



ETHICAL ISSUES RELATING TO THE USE OF SOCIAL MEDIA AND OTHER HOT TOPICS

Current Issues and Trends



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April 24, 2019 In-House Counsel Conference

Presenters:

- Barbara Binis - **Reed Smith**
- Rachel Weil - **Reed Smith**
- Jaimee Farrer - **GlaxoSmithKline**



Today's Discussion Points

- **Monitoring Content and Training On Appropriate Use Of Social Media In The Company**
 - Institute a robust social media policy with “Dos and Don’ts”
 - Emphasize that social media is discoverable—sometimes even when strictly internal or designated as “private”—and institute the necessary preservation procedures
 - Institute a policy for outward statements made by employees posted to social media
- **Lessons For In-House and Outside Counsel On Use of Social Media**
 - Lawyers must be mindful of duty of confidentiality and conflicts of interest.
 - Be aware of ethics rules regarding lawyer access of the social media of others.

Employee Use of Social Media

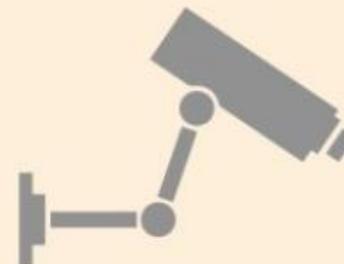
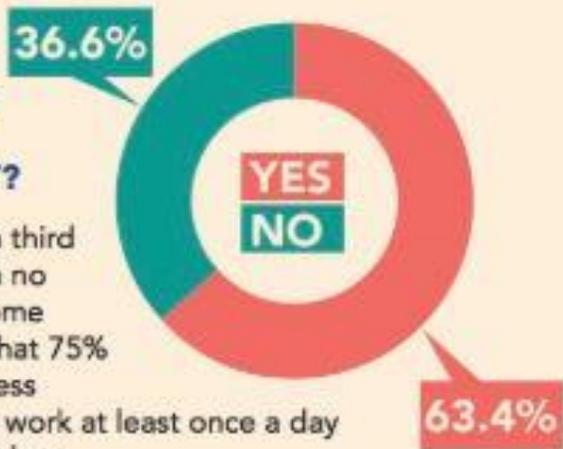


SOCIAL MEDIA IN THE WORKPLACE

how businesses are monitoring the use (and abuse!)
of social media by their employees.

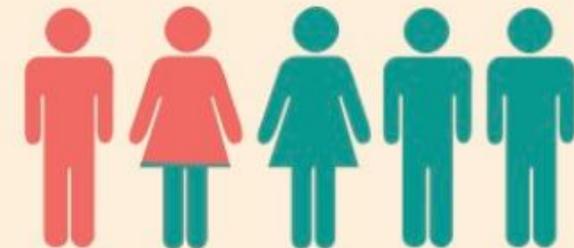
DO YOU HAVE A SOCIAL MEDIA POLICY?

We still see over a third
of businesses with no
policy and with some
surveys showing that 75%
of employees access
social media from work at least once a day
this may be a problem.



DO YOU MONITOR THE USE OF SOCIAL MEDIA AMONGST YOUR EMPLOYEES IN THE WORKPLACE?

YES 32.5%
NO 67.5%



Rule 1.1 Competence: Counsel's Duty to Review Social Media and Advise Clients On Proper Use



“[A] competent lawyer should advise clients about the content that they post publically online and how it can affect a case or other legal disputes . . . tracking a client’s activity on social media may be appropriate for an attorney to remain informed about development’s bearing on a client’s legal dispute.”

