By Susan E. Trent

#AttorneysEmbracingSocialMedia[1]

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Albeit a bit "tongue-in-cheek," nobody can scare an attorney like another attorney. There are a fair number of cautionary articles that ominously depict the ethical and evidentiary problems associated with the utilization of social media in the legal profession — in both client-engagement efforts and substantive practice. The fact of the matter is, however, that social media is nothing more than a tool that allows attorneys and clients to communicate, share information, and develop and deepen personal and professional relationships electronically — not wholly different than, say, using the telephone or sending an email.

That being said, social media has distinct advantages over other forms of electronic communication. It interactively engages the user's visual and auditory senses. Social media allows legal professionals to relationship-build *en masse*, but with focus. It fosters the revival of relationships that may have otherwise dissipated with time. Social media facilitates communication with a diverse spectrum of clients with greater frequency, efficiency, immediacy and reach. Most social media platforms are also free of charge. Indeed, universal access may prove to be the most revolutionary aspect of social media for the legal profession as a whole.

Social media is also increasingly becoming a means of effective fact investigation for substantive legal practice. Opposing counsel, witnesses, jurors and parties are immediately researchable online, in addition to traditional methods. Attorneys can even "egosurf" by Googling themselves for "hits" on their various electronic profiles or can meticulously track search engine optimization data by using Google analytics. Internet companies now offer social media management services to assist with duplicate message streams and content management across various social media platforms.[2]

It's a brave new world, folks.

Having a Working Knowledge of Relevant Technology Is Likely a Matter of Competence

The implications of social media for the legal profession were relatively unexplored, unfamiliar and unknown in any formal context until relatively recently. Attorneys never want to be the subject of any disciplinary matter, so it is foreseeable that risk-adverse legal professionals would decline to immediately seize opportunities associated with social media. In 2015, is it possible for attorneys to simply "opt out" of social media and avoid any trouble? The short answer is increasingly and resoundingly "no."

Principally, attorneys who "opt out" ignore the reality that 74 percent of adults 18 years and over use social media sites like LinkedIn, Facebook and Twitter.[3] Social media is also not merely a young adult phenomenon, as 49 percent of adults age 65 or older are currently active on social media.[4] In addition, 40 percent of adults have social media access on their smartphones, with 28 percent accessing social media on a *daily* basis.[5] Of the population of cellphone users, the highly educated, the highest-income earners, young people, blacks and Hispanics are most likely to use their phones to access social media.[6]

If the tsunami of client use were not enough to convince our most skeptical practitioners, in August 2012 the American Bar Association (ABA) made a material change to the ABA Model Rules of Professional Conduct[7] to address the prevalent use of technology. The ABA added comment [8] to Rule 1.1, Competence (as underscored):

> To maintain requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, <u>including the benefits and risks associated with relevant technology</u>, engage in continuing study and education and comply with all continuing legal education to which the lawyer is subject.[8]

It is not a great leap from the ABA's comment to conclude that legal competency requires attorneys to know the benefits and risks of social media, in addition to relevant technology — even if they choose not to use social media as a client-engagement tool. It would be surprising if all of the states do not adopt similar language over time, if they have not done so already. The Federal Rules of Civil Procedure have already been amended to address issues that are related to electronic information in discovery.[9]

1 This is a faux Twitter "hashtag." A "hashtag" is a word or an unspaced phrase prefixed with the hash character to form a label. The term was added to the *Oxford English Dictionary* in June 2014.

2 One such company is Hootsuite. *See, e.g.*, hootsuite.com (unless otherwise specified, all of the links within this article were last visited on March 25, 2015).

3 *See* "Social Networking Fact Sheet," Pew Research Center, *available at* www.pewinternet.org/fact-sheets/social-networking-fact-sheet. According to its website, the statistics are updated whenever new data is available.

4 *Id.*

5 *Id.*

6 *Id.*

7 ABA, Commission on Ethics 20/20, *available at* www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf.

8 *Id.*

9 *See, e.g.*, Fed. R. Civ. P. 37(e).

Courts Use Twitter, Facebook & YouTube

In the March 2015 *ABI Journal*, **Susan M. Thurston** wrote that 13 bankruptcy courts currently use Twitter, six have Facebook pages and four host YouTube channels.[10] They have done so in response to increased customer service expectations and increasing mobile access. Moreover, these numbers are expected to increase. Thurston noted in her article that

> bankruptcy courts now using social media find enormous value in its function, noting that their customer service reach has increased by broadcasting court information over several platforms that appeal to different types of users.[11]

If bankruptcy courts experience significant benefits, then reason dictates that the legal profession (a quintessentially customer-service industry) must also embrace relevant technologies in order to similarly meet client expectations going forward.

