

Social Media in PI Cases: Pitfalls and Possibilities

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Social Media: Pitfalls and Possibilities

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“In all professional functions a lawyer should be competent, prompt and diligent. Competence implies an obligation to keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology.**”

—Preamble to the Montana Rules of Professional Conduct

Social Media Competence

Duty to Understand Social Media

- ♦ Pennsylvania Bar Association Formal Opinion 2014-300
“[I]n order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a **basic knowledge** of how social media websites work, and (2) **advise clients about the issues** that may arise as a result of their use of these websites.”
- ♦ New Hampshire Bar Association Advisory Opinion #2012-13/05
A lawyer “has a **general duty** to be aware of social media as a source of **potentially useful information** in litigation, **to be competent** to obtain that information directly or through an agent, and **to know how to make effective use** of that information in litigation.

What is social media?

- ♦ **Social media** = forms of **electronic communication** through which **users create online communities to share** information, messages, and other content
 - ♦ Facebook, Instagram, WhatsApp, Messenger
 - ♦ Twitter
 - ♦ Snapchat
 - ♦ YouTube
 - ♦ Linked In, AVVO, etc.
 - ♦ Comments sections of articles, videos, etc.

Who is using social media?

- ♦ There are **1.59 billion daily active users on Facebook**.
- ♦ More than **2.1 billion people** use Facebook, Instagram, WhatsApp, or Messenger **every day**.
- ♦ **186 million people** use Snapchat daily. **78% of American internet users** between the ages of **18 and 24** used Snapchat in 2018.
- ♦ **500 million Tweets** are sent per day. That’s almost 5800 Tweets per second.

What can we learn?

- ❖ Beliefs, motivations, “private thoughts”
- ❖ Information re: witnesses present for events
- ❖ Metadata (data about data)
 - ❖ Location
 - ❖ Timing
 - ❖ Usernames
 - ❖ Distribution / proliferation

Social Media and Our Clients

“Dance Like No One is Watching; E-mail Like It May One Day Be Read Aloud in a Deposition”

– Olivia Nuzzi, political reporter for *The Daily Beast*

Duties to our clients

- ❖ Inquire about client's online presence
- ❖ Preservation of discoverable information
 - ❖ "Cleaning up" client's online presence
- ❖ Protection of client's personal information
 - ❖ Changing privacy / access settings
- ❖ Posting before, during, and after litigation

Social Media and Opposing Parties

Mining social media

- ❖ Learn about opposing party's history and habits
- ❖ Expand the scope of discovery
- ❖ Document the timeline
- ❖ Establish liability in contested cases
- ❖ Create opportunities for impeachment at the deposition and trial

Social Media and Juries

Duty to investigate

ABA Formal Opinion 466: Lawyers **can and should review** jurors' social media presence but **there are limitations** on a lawyer's ability to investigate

- ❖ **May review** a juror's Internet presence
- ❖ A lawyer **may not contact a juror** to discover **non-public social media** information
- ❖ If a lawyer discovers evidence of **juror misconduct**, s/he **must take reasonable remedial measures**

Duty to investigate

- ❖ **Pre-trial investigation** in preparation for voir dire
- ❖ Review during trial for **inappropriate posts**
- ❖ Post-trial **confirmation of juror's duty** to fairly weigh evidence

Social Media and Lawyers

Ethical considerations

- ❖ Posting about active cases
- ❖ Advertising
- ❖ Inadvertent creation of attorney-client relationship
- ❖ Negative reviews
- ❖ Endorsements from clients / peers
- ❖ Connecting with judges / potential jurors

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