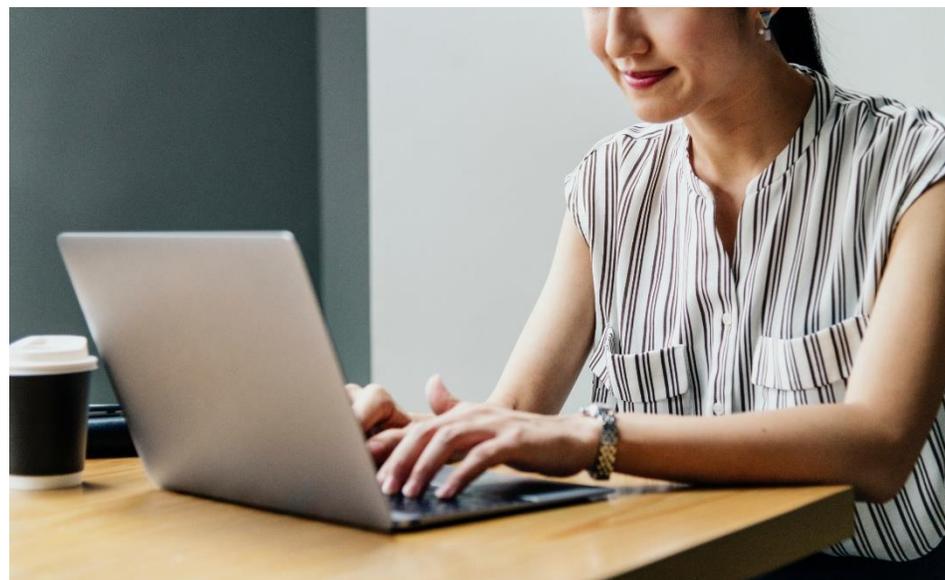
Formal Opinion 2014-300

Securing Communication of Protected Client Information: ABA Formal Opinion 477

Duty of Competence

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.*

- Keep up with technology on ephemeral messaging



Rule 3.4 - Content, Truthfulness & Access



“[G]uide the client appropriately, including formulating a corporate policy on social media use.”

Formal Opinion 745

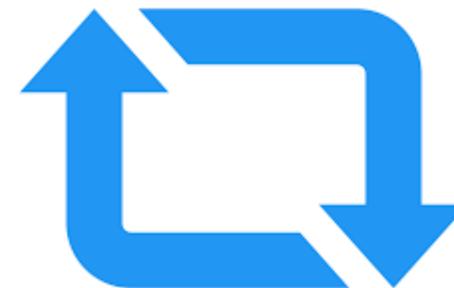
- Such guidance could include:
 - Counseling client to publish truthful and favorable information
 - Discussing the content and advisability of social media posts
 - Advising the client on how social media posts might be perceived
 - Advising the client about how legal adversaries might obtain access to even “private” social media pages
 - Reviewing both posts not yet published and those that have been published
 - Discussing potential lines of questioning that might result

Don't Forget About Third Party Comments

NORTH CAROLINA

BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

Lawyers should advise clients about “third party comments” like retweets, comments, shares and likes. ***Formal Ethics Opinion 2014-5***



Tweets, Comments, Shares & Likes . . .

MONITORING CONTENT, INSTITUTING A POLICY, AND TRAINING EMPLOYEES

General Social Media Guidelines

- **STOP, LOOK & LISTEN** before posting
- **DO NOT** degrade coworkers or company
- **Always** respect the company's image
- **Keep** sarcasm out of the picture
- **Always** brand any opinion as personal
- **DO NOT** disclose confidential information



Good Examples of Company Policies

“Employees are allowed to associate themselves with the company when posting but they must clearly brand their online posts as personal and purely their own.”

Adidas Social Media Policy





“Employees are not allowed to disclose information that is financial, operational and legal in nature, as well as any information that pertains to clients and customers.”

Best Buy Social Media Policy



“The company reserves the right to edit or amend any misleading or inaccurate content depicted in blog posts. The company also reserves the right to delete blog posts violating the code of conduct.”

HP Blogging Code of Conduct

Q: What level of rigor does this promise?



Emphasize the Discoverability of Social Media: No Reasonable Expectation of Privacy Regardless of Privacy Settings

By creating a social account, a user acknowledges that her personal information would be shared with others.



“Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist.”

“[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.”

