

SOCIAL MEDIA AND ATTORNEYS

INTRODUCTION

“Social media” are “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).” Merriam-Webster. Additionally, “social networking” is “the creation and maintenance of personal and business relationships especially online.” *Id.* Although there are thousands of social media websites, as of May 2015, the seven most frequently used sites were Facebook, Twitter, LinkedIn, Pinterest, Google Plus+, Tumblr and Instagram.¹ According to a survey conducted in September 2014 by the Pew Research Center, the following represents the demographics of key social networking platforms: (1) Facebook - 71% of adult internet users and 58% of entire adult population; (2) Twitter - 23% of adult internet users and 19% of entire adult population; (3) LinkedIn - 28% of adult internet users and 23% of entire adult population; (4) Pinterest - 28% of adult internet users and 22% of entire adult population and (5) Instagram - 26% of adult internet users and 21% of entire adult population.²

Social networking websites first appeared almost twenty years ago and have grown rapidly in popularity over time. Social networking websites allow users to create online

¹ <http://www.ebizmba.com/articles/social-networking-websites>

² <http://www.pewinternet.org/2015/01/09/social-media-update-2014/>

profiles, increase their circles of acquaintances, create and join groups based on varied topical interests, and share their daily activities via narrative, photographs and videos. The privacy settings among social networking websites vary. Facebook, for example, permits users to restrict who may view the information a user posts, as the user may limit viewing to specific friends, all friends of the users, friends of the user's friends, and finally, the general public.

Attorneys, as well as their clients, use social media for both business and personal matters. Because the West Virginia Rules of Professional Conduct apply to attorneys' use of social media, regardless of the purpose for such use, the Lawyer Disciplinary Board, through this L.E.O., seeks to provide guidance to members of the bar concerning several aspects of such use. As social media is a rapidly and constantly evolving entity, the Lawyer Disciplinary Board notes that there is no way certain to anticipate such changes and instructs attorneys to adhere to the spirit of the West Virginia Rules of Professional Conduct when using social media and not simply the language of this L.E.O.

Through this L.E.O., the Lawyer Disciplinary Board provides an overview of social media's ethical issues for attorneys, including the following³:

1. Whether attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information;

³ The Lawyer Disciplinary Board finds instructive the Pennsylvania Bar Association's Formal Opinion 2014-300, entitled "Ethical Obligations for Attorneys Using Social Media." Accordingly, through this L.E.O., the Lawyer Disciplinary Board has incorporated much of the analysis, and expanded upon the topics discussed, of the Pennsylvania Bar Association's Formal Opinion.

2. Whether attorneys may connect with a client or former client on a social networking website;
3. Whether attorneys may contact a represented person through a social networking website;
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 private/unavailable to the public;
5. Whether attorneys may use information on a social networking website in client-related matters;
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 any Rule of Professional Conduct;
7. Whether attorneys may comment on or respond to reviews or endorsements;
8. Whether attorneys may endorse other attorneys on a social networking website;
9. Whether attorneys may review a juror's Internet presence;
10. Whether attorneys may connect with judges on a social networking website;
11. Whether attorneys may advertise on a social networking website; and
12. Whether a prospective attorney-client relationship may be formed on a social networking website.

The Lawyer Disciplinary Board concludes as follows:

1. Attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information;
2. Attorneys may connect with a client or former client on a social networking website;
3. Attorneys may not contact a represented person through a social networking website;

4. Although attorneys may contact an unrepresented person through a social networking website, they may not use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public;
5. Attorneys may use information on a social networking website in client-related matters;
6. Attorneys may accept client reviews but must monitor those reviews for accuracy;
7. Attorneys may generally comment on or respond to reviews or endorsements;
8. Attorneys may generally endorse other attorneys on a social networking website;
9. Attorneys may review a juror's Internet presence;
10. Attorneys may connect with judges on a social networking website provided the purpose is not to influence the judge in performing his or her official duties;
11. Attorneys may advertise on a social networking website provided such advertisement complies with the requirements of the Rules of Professional Conduct; and
12. A prospective attorney-client relationship may be formed on a social networking website.

