

LinkedIn and Twitter and Slack ... Oh My!!!

Navigating the Ethical Road through Social Media

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Power of Social Media

- Americans on at least one platform
 - 2018: 69%
 - 2005: 5%
- Increased participation by generation
 - 88% of 18-29 year olds
 - 37% of 65+
- Americans with college degrees
 - 77% on Facebook
 - 50% on LinkedIn

Social Media Fact Sheet, Pew Research Center (Feb. 5, 2018)

Tip #1

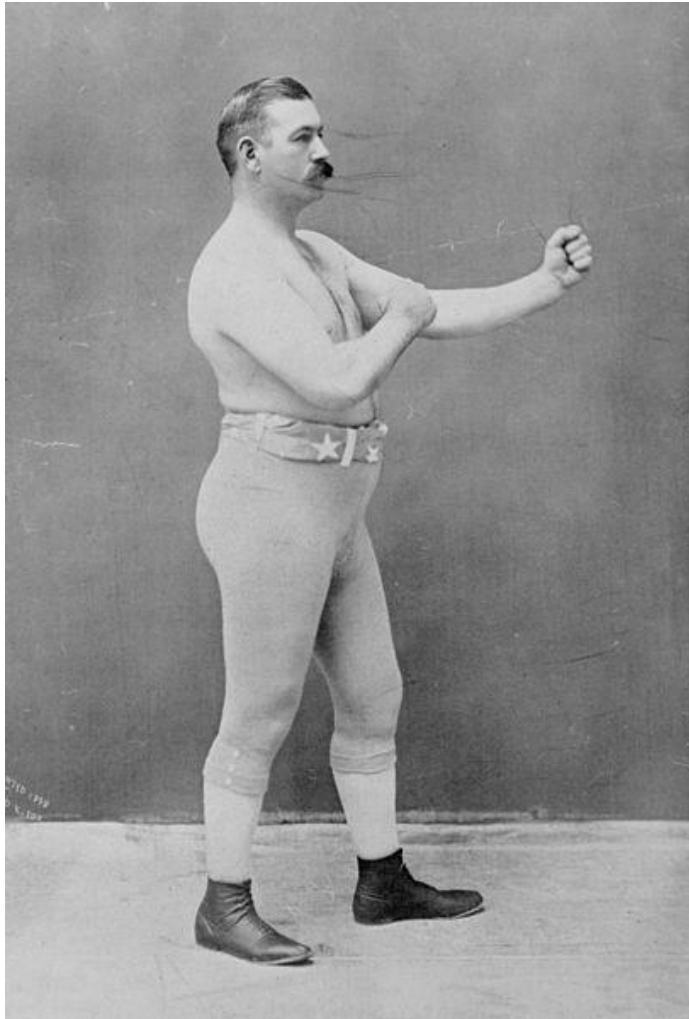
**Remember the
Real World Rules**

A Cautionary Tale ...

“NONE of these guys should have ever been given a badge. We should research how they got on the police department, who trained them, who supervised them, and why they were ever promoted. You put crap in, you get crap out!!!”

~ legacyusa

Social Media Is Fast and Casual



Do Not Let Your
Guard Down!

Tip #2

Know Your Snaps from Your Tweets

Competence & Diligence

- “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.1
- “A lawyer shall act with reasonable diligence and promptness in representing a client.” Rule 1.3
- Roughly 30 states have a duty of competence in technology. *E.g.*, Pennsylvania, New York.



Sara Valentine

@saramvalentine



Everyone hates millennials until it's time to convert a PDF into a Word document

9/18/18, 2:02 PM

1,397 RETWEETS **6,082** LIKES

Tip #3

Know Thyself

Attorney Advertising

- “A lawyer shall not make a *false or misleading* communication about the lawyer or the lawyer’s services.” Rule 7.1
- “A lawyer shall not *state or imply* that a lawyer is *certified as a specialist* in a particular field of law [except where specific certification requirements are met].” Rule 7.2

Your Online Self Is Still You



"Good afternoon, Ted, I'm your online presence."

No False or Misleading Statements

- Attorney Advertising
- Specialist Headings
- Google Yourself!

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Tip #4

Beware of the Back and Forth

Confidential Communications

“A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent . . .”