Tension Between Preservation and Discretion



Removal of Information from Social Pages

The general duty of competence mandates that lawyers must advise clients “regarding the removal of relevant information from the client’s social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of privacy settings.” ***Proposed Advisory Opinion 14-1***

Duty to Preserve Social Media Evidence

- **Data residing on social media platforms is subject to same duty to preserve as other types of ESI**
 - **Duty triggered when one can reasonably foresee that evidence may be relevant to litigation.**
- **Determine on a regular basis what might be discoverable and thus subject to preservation.**
- **Attorney may advise employee that photos may be deleted from Facebook as long as they are otherwise preserved.**

Preserving Social Media Evidence

Hypothetical

Employee of client asks if she can delete embarrassing picture on company social media from the office Halloween party – generally this is ok. See *Barnett v. Deere & Co.*, No. 2:15-CV-2-KS-MTP, 2016 WL 4544052 (S.D. Miss. Aug. 31, 2016)

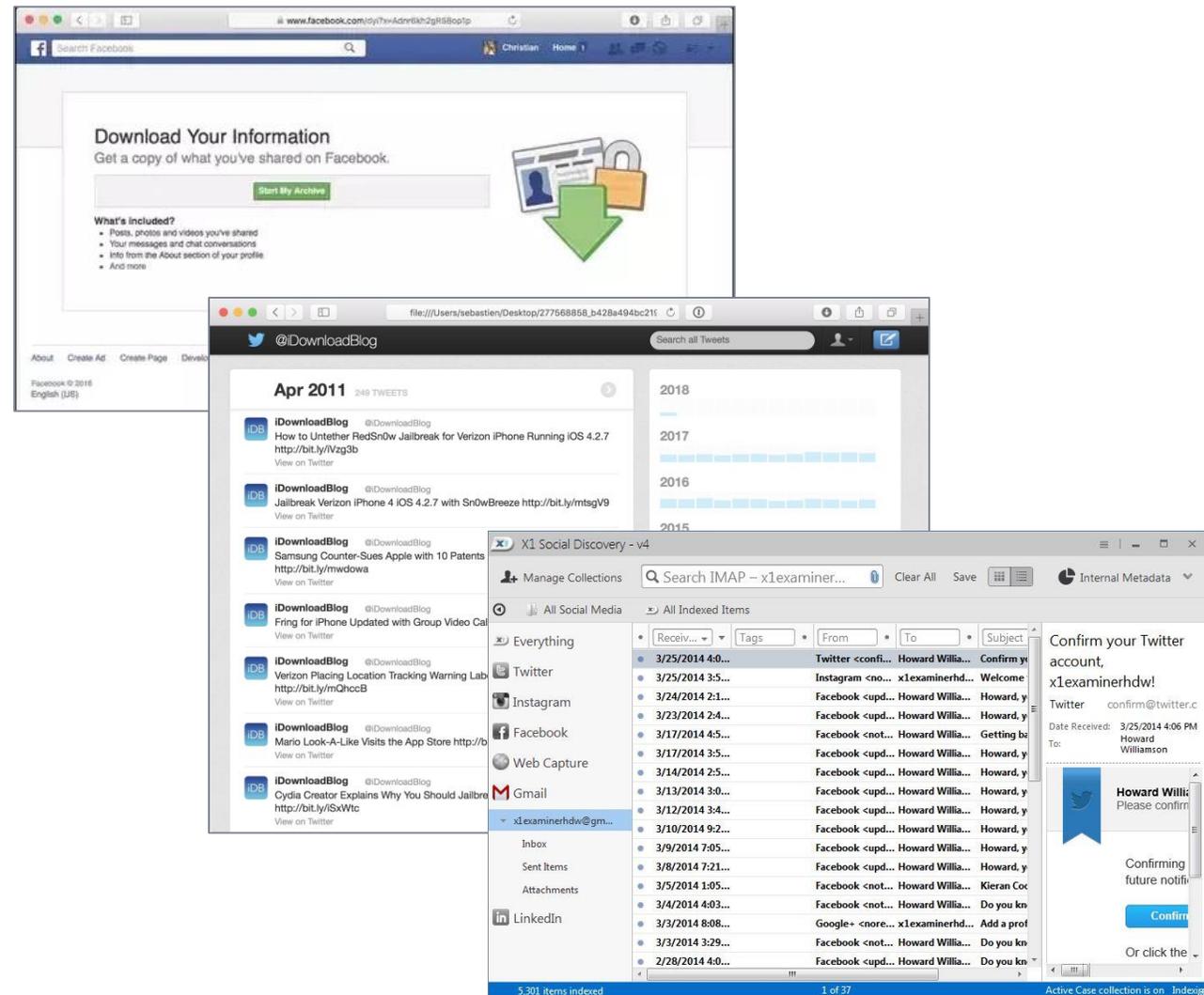
However, if employee received a letter from an attorney representing former employee in sexual harassment suit, including conduct at the party, these photos are potentially relevant and should be preserved.



