

BUSINESS LAW TODAY

12 Rules for Ethically Dealing With Social Media

By [Daniel J. Siegel](#)

The practice of law constantly changes. Despite the technological changes, it remains remarkably similar to how we practiced 10, 30, or even 50 years ago. Although computers, smartphones, and social media didn't exist when many of us passed the bar exam, neither did MRIs or other medical tests, and they didn't prevent doctors from changing.

Consider email, whose rise in popularity was highlighted by the phrase, "You've Got Mail," which even became a popular movie. Eventually, lawyers began to embrace this method of communicating. Next came the Internet, which begat websites, Google, smartphones, and, eventually, social media. Yes, social media, those massively popular websites where people—including clients and lawyers—gossip and reveal their deepest secrets.

Gossip has existed since man could talk, and will endure long after Facebook goes the way of MySpace and Friendster and other previously "hot" websites. But for lawyers trying to contain the damage from rash, thoughtless, or spiteful comments or postings by clients (or the lawyers themselves), social media creates new challenges: How can lawyers limit the spread of important client-related information on social media? Fortunately, the American Bar As-

sociation Center for Professional Responsibility, and numerous state and local bar ethics committees have issued ethical guidance to help lawyers understand the obligations that arise with social media. From those opinions, I offer the following 12 tips gleaned from that guidance (remember to review the opinions from jurisdictions where you are licensed to confirm that they agree with these opinions):

1. Attorneys may not contact a represented person through social networking websites.
2. Attorneys may not contact a party or a witness by pretext. This prohibition applies to other parties and witnesses who are either identified as a witness for another party or are witnesses the lawyer is prohibited from contacting under the applicable Rules of Professional Conduct.
3. Attorneys may contact unrepresented persons through social networking websites, but may not use a pretextual basis for viewing otherwise private information on those websites.
4. Attorneys may advise clients to change the privacy settings on their social media page. In fact, lawyers *should* discuss the various privacy levels of social networking websites with clients, as well as the implications of failing to change these settings.
5. Attorneys may instruct clients to make information on social media websites "private," but may not instruct or permit them to delete/destroy relevant photos, links, texts, or other content, so that it no longer exists. This rule is no different from the obligation not to destroy physical evidence, i.e., evidence is evidence, regardless of how it was created.
6. Attorneys must obtain a copy of a photograph, link, or other content posted by clients on their social media pages to comply with requests for production or other discovery requests.
7. Attorneys must make reasonable efforts to obtain photographs, links, or other content about which they are aware if they know or reasonably believe it has not been produced by their clients.
8. Attorneys should advise clients about the content of their social networking websites, including their obligation to preserve information, and the limitations on removing information.
9. Attorneys may use information on social networking websites in a dispute or lawsuit. The admissibility of the

information is governed by the same standards applied to all other evidence.

10. Attorneys may not reveal confidential client information in response to negative online reviews without a client's informed consent. Thus, responses should be proportional and restrained.
11. Attorneys may review a juror's Internet presence.
12. Attorneys may connect with judges on social networking websites provided the purpose is not to influence judges in carrying out their official duties.

This advice is identical to the advice an attorney would give to clients in the pre-Internet and pre-social media world. Telling clients not to talk about their cases and to preserve evidence, reminding lawyers they cannot reveal confidential information without consent, and knowing that lawyers cannot contact parties and witnesses by pretext, is same advice they gave before the Internet, but is merely repackaged for technology. In short, the more things change, the more they really stay the same, including issues related to ethics and social networking.

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