DISCUSSION

A. West Virginia Rules of Professional Conduct

Although there is not a rule within the West Virginia Rules of Professional Conduct that specifically addresses social media or social networking websites, the Lawyer Disciplinary Board finds that the topics addressed in this L.E.O. implicate various Rules, including the following:

- Rule 1.1 (“COMPETENCE”)
- Rule 1.6 (“CONFIDENTIALITY OF INFORMATION”)
- Rule 1.18 (“DUTIES TO PROSPECTIVE CLIENT”)
- Rule 3.3 (“CANDOR TOWARD THE TRIBUNAL”)
- Rule 3.4 (“FAIRNESS TO OPPOSING PARTY AND COUNSEL”)
- Rule 3.5 (“IMPARTIALITY AND DECORUM IN THE TRIBUNAL”)
- Rule 3.6 (“TRIAL PUBLICITY”)
- Rule 4.1 (“TRUTHFULNESS IN STATEMENTS TO OTHERS”)
- Rule 4.2 (“COMMUNICATION WITH PERSONS REPRESENTED BY COUNSEL”)
- Rule 4.3 (“DEALING WITH UNREPRESENTED PERSON”)
- Rule 7.1 (“COMMUNICATIONS CONCERNING A LAWYER’S SERVICES”)
- Rule 7.2 (“ADVERTISING”)
- Rule 7.3 (“SOLICITATION OF CLIENTS”)
- Rule 7.4 (“COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION”)
- Rule 8.2 (“JUDICIAL AND LEGAL OFFICIALS”)
- Rule 8.4 (“MISCONDUCT”)

Pursuant to the Scope, the Rules of Professional Conduct are rules of reason, some of which are imperatives that define proper conduct for purposes of professional discipline, others of which are permissive that define areas under the Rules in which an attorney has discretion to exercise professional judgment. Additionally, some Rules define the nature of relationships between the attorney and other individuals. Accordingly, the Rules of Professional Conduct are partly obligatory and disciplinary and partly constitutive and

descriptive insofar as they define an attorney's professional role. The Comments to the Rules provide guidance for practicing in compliance with the Rules.

B. General Rules Regarding Social Media

Attorneys must have a general understanding as to how social media and social networking websites function. Rule 1.1 (COMPETENCE) of the Rules of Professional Conduct provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Furthermore, Comment 8 to Rule 1.1 provides that “[t]o maintain the requisite knowledge and skill, a lawyer must 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 and comply with all continuing legal education requirements to which the lawyer is subject.” (Emphasis added). Accordingly, in order to comply with Rule 1.1 of the Rules of Professional Conduct, attorneys should both have an understanding of how social media and social networking websites function, as well as be equipt to advise their clients about various issues they may encounter as a result of their use of social media and social networking websites.

Additionally, Rule 8.4 (MISCONDUCT) of the Rules of Professional Conduct provides, in pertinent part, that “[i]t is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Because of the ease of creating a false profile or posting inaccurate or embellished information, attorneys may find

themselves at the risk of violating Rule 8.4(c) while using social media and social networking websites.

C. Questions Addressed in this Legal Ethics Opinion

As outlined above, social media and social networking websites are now a part of our daily lives. The Lawyer Disciplinary Board finds that in order to comply with the Rules of Professional Conduct, attorneys must be mindful of their use of social media and social networking websites, as well as be capable of assisting their clients in navigating the world of social media and social networking websites.

