

BY RICHARD S. KLING, KHALID HASAN, AND MARTIN D. GOULD

Ethics and Social Media



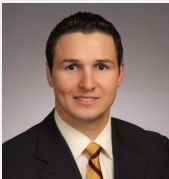
▲
RICHARD S. KLING is a practicing criminal defense attorney and Clinical Professor of Law at Chicago-Kent College of Law in Chicago, where he has been teaching since 1981.

✉ rkling@kentlaw.iit.edu



▲
KHALID HASAN is an associate at Lucas & Cardenas, practicing in the areas of personal injury, wrongful death, and medical malpractice.

✉ KJH@LucasandCardenas.com



▲
MARTIN D. GOULD is an associate attorney at Romanucci & Blandin, LLC, concentrating his practice on wrongful death, catastrophic personal injury, and police misconduct cases.

✉ mgould@rblaw.net

Social media is a trove of potential evidence, but lawyers must be mindful of ethical limits before they attempt to get and use it. This article looks at the narrow body of law and advisory opinions applicable to social media evidence and related issues.

IMAGINE YOU'RE INFORMED BY A CLIENT THAT PHOTOGRAPHS AND STATEMENTS have been posted on Facebook that could harm your case. Your client wants to know whether he should delete the harmful posts. How should you advise him?

The ethics of removing social media posts

While there is little case law in Illinois, ethics opinions in other jurisdictions have provided some insight into how Illinois attorneys should respond. The general rule is: "as long as you do not destroy evidence, introduce misleading evidence, or withhold evidence from discovery, it is ethically permissible to advise your client on the management of social media sites."¹

The Pennsylvania Bar Association addressed this exact question, highlighting the relevant Pennsylvania Rules of Professional Conduct at play (which are the same as the Illinois Rules).² On one end of the spectrum,

1. John Levin, *Social Media - Advising Your Client*, 29 CBA Rec. 40 (Jan. 2