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

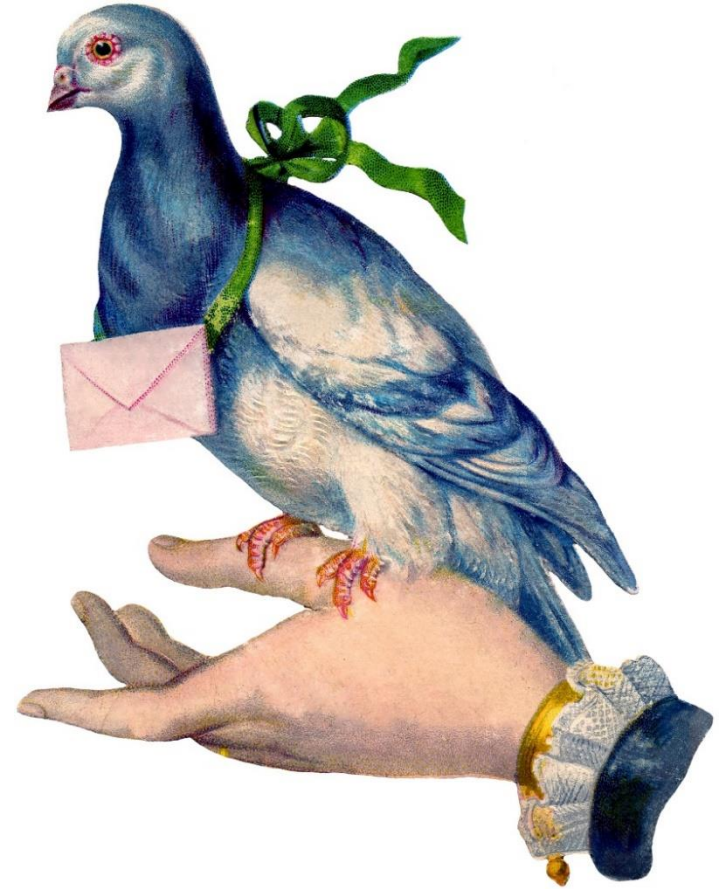
Rule 1.6(a), (e).

Communicating with Clients

- Be Careful Not to Waive Privilege
- Avoid Inadvertent Disclosures
- Read Terms of Service and Privacy Policies
- Be Aware of Retention Requirements

Communicating with Clients

Safest to Communicate
in Traditional Ways



Answering Questions Online

A Series of Minefields:

- Attorney-Client Relationship
- Prospective Relationship
- Unauthorized Practice of Law

How to Avoid the Minefields?

- Avoid Specific Advice
- Do Not Solicit Information
- Include Disclaimers

Tip #5

Don't Tweet Tales

Confidentiality of Information

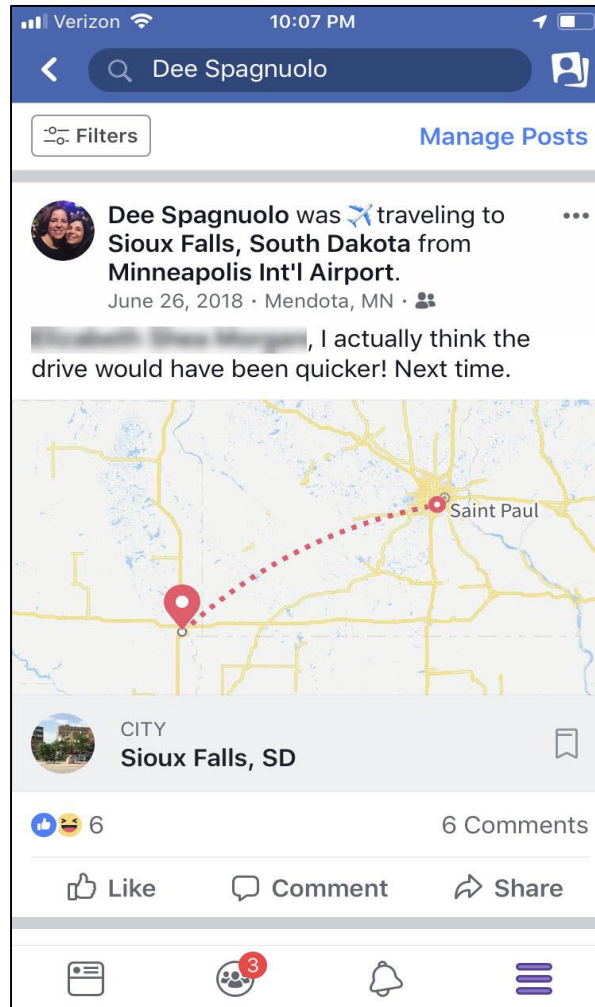
“A lawyer shall not reveal information relating to the representation of a client...” Rule 1.6



