago lawyer disciplined by Illinois disciplinary authorities after representing American Airlines flight attendant in unsuccessful unemployment benefits claim.
  ▪ Lawyer wrote in reply to client’s negative post on AVVO:
    “...I cannot invent positive facts for him ... his own actions in beating up a female co-worker are what caused the consequences he is now so upset about.”

• Georgia appeals court affirmed verdict in favor of divorce lawyer against former client who described her as a “CROOK lawyer” and an “Extremely Fraudulent Lady” on an online business rating site.
PBA FO 2014-300: ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

• Lawyers may advise clients on content of social networking sites, including removal of information
• Lawyers may accept client reviews but must monitor those reviews for accuracy
• May endorse other lawyers on social networking sites
• May not contact represented persons through social media, but free to access public portion of represented party’s social media site
LAWYERS MAY ADVISE CLIENTS TO TAKE DOWN FACEBOOK POSTS


- What are your ethical obligations when the client has posted potentially damaging photos or other content on a social media site?
- Recognizes increasing importance of social media evidence, as well as Rule 3.4 prohibition against destroying “a document or other material having potential evidentiary value...
LAWYERS MAY ADVISE CLIENTS TO TAKE DOWN FACEBOOK POSTS

• May a lawyer advise client to change privacy settings limiting access to content?
  • Yes.

• May a lawyer instruct client to remove a photo or other content deemed damaging?
  • Yes, subject to qualification.

• Bear in mind that this guidance applies to any social media presence.
ADVISING CLIENTS

• Warn clients about how social media can impact their cases
• Numerous examples of cases harmed by social media
• Permissible to instruct on privacy settings
• Fine to alter privacy settings
• Ok to delete damaging content
• But must preserve first
• Rule 3.4 prohibition against destroying “a document or other material having potential evidentiary value.”
• Must take reasonable steps to provide data believes client has not produced
QUALIFICATIONS

• Lawyer may not instruct or knowingly permit client to delete/destroy relevant photo, link, text or other content

• Lawyer must take appropriate steps to preserve the social media information that may be relevant and discoverable

• Lawyer must make reasonable efforts to obtain and preserve social media content the lawyer knows or reasonably believes has not been produced by the client.
ADVISING CLIENT ON FACEBOOK POSTS

• Virginia state bar suspended lawyer for 5 years for instructing client to delete damaging photos from Facebook and withholding photos from opposing counsel.

• Recommend keeping a record of your advice and follow up to review content of client’s social media page.
JUDICIAL CRITICISM VIA SOCIAL MEDIA

• Florida lawyer received public reprimand for criticizing judge in a blog post as “evil, unfair witch” and “seemingly mentally ill.”

• Illinois public defender fired and suspended for blogging about cases and clients, referring to Judge Clueless.”

• Indiana lawyer and blogger suspended for one year for private emails in which he criticized a judge and his handling of a case.
SOCIAL MEDIA

• Be aware of advertising
• Do not communicate with opposing party
  • No “friending” of adverse parties
• Do not lie or mislead
• Responsible for actions of employees & investigators
• Fine to research jurors
  • But do not communicate
WEB REVIEWS/TESTIMONIALS

• Allowed, **but**
  • Must follow relevant rules
  • Responsible for accuracy of reviews
    • Ask client to edit or remove false statements
    • Respond in comments if client cannot fix
  • May not promise favorable results
AVOID EXPOSURE TO DEFAMATION CLAIMS

• Aggressive statements in support of client’s claims or defenses may expose lawyers to defamation (or related) claims.
• Recent high profile cases (e.g., Cosby’s lawyer sued after criticizing accuser)
• Most states do not grant complete immunity for extra-judicial statements made on client’s behalf
• Will professional liability insurers afford coverage against claims for defamation in the absence of a malpractice claim?
ADVERTISING RULE 7.3: SOLICITATION OF CLIENTS

Recent revisions make clear that online advertising is acceptable. Provide limitations.

• **What is a prospective client?** *See Rule 1.18*
  • Someone “who *consults* with a lawyer *about* the possibility of forming a client-lawyer relationship with respect to a matter.”
  • Lawyer advertising is meant not only to help public obtain legal services, but also learn about legal services
  • Name of firm, email address, website address all appropriate for public dissemination
SOLICITATION OF CLIENTS RULE 7.3

Clarify solicitation

• Comment [1] now defines as: “targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide legal services.”

• Communication to general public is acceptable
  • Billboard
  • Website
  • Search results

• Real time communication not ok
  • Telephone
  • Instant message

• Beware Facebook (or other social media) communication
  • Someone not online more like an email
  • Someone online instant message

"Hi, I'm soliciting for 'Fill My Picnic Basket'."
NUMEROUS OPPORTUNITIES TO RUN THE RISK OF EXPOSURE TO LIABILITY DUE TO SOCIAL MEDIA ACTIVITY

- Avvo daily questions seem so simple and easy to answer....
- Comments or advice in response to legal blog posts
- Rude, defamatory or crude posts online using firm supplied devices not only place the firm in a negative light, but may also create exposure
SOCIAL MEDIA POLICIES IN FIRM SETTING

• Every firm should adopt a social media policy applicable to all employees, not just attorneys
• The policy should have compliance procedures
• Consider inclusion of a disclaimer that blog or post does not constitute legal advice
FIRM SOCIAL MEDIA POLICIES

• Avoid any disclosure of client confidential information or detail that may offend or embarrass a client, judge or other person in the professional setting
• If you would not make the statement in person, don’t make it online
• Avoid comparisons with other lawyers and superlative and subjective claims
FIRM SOCIAL MEDIA POLICY CHECKLIST

- Employees should not post content that would violate any firm policies, including on confidentiality, electronic security and privacy, employment references, EEO, harassment, professional responsibility and workplace security.
- Employees may not create or manage legal blogs or Internet sites without express firm approval.
- Employees should not post web content for non-work related purposes during working hours.
SOCIAL MEDIA POLICY CHECKLIST (CONT.)

- Posts that identify the lawyer as affiliated with a firm should state clearly that any views expressed are employee’s own and not those of the firm or its clients.
- Posts should not create unjustified expectations for actual or prospective clients or be otherwise false or misleading.
- Create a system for keeping track of your communications.
- Do not allow others to praise or commend your lawyers for skills they do not possess.
THANK YOU.

Thomas G. Wilkinson
Cozen O’Connor
(215) 665-3737
twilkinson@cozen.com
www.cozen.com

Jennifer Ellis
Lowenthal & Abrams, P.C.
(610) 667-7511
jennifer@jellis.net
www.lowenthalabrams.com