Preserving Social Media Evidence

Methods of Preservation

- **Facebook** “download your info” button
- **Twitter** “archive” – nonpublic information like IP logs must be obtained by request to Twitter
- Third party vendors for complete preservation
 - Tools to address the collection of social media content, websites, webmail, and YouTube video capture, in one single interface.



Preserving Social Media Evidence



What about preserving potentially relevant communications of employees?

Open question, but *Cotton v. Costco* court denied motion to compel employee text messages on personal cell phones because there was no showing that employer had any legal right to obtain the text messages.

Cotton v. Costco Wholesale Corp., No. 12-2731-JW, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013)

Consequences for Failing to Preserve

Facebook

Lester v. Allied Concrete: Court sanctioned plaintiff and counsel for spoliation of social media evidence where counsel told a paralegal to “clean-up” plaintiff’s Facebook page and paralegal deleted photos and deactivated account.

Allied Concrete Co. v. Lester, 285 Va. 295, 301, 736 S.E.2d 699, 702 (2013)



Virginia State Bar
An agency of the Supreme Court of Virginia

The Virginia State Bar suspended the lawyer for five years for advising his client to delete Facebook posts and de-activate his Facebook account after the litigation started.

In re Murray, Nos. 11-070-088405 and 11-070-088422 (Va. State Bar Disc. Board, July 27, 2013)

Consequences for Failing to Preserve

“E Room” Collaboration

In re Pfizer, Inc. Securities Investigation: Pfizer failed to preserve data from “e-rooms” (internal collaboration apps where employees shared docs and calendars and communicated via discussion boards and instant messaging).

Court found info was relevant because would allow plaintiffs to understand narrative of events in a way not necessarily afforded by custodial production and therefore Pfizer breached its duty to preserve.

In re Pfizer Inc. Sec. Litig., 288 F.R.D. 297 (S.D.N.Y. 2013)



Ephemeral Messaging



<https://www.youtube.com/watch?v=fkXGGhuQs0o>

What Is Ephemeral Messaging?

- Ephemeral messaging is the mobile-to-mobile transmission of multimedia messages that automatically disappear from the recipient's screen after the message has been viewed.
 - Untraceable messages
 - Deletes messages from others' devices as well.
 - Prevents screenshots
 - Message encryption prevents unauthorized access



WhatsApp



SnapChat



Managing Data Storage Costs



According to the Compliance, Governance and Oversight Council, corporate information generally falls into one of four categories with almost 70% of data able to be safely deleted:

- One (1%) percent of data needs to be retained for litigation purposes;
- Five percent (5%) needs to be retained for regulatory compliance reasons;
- Twenty percent (25%) has business value; and
- Sixty-nine percent (69%) has little or no business value.

Ephemeral Messaging Best Practices

- First, clients should not use self-destructing messages to communicate regarding matters relevant to existing, imminent, or reasonably foreseeable litigation.
 - Make sure clients understand this and stop using these messages at the appropriate time.
- Second, lawyers should not advise clients to use self-destructing messages in order to hide information after a preservation duty arises.

Department of Justice - FCPA Corporate Enforcement Policy On Ephemeral Messaging

Initial Policy v. Revised Policy

2017 Policy	2019 Policy Revision
<p>“Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including <i>prohibiting employees from using software that generates but does not appropriately retain business records or communications</i>” [emphasis added]</p>	<p>“Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including <i>implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company’s ability to appropriately retain business records or communications or otherwise comply with the company’s document retention policies or legal obligations</i>” [emphasis added]</p>

Waymo v. Uber



Waymo LLC v. Uber Technologies, Inc., No. C 17-00939 WHA, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018)

APPROPRIATE USE OF SOCIAL MEDIA FOR LAWYERS IN THE COMPANY

Confidentiality

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.