1. Attorneys May Advise Clients About the Content of the Clients' Social Networking Websites, Including Removing or Adding Information

Although attorneys are not responsible for the information their clients post on the clients' social media profile, attorneys may and often should advise their clients about such information. Attorneys should ensure that their clients are aware of the consequences of their actions via social media and social networking websites, as it is reasonable to expect that their clients' activities will be monitored by opposing counsel and others. Additionally, attorneys may wish to monitor their clients' use of social media and social networking websites, as doing so may be helpful for attorneys to stay abreast of matters that may impact their clients' legal disputes. Furthermore, attorneys should also be mindful of the consequences of their own actions when advising and instructing their clients about their clients' use of social media and social networking websites.

Attorneys should review the following Rules of Professional Conduct when considering their duties regarding advising their clients about the content of their clients' social networking websites:

RULE 3.3. CANDOR TOWARD THE TRIBUNAL.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL.

(In pertinent part).

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]

RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Attorneys may advise their clients to change the privacy settings of their social media pages so as to restrict or expand whom may see the information shared on such pages. Attorneys may not, however, instruct their clients to destroy, alter or conceal any relevant content on their social media pages. Although attorneys may instruct their clients to delete information from the clients' social media pages that may be damaging to the clients, provided the attorneys' conduct does not constitute spoliation or is otherwise illegal, attorneys must take the appropriate steps to preserve the aforementioned information in the event that it is deemed discoverable or becomes relevant to the clients' cases. Accordingly, attorneys must respond to discovery requests regarding any relevant content their clients have posted on the clients' social media pages. Finally, attorneys may not advise their clients to post false or misleading information on their social media pages, and if an attorney knows that the client has posted false information, the attorney may not present such information as truthful information in the client's case.

2. Attorneys May Connect with Clients or Former Clients on a Social Networking Website

Attorneys may connect with clients or former clients via social media or on a social networking website. When doing so, attorneys should be mindful that their conduct must adhere to the Rules of Professional Conduct and that they should maintain a professional relationship with their clients. Moreover, attorneys must be aware that any information they post on social networking websites may be seen by clients and former clients, regardless of whether an attorney is connected to these individuals via the attorney's own social media page.

Should an attorney use social media to communicate with a client regarding the attorney's representation of that client, the attorney should retain records of such communications that relate to legal advice given to the client. Furthermore, attorneys must not reveal confidential client information via social media or social networking websites.

3. Attorneys May Not Contact a Represented Person Through a Social Networking Website

Rule 4.2 (COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL) of the Rules of Professional Conduct provides: "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, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Accordingly, attorneys may not contact a represented person through social media or through a social networking website, nor may attorneys send a "friend request" to represented persons. Furthermore, attorneys may

not utilize the assistance of a third party to contact a represented person through social media or through a social networking website in order to gain access to the represented person's social media page, as doing so would constitute a pretextual "friend request" and would violate Rules 4.1 and 8.4(c).⁴ Notwithstanding the prohibitions identified above, attorneys may access the public portions of a represented person's social media page, as any information the represented person shares publically is akin to any public statement the person makes, and thus, access to such public information is not a prohibited communication pursuant to Rule 4.2.

4. Although Attorneys may Contact an Unrepresented Person Through a Social Networking Website, They may not use a Pretextual Basis for Viewing Information on a Social Networking Website That Would Otherwise be Private/Unavailable to the Public

Rule 4.3 (DEALING WITH UNREPRESENTED PERSON) of the Rules of Professional Conduct provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

⁴ Rule 8.4(c) provides: "It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Accordingly, although attorneys may contact an unrepresented person through social media or through a social networking website, they may not use a pretextual basis for viewing information on an individual's social networking website that would otherwise be private or unavailable to the public, as doing so would violate Rule 4.3. Indeed, when contacting an unrepresented person through social media or through a social networking website, attorneys must not only use their actual name, they must also state their purpose for contacting the unrepresented person, as failing to do so would imply that the attorney was disinterested in violation of Rule 4.3.

Furthermore, as previously noted, Rule 8.4(c) prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Thus, attorneys may not utilize the assistance of a third party to contact an unrepresented person through social media or through a social networking website in order to gain access to the unrepresented person's social media page, as doing so would constitute a pretextual "friend request" and would violate Rules 4.1 and 8.4(c). Notwithstanding the prohibitions identified above, attorneys may contact an unrepresented person through social media or through a social networking website, provided attorneys do not state or imply that they are disinterested, provided attorneys make reasonable efforts to correct any misunderstandings concerning attorneys' roles in a given matter, and further provided attorneys do not give legal advice to such unrepresented person.

5. Attorneys may use Information on a Social Networking Website in Client-Related Matters

Attorneys may use information obtained from a social networking website in client-related matters and legal disputes, provided such information was obtained ethically and consistent with this L.E.O. As previously noted, in order to comply with Rule 1.1 of the Rules of Professional Conduct, attorneys should both have an understanding of how social media and social networking websites function, as well as be equipt to advise their clients about various issues they may encounter as a result of their use of social media and social networking websites.

Occasionally, information posted via social networking websites may be used against a client's interests or against an opposing party's interests. Thus, information that is posted on social networking websites may be used in discovery. Indeed, courts have granted motions to compel discovery of information contained on private social networking websites when the individuals' public profiles indicate that relevant evidence may be found on their private profiles. *See McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010) (motion to compel discovery of individual's private Facebook page granted after opposing counsel provided evidence that individual may have misrepresented the extent of their injuries); *see also Romano v. Steelcase Inc.*, 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).

6. Attorneys may Accept Client Reviews but Must Monitor Those Reviews for Accuracy

Some social networking websites, such as LinkedIn, permit users to “endorse” the skills another user has listed on their profile, as well as permit users to request that others endorse them for their specified skills. Clients, former clients and professional colleagues are among the users who may engage in endorsing an individual’s skills as listed on their profile. LinkedIn permits users to remove or limit the endorsements on their profile. Additionally, Avvo, an online legal services marketplace, provides a rating scale for listed attorneys based on a proprietary algorithm, as well as includes attorney profiles, client reviews and peer endorsements. Avvo’s website states that the attorney ratings are “calculated using a mathematical model that considers the information shown in a lawyer’s profile, including a lawyer’s years in practice, disciplinary history, professional achievements and industry recognition [.]”

Rule 7.1 (COMMUNICATIONS CONCERNING A LAWYER’S SERVICES) of the Rules of Professional Conduct provides: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” Although attorneys are not responsible for the content others post on the attorneys’ social networking websites, attorneys: (1) should monitor their social networking websites; (2) must verify the accuracy of any information posted on their social networking websites; and (3) must remove or

correct any inaccurate endorsements. The aforementioned obligations exist regardless of whether the information is posted by the attorney, a client, a former client or a professional colleague. Furthermore, attorneys should be mindful not to post and/or to allow information to be posted to their social networking websites that violates Rule 7.1. For example, if an attorney is endorsed for his or her litigation skills but his or her practice is limited to transactional work, the attorney must remove the inaccurate endorsement.

7. Attorneys may Generally Comment on and Respond to Reviews or Endorsements

Although attorneys may comment on and respond to reviews or endorsements on social media or social networking websites, they must be mindful not to disclose confidential client information without the client's consent, as doing so would violate Rule 1.6 of the Rules of Professional Conduct.

Rule 1.6 of the Rules of Professional Conduct provides, in pertinent part:

RULE 1.6. CONFIDENTIALITY OF INFORMATION.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(c) 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.

Although 1.6(b)(5) permits disclosure of confidential client information under certain circumstances, attorneys may not disclose such information in response to a review or endorsement, positive or negative, on social media or social networking websites. Accordingly, any information attorneys post on social media or social networking websites must not violate the confidentiality that exists between the attorney and his or her client.

Furthermore, Rule 3.6 of the Rules of Professional Conduct provides:

RULE 3.6. TRIAL PUBLICITY.

(a) 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.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

- (i) the identity, residence, occupation and family status of the accused;
- (ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 3.6 prohibits attorneys from making extrajudicial statements that the attorney 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, subject to the aforementioned exceptions. An attorney's social networking website is subject to Rule 3.6. If an attorney's account is publically accessible, it falls squarely under the parameters of Rule 3.6. The Lawyer Disciplinary Board finds, however, even if an attorney's social networking website contains privacy settings, it is subject to Rule 3.6, as any posts or comments shared are disseminated to those with whom the attorney is connected via such social networking website. Although attorneys may state certain information as set forth above, the Lawyer Disciplinary Board cautions attorneys regarding their use of social media and social networking websites regarding any trial publicity.

8. Attorneys may Generally Endorse Other Attorneys on a Social Networking Website

Although attorneys may generally endorse other attorneys on social media or social networking websites, they must comply with Rule 8.4(c)'s requirements to refrain from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Simply stated: attorneys endorsing other attorneys on social media or social networking websites must be honest and only provide endorsements that are accurate and not misleading.

Furthermore, attorneys should be mindful to conduct themselves as professionals while using social media and social networking websites. Although comments concerning other attorneys or judges may not rise to the level of a violation of the West Virginia Rules of Professional Conduct⁵, the Lawyer Disciplinary Board, nonetheless, finds that attorneys should be cautious when commenting about other attorneys or judges via social media and social networking websites, and further advises that a better practice is simply to refrain from making such comments.

9. Attorneys may Review a Juror's Internet Presence

Although attorneys may review the public sections of a juror's social networking websites, attorneys are prohibited from attempting to access the private sections of a juror's social media page, as doing so would violate Rule 3.5 of the Rules of Professional Conduct. Rule 3.5 provides:

⁵ See Rules 8.2 and 8.4(c) as discussed herein.

RULE 3.5. IMPARTIALITY AND DECORUM IN 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 unless authorized to do so by law or court order;

(c) After conclusion of a trial, a lawyer, or an agent of a lawyer, shall not communicate or attempt to communicate with a member of the jury, or an alternate juror who was dismissed prior to deliberations, about the trial, the jury's deliberations or verdict without first applying for and obtaining an order from the court. Notice of a request to communicate with a juror or alternate juror shall be given to all parties;

(d) engage in conduct intended to disrupt a tribunal.

Similarly, attorneys may not utilize the assistance of a third party to contact a juror through social media or through a social networking website in order to gain access to the private sections of a juror's social media page, as doing so would also constitute an *ex parte* communication in violation of Rule 3.5. Finally, attorneys should be mindful of their obligations pursuant to Rule 3.6 regarding trial publicity, as discussed above.

10. Attorneys may Connect with Judges on a Social Networking Website Provided the Purpose is not to Influence the Judge in Performing His or Her Official Duties

Although attorneys may connect with judges on social media or social networking websites, they may not do so if the purpose of the contact is to influence the judge in performing his or her official duties. As noted above, Rule 3.5 prohibits attorneys from seeking to influence judges by means prohibited by law, as well as prohibits attorneys from communicating *ex parte* with judges during a proceeding unless authorized to do so by law or court order.

Furthermore, Rule 8.2 provides, in pertinent part:

RULE 8.2. JUDICIAL AND LEGAL OFFICIALS.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office;

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Therefore, attorneys should also be mindful not to make statements on social media or social networking websites that would violate Rule 8.2, whether such statements are made when connecting directly with a judge or not.

11. Attorneys may Advertise on a Social Networking Website Provided such Advertisement Complies with the Requirements of the Rules of Professional Conduct

Rule 7.2 (ADVERTISING) of the Rules of Professional Conduct provides, in pertinent part: “(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.” Rule 7.2(c) provides that “[a]ny communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.” Advertising via social media or social networking websites is permissible, as it constitutes advertising via the Internet and/or via electronic communication. Indeed, Comment 3 to Rule 7.2 pointedly notes that “[t]elevision, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and

other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public.”