Client Confidences

- Exceptions
 - Defending Against Accusations of Wrongful Conduct
 - “Generally Known” Waiver
- Inadvertent Disclosures
 - Indirect Communications
 - Privacy Settings

Indirect Communications



Privacy Settings

The screenshot shows the Facebook interface for a user named Jacquelyn. The top navigation bar includes the Facebook logo, a search bar, the user's name 'Jacquelyn', and links for 'Home', 'Create', and notification icons. The left sidebar lists various settings categories, with 'Timeline and Tagging' selected and highlighted in blue. The main content area is titled 'Timeline and Tagging Settings' and contains a table of settings. A yellow oval highlights the 'Review' section settings.

| Section | Setting | Value | Action |
|----------|--|---------|--------|
| Timeline | Who can post on your timeline? | Friends | Edit |
| | Who can see what others post on your timeline? | Friends | Edit |
| | Allow post sharing to stories? | On | Edit |
| | Hide comments containing certain words from your timeline | Off | Edit |
| Tagging | Who can see posts you're tagged in on your timeline? | Friends | Edit |
| | When you're tagged in a post, who do you want to add to the audience of the post if they can't already see it? | Friends | Edit |
| Review | Review posts you're tagged in before the post appears on your timeline? | On | Edit |
| | Review tags people add to your posts before the tags appear on Facebook? | Off | Edit |

Positional Conflicts

“... a lawyer shall not represent a client if...there is a significant risk that the representation of one or more clients will be materially limited by...*a personal interest of the lawyer.*”

Rule 1.7 (emphasis added)

Tip #6

Please Peruse the Public

Diligence

“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.”

Rule 1.3, cmt. 1.

Social Media as Evidence

“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.”

~ N.Y. State Bar Association’s
Commercial & Federal Litigation Section

Jury Research

“I CAN tell you THIS.
‘Justice’ . . . IS Coming.”

Jury Research

Remember Rule 3.5:
No *Ex Parte* Communication

Leave No Footprint

Tip #7

Don't Be A Frenemy

Represented Parties

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter...”

Rule 4.2

Represented Parties

- Cannot Contact or Communicate Online
- Cannot Request Access to Private Social Media

Unrepresented Parties

- Tread Carefully
- No Deception
- Rules Vary by Jurisdiction

Fake Accounts

- Britney Bella and the Bath Salts
- Don't Be a Poser



Tip #8

**Friends Don't Let Friends
Friend in Unfriendly Ways**

Duty to Supervise

- “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct” Rule 5.1(b).
- “A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer” Rule 5.3(b).

Duty to Supervise Applies Online

If You Can't Do It,
You Can't Ask Someone Else to Do It

A Cautionary Tale from New Jersey

A Facebook Friending Fails

Robertelli v. New Jersey Office of Attorney Ethics,
134 A.3d 963 (N.J. 2016)

Tip #9

**Judges Are People, Too . . .
Mostly**

Impartiality & Decorum of the Tribunal

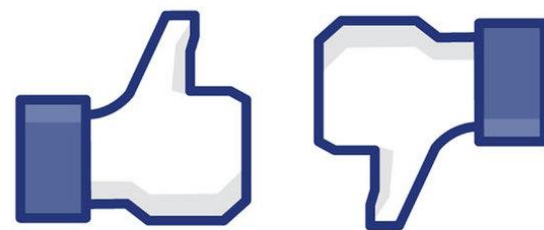
“A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding”

Rule 3.5

Court Ethical Etiquette

- Intent to Influence is Subjective
- While Case Is Pending?
- No Judicial Endorsements
- Social Media “Friendship” Remains an Open Question



Inconsistent Perspectives

- “Mere status of being a ‘Facebook friend’ . . . is an insufficient basis to require recusal.”
 - NY Advisory Committee on Judicial Ethics
- “Judges do not have the unfettered social freedom of teenagers.”
 - Dissent in *Law Offices of Herssein and Herssein, P.C.* (Fla. Nov. 15, 2018)

Tip #10

Counsel Clients Correctly About Their Content

Another Cautionary Tale

The *Snay* Suit

Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.

Like · Comment · 9 minutes ago · 

Review Your Client's Content

- Do Not Advise to Post Content that Is False
- Do Not Use Content that Is False

Advise Your Client on Existing Content

- OK to Advise on Removing or Hiding Content
- Remember Preservation Obligations



A Final Word on Client Social Media Use

- Clients Can Freely Communicate with Represented Parties
- But – You Need to Remember Ethical Obligations

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Questions?

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