ABA Formal Opinion 480

When a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a).

There is no exception for info that is "generally known" or in a "public record."

- The only exception is client-informed consent.

Blogs

tumblr.

Micro Blogs

twitter

Podcasts and Webinars



ABA

**Rule 1.6: Confidentiality
of Information**

Trial Publicity

Public commentary may be allowed in some circumstances (client consent)

- However, **Model Rule 3.6** provides that a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an **extrajudicial statement** that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.



Avoiding Conflicts of Interest Under Rule 1.7(b)(4)



Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict.

Online communications and interactions with people who are unknown to the lawyer may unintentionally cause the development of relationships with persons or parties who may have interests that are adverse to those of existing clients.



Be Careful With “Endorsements” On Social Media

- Endorsing someone as an “expert” on LinkedIn could come back to bite you if that expert ends up on the other side in litigation
- Endorsing employees who are subsequently fired



Reco M. Mendentions

Direct Sales Consultant at Example Inc.

“ Tom is wonderful to work with, and has exceptional expertise in leadership, coaching, motivation. He consistently demonstrated a solid work ethic at Uber plus a dedication to success. Tom is dedicated, self-motivated, methodical, and very capable. He is not only a reliable and forward thinking Project Manager but also an inspiring team player. Besides... [more](#)



Lin Kedinendorse

Retail Store Manager at Sample Corp.

“ Mr Smith is a motivated, forward-thinking and also intelligent CEO who has lots of knowledge in his field. Broad-minded CEO - his exceptional work flow, skills, ingenuity and comprehension of change requests made the project a dream. Mr. Smith leads by example and many people at XYZ Inc. find his enthusiasm and dedication both inspiring and motivating.... [more](#)



Endor Sements

Social Media Director at Example Company.

“ It was fantastic to work together with John, who was an exceptional CEO. His hands-on approach to career coaching, motivational speaking and consulting and powerful personality won him the respect of the staff. Loyal, insightful and independent. Is always capable of adapting to new working environments. Very positive attitude towards work. John always... [more](#)



USING SOCIAL MEDIA TO INVESTIGATE CLAIMS AGAINST THE COMPANY

NYSBA Social Media Ethics Guidelines

Viewing Public Portion of a Social Media Website

A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer.

Driving down the street where the person lives to observe . . . and gain publicly available information.



NYSBA Social Media Ethics Guidelines

Contacting an Unrepresented Party and/or Requesting to View a Restricted Social Media Website

- A lawyer may communicate with an unrepresented party and also request permission to view a restricted portion of the party's social media website or profile.
- However, the lawyer must use her full name and an accurate profile, and may not create a different or false profile in order to mask her identity.

Driving down the person's street, stopping the car, getting out, and asking the person for permission to look inside [her] house because the lawyer cannot see enough when just driving past.



NYSBA Social Media Ethics Guidelines

Contacting a Represented Party and/or Viewing Restricted Social Media Website



A lawyer shall not contact a represented person or request access to review the restricted portion of the person's social media profile unless express consent has been furnished by the person's counsel.

NYSBA Social Media Ethics Guidelines

Lawyer's Use of Agents to Contact a Represented Party

As it relates to viewing a person's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.



In-House Counsel Checklist

- ✓ **Know what social media and other technology employees are utilizing**
 - Be careful with ephemeral messaging – restrict access to authorized users, provide training, and audit use periodically.
- ✓ **Institute a policy regarding the appropriate use of social media**
 - Keep abreast of new technologies and revise your policies as appropriate
- ✓ **Monitor employee use of social media and other technologies**
 - Watch for employee misuse or violations of social media policy
 - Regularly analyze issues of discoverability and preservation
- ✓ **Be mindful of third party access to employee social media**
 - Remind employees that they should monitor their social media for inappropriate statements of others
 - Be careful about sharing and retweeting social media content without understanding the source.

A reminder about the benefits of ACC membership...

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 - ACC Docket Magazine
 - InfoPAKs
 - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at ChrisStewart@ACCglobal.com.**



QUESTIONS & ANSWERS