How Do Attorneys Participate in Social Media and Relevant Technologies Ethically?

Much like the somewhat-tumultuous implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), before reasonable judges and attorneys could cogitate and work through some of its rougher edges, social media was initially untested and resisted by many in the bar. Fortunately, guidance is increasingly available to legal professionals concerning the permissible and appropriate use of social media and relevant technologies. Much of the guidance seems reasonable and fairly pragmatic, even for rookie attorney "techies." With the adoption of the Model Rules by many states, opinions from other jurisdictions can be very helpful — even where no specific guidance has yet been promulgated by an attorney's particular state ethics committee.

Two of the best recent resources for attorneys desiring to better familiarize themselves with the ethical use of social media in practice come from Pennsylvania and New York and are discussed herein.

Pa. Bar Association Formal Advisory Opinion 2014-300

The Pennsylvania Bar Association (PBA) tackled the following social media issues.

"1. Whether attorneys may advise clients about the contents of clients' social networking websites including removing or adding information." Competent attorneys should advise clients about content that has been posted publicly and how it can affect a legal dispute. Attorneys should expect that opposing counsel are monitoring their clients' electronic presence.[12] Attorneys may not advise clients to alter, destroy or conceal any relevant information whether it is in paper or digital form.

"2. Whether attorneys may connect with a client or former client on a social networking website." Attorneys may connect with clients and former clients. The committee did not recommend using social media to discuss matters related to the representation of the client given the potential for privacy-setting fumbles.

"3. Whether attorneys may contact a represented person through a social networking website." Attorneys may not contact a represented person through social networking sites. Model Rule 4.2 clearly states that an attorney must seek the permission of opposing counsel, no matter the forum.

"4. Whether attorneys may contact an unrepresented person through a social networking website or use a pretextual basis for viewing information on a social networking site that would otherwise be non-public/private." Attorneys may contact an unrepresented person through a social media site but may not use a pretextual basis for viewing otherwise private or non-public information. A third person may not attempt to gain access to private or non-public information for the attorney because such conduct amounts to a false statement and/or misrepresentation.[13] Attorneys have the duty to investigate their clients, but they must do so openly and honestly.

"5. Whether attorneys may use information on a social networking website in client-related matters." Attorneys may use information on social media in disputes if obtained ethically.

"6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate the Rules of Professional Ethics." Attorneys may accept reviews but must monitor them for accuracy. Attorneys should monitor their own social networking sites, and they have a duty to verify the information posted and to remove or correct inaccurate information.

"7. Whether attorneys may comment or respond to endorsements." Attorneys may generally comment or respond to reviews and endorsements, and may solicit endorsements. In the case of a negative review, attorneys may respond, but may not reveal confidential client information in so doing.

"8. Whether attorneys may endorse other attorneys." Attorneys may generally endorse other attorneys on social networking sites. Endorsements from celebrities or judges are generally not permitted. Attorneys providing endorsements may do so based on personal knowledge.

"9. Whether attorneys may review a juror's Internet presence." Attorneys may generally review a juror's public internet presence. However, attorneys who access a juror's private Internet information may engage in *ex parte* communication and violate Model Rule 3.5.

"10. Whether attorneys may connect with judges on social networking sites." Attorneys may connect with judges on social networking sites, provided that the purpose is not to influence the judge in carrying out his/her official duties. However, the PBA cautioned attorneys against doing so as it may create the appearance of bias or partiality. Judges must avoid communications with attorneys that may be construed as *ex parte*.

10 Susan M. Thurston, "Social Media and Mobile Technology to Enhance Court Customer Service," XXXIV *ABI Journal* 3, 42-43, 93, March 2015.

11 *Id.* at 43.

12 This is referring to the case of an employee who forfeited $80,000 from a confidential settlement when his daughter posted about it on Facebook. "Girl Costs Father $80,000 with 'Suck It' Facebook Post," CNN, March 4, 2014, *available at* www.cnn.com/2014/03/02/us/facebook-posts-costs-father/index.html.

13 The PBA noted the case of a former prosecutor who was fired after he posed as the accused killer's ex-girlfriend in order to influence an alibi's testimony.

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The PBA advisory opinion notes that Model Rule 8.4 prohibits attorneys generally from engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation."[14] Attorneys should not identify themselves as experts on social media if the appropriate certification has not actually been obtained. The PBA essentially applies traditional ethical rules to new technology.

Social Media Ethics Guidelines of Commercial and Federal Litigation Section of New York State Bar Association

Like the PBA's wholly advisory opinion, the Commercial and Federal Litigation Section of the New York State Bar is careful to note that it provides "guidelines," as opposed to "best practices," which may or may not have any application in any other jurisdiction. Nevertheless, the offered guidelines are well-reasoned and worthy of general consideration.

The Commercial and Federal Litigation Section discussed the application of advertising rules to attorneys' personal social media sites. It also notes that whether or not a site maintained by an attorney is wholly personal is a question of fact. If it is a "hybrid' site (with personal and professional aspects), then the ethical rules concerning advertising and soliciting apply.

The Commercial and Federal Litigation Section also addressed providing general legal information via a social networking site. According to the section, an attorney may provide general answers to legal questions posed; however, the attorney must stop short of providing specific legal advice on a specific legal matter because doing so may create an attorney/client relationship. The line between "general" and "specific" advice is, of course, difficult to define and circumstance-specific.

The viewing of public information in a social media profile was also considered by the Commercial and Federal Litigation Section. While permissible, a lawyer must understand the technology, since unintentional communications can occur due to some social network platforms notifying the person when their account is viewed. Such automatic messages have been found to constitute *ex parte* communications when seeking to investigate or monitor jurors.

The Commercial and Federal Litigation Section also opined that attorneys must ensure that potentially relevant evidence is not destroyed "once a party reasonably anticipates litigation." The section cautioned that the act of deleting information does not necessarily mean that the information cannot ultimately be recovered. An attorney may counsel a client to post truthful information favorable to the client in a dispute, but may not counsel a client to post untruthful but favorable information.

Admissibility of Social Media Evidence

Once an attorney has ethically obtained relevant social media evidence, may it be used in disputes? Yes. Is it hearsay? Probably not. Criminal decisions are a good resource concerning evidentiary matters in social media. Courts have ruled that text messages are admissions by a party opponent and therefore not inadmissible hearsay.[15] For example, Facebook messages have been deemed admissible under the "state of mind" and "present sense impression" exceptions.[16]

In addition, the Best Evidence Rule permits an attorney to utilize a duplicate or convert electronic information into a usable format like a Portable Document Format (PDF) or Excel spreadsheet, unless there are genuine issues raised about the authenticity of the duplicate or the circumstances make it unfair to admit the copy.[17] Authenticating social media evidence can be tricky. Usually, it can be done through a witness with personal knowledge concerning the particular social media post, offering the Internet history or hard drive to show the post's creation, or via circumstantial evidence, linking the account or post to the person in question.[18]

Attorneys should also consider the appropriate redaction of social media evidence. For example, information pertaining to minors should be redacted from social media exhibits. Rule 11 also applies to social media evidence requiring attorneys to make a reasonable and competent inquiry concerning the validity of electronic information discovered on the Internet; for example, Internet and social media searches often uncover individuals and corporations using similar, if not identical, names and manipulated visual images.

Social Media in Bankruptcy

In bankruptcy, social media may be used for, among other things, impeachment and asset-location purposes. A debtor's social media account may disclose an asset not found in their schedules or a suspiciously more lavish lifestyle than their 341 testimony or Schedules I and J would otherwise indicate. Potential inheritances or lottery winnings may also be discovered. Insiders' social media accounts may disclose unauthorized asset transfers. To the extent that chapter 7 trustees pursue pre-petition claims (*e.g.*, personal-injury claims), a debtor's post may undercut injuries alleged diminishing potential recovery for the estate.

Conclusion

Logic dictates that the legal profession, as it has with past technologies, will increasingly embrace social media in an ethically responsible manner — even as new technologies continually emerge. Simply put, social media as a substantive practice aid and client-engagement tool presents significant opportunity to provide competent, thorough and responsive service to clients. abi

Editor's Note: *Stay connected with ABI events and interact with other members via social media by following ABI on Facebook, LinkedIn and Twitter.*

14 Pennsylvania Bar Association, Formal Opinion 2014-300, p. 4.

15 *State v. Thompson*, 777 N.W.2d 617, 626-27 (North Dakota 2010).
16 *People v. Oyerinde*, 2011 Mich. App. LEXIS 2104 at *27-28 (Mich. Ct. App. Nov. 29, 2011) (printout of chat session is admissible as duplicate).
17 *U.S. v. Nobrega*, 2011 U.S. Dist. LEXIS 55271, at *20-21 (D. Me. May 23, 2011).
18 *Tienda v. State*, 358 S.W.3d 633, 641, n.33 (Tex. Crim. App. 2012) (citing examples of authentication).