As previously discussed, Rule 7.1 (COMMUNICATIONS CONCERNING A LAWYER’S SERVICES) provides that attorneys shall not make false or misleading communications about the attorney or the services they provide. Attorneys should be mindful about communicating jury verdicts and other results obtained on behalf of clients via social media or social networking websites. Comment 3 to Rule 7.1 notes that “an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.” When making such comparisons, attorneys should consult Comment 3, which provides that “[t]he inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.”

Rule 7.3 discusses, among other media, real-time electronic contact. Although the Rules of Professional Conduct do not provide a definition of “real-time electronic contact,” such contact arguably includes contact via social media and social networking websites in the forms of live chats and comments to individual’s posts. Rule 7.3 provides as follows:

RULE 7.3. SOLICITATION OF CLIENTS.

(a) A lawyer – or a lawyer’s agent, representative or employee – shall not by in-person, live telephone or real-time electronic contact, directly or indirectly solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope and at the beginning and ending of any recorded, if any, or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Finally, pursuant to Rule 7.4 (COMMUNICATIONS OF FIELDS OF PRACTICE AND SPECIALIZATION), West Virginia does not recognize specialization in the practice of law. Accordingly, attorneys may not state or imply that they are certified as a specialist in a particular field of law. Notwithstanding the fact that attorneys are prohibited from stating or implying that they are specialists, attorneys may communicate the fact that they do or do not practice in a particular field of law, and may do so via social media or social networking websites, as well.

Accordingly, although attorneys may advertise via social media or on a social networking website, they must do so in compliance with the Rules of Professional Conduct. Notably, unless they have a relationship as described within Rule 7.3, attorneys must be mindful not to solicit clients by real-time electronic contact, among other forms of media discussed, as doing so would violate the Rules of Professional Conduct.

12. A Prospective Attorney-Client Relationship may be Formed on a Social Networking Website

Rule 1.18 (DUTIES TO PROSPECTIVE CLIENT) of the Rules of Professional Conduct provides, in pertinent part: “(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” Furthermore, Comment 2 to Rule 1.18 provides, in pertinent part:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response.

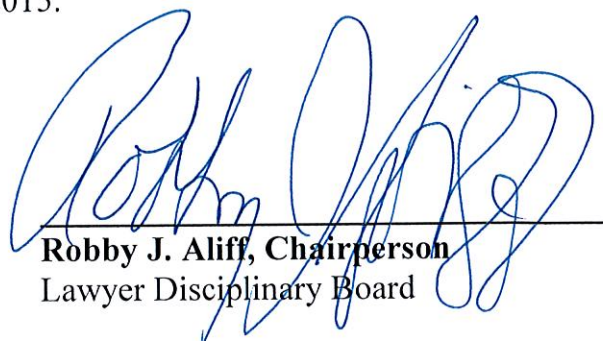
Thus, a prospective attorney-client relationship may be formed via social media or on a social networking website if an individual’s electronic communication with an attorney is determined to be a consultation. Attorneys should be mindful that their communications with

individuals via social media or on a social networking website may place them into a prospective attorney-client relationship with such individuals.

CONCLUSION

Social media and the use of social networking websites have impacted the manner in which individuals communicate, and attorneys must stay abreast to the many changes in technology in order to remain competent as required by the West Virginia Rules of Professional Conduct. Attorneys should be mindful that conduct prohibited in other manners of communication is prohibited in the world of social media and social networking websites, as well. Although the Lawyer Disciplinary Board addressed numerous topics herein, the Lawyer Disciplinary Board finds that the use of social media and social networking websites is a rapidly evolving area and, as such, attorneys are instructed to adhere to the spirit of the West Virginia Rules of Professional Conduct when using social media and social networking websites and not simply the language of this Legal Ethics Opinion.

APPROVED by the Lawyer Disciplinary Board on the 18th day of September, 2015,
and **ENTERED** this 22nd day of September, 2015.



Robby J. Aliff, Chairperson
Lawyer Disciplinary Board