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Social Media, Ethics and TMI: Why You Won't Be ROFL

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Introduction

> "Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology."[2]

As a general rule, Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct ("TDRPC") forbids lawyers from "accepting or continuing employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence…"[3] A lawyer is responsible for becoming competent and maintaining such competence in the practice of law.[4]

But what is competence in today's digital world and what does that require of our profession? The New York State Bar Association, for example, interprets lawyer competency as necessarily having the requisite "knowledge of the basics of each social media platform that a lawyer or his or her client uses."[5] With the undeniable presence, risk and practical benefits of social media use, lawyers should engage in continuing legal education in order to maintain the requisite knowledge and skill of today's competent practitioner.[6]

To that end, the goal of this paper is to provide you with a basic understanding of *some* of the ethical risks associated with a lawyer's casual and professional use of social media.[7] This paper does not cover other important topics such as a client's use of social

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[1] Commonly used acronym on social media meaning "rolling on the floor laughing."

[2] Texas Disciplinary Rules of Professional Conduct § 1.01, Comment 8; *see also* Claude Ducloux, Your Ethical Duty to Maintain Technological Competence, 96 The Advoc. (Texas) 37 (2021) (providing some editorial hilarity and background regarding the need for and adoption of Comment 8 to the TDRPC).

[3] Tex. Disciplinary R. Prof'l Conduct § 1.01(a).

[4] Tex. Disciplinary R. Prof'l Conduct § 1.01, Comment 8.

[5] Paul Ragusa & Stephanie Diehl, Social Media and Legal Ethics—Practical Guidance for Prudent Use, BAKER BOTTS LLP (Nov. 1, 2016) (quoting Social Media Ethics Guidelines, New York State Bar Association, Commercial and Federal Litigation Section (June 2015)); *see also* Social Media Ethics Guidelines, New York State Bar Association, Commercial and Federal Litigation Section (last updated June 2019) ("…[A] lawyer may choose to use social media for a multitude of reasons… Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer uses in connection with the practice of law or that his or her client may use if it is relevant to the purpose or purposes for which the lawyer was retained.").

[6] Tex. Disciplinary R. Prof'l Conduct § 1.01, Comment 8.

[7] "Social Media" encompasses more online platforms than the instant word limit allows, but in relevant part has been generally defined by the State Bar's Advertising Review Board (the "ARC") and further explained by the Texas Young Lawyers Association:

media and, thereby, violating TROs by "tagging" protected persons on Facebook,[8] juror or judicial misconduct (online), gathering evidence and conducting investigations through social media, spoliation of online evidence, data security, metadata, e-discovery or ESI, nor does this paper afford me the liberty of making lighthearted side-bar comments about lawyers inadvertently using cat filters for virtual court appearances (sadly).

Online Legal Advice and Unauthorized Practice of Law

One of the more common pitfalls comes in the form of an innocent hello in the form of a private Facebook message from an old high school classmate. One message leads to another, and you then quickly realize, your old classmate could not care less about your life—she wants legal advice because, "you're a lawyer, right?".

Forming an attorney-client relationship requires the client's communicated intent that the lawyer render legal services, and the lawyer's consent to do so. Under Texas law, the attorney-client relationship is viewed as a contractual relationship.[9] Under this contractual relationship, the attorney agrees to render professional services on behalf of the client.[10] The attorney-client relationship can be formed by explicit agreement of the parties or may arise by implication from the parties' actions.[11] Courts, however, will not readily impute the contractual relationship absent a sufficient showing of intent.[12]

> The term "social media" includes many different services, such as LinkedIn, Facebook, Twitter [now known as X], Instagram, and various blogging services. The ARC has used the term "electronic communication" since 2005 to broadly encompass all of these areas of social media. Interpretive Comment 17 was revised in 2010 to include specific references to different types of social media.
> […]
> Online media can take numerous forms, each raising different ethical concerns. When approaching any type of online expression, whether creating a website, drafting a blog entry, or posting videos to social media websites, it is important to be professional and remember that all of the disciplinary rules, not just those related to advertising online, apply. In any medium, attorneys must maintain the confidentiality of his or her client, be truthful in statements to others, and avoid dishonesty, fraud, deceit, or misrepresentation.

TYLA Pocket Guide: Social Media 101, Texas Young Lawyers Association (2013).

[8] *Boes v. State*, 675 S.W.3d 104 (Tex. App. - Amarillo, 2023).

[9] *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (C.A.5 (Tex.), 1995).

[10] *Id.*

[11] *Id*.

[12] *Id*. (citing *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied) (holding that husband's attorneys did not have attorney-client relationship with wife even though the wife met with attorneys and signed documents in their offices); see also *Dickey v. Jansen,* 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (concluding that testamentary beneficiaries could not maintain a cause of action against attorney who negligently drafted will due to lack of privity); *F.D.I.C. v. Howse,* 802 F.Supp. at 1563 (finding that a lack of privity prevented bank directors from obtaining indemnity from the law firm which had handled the bank's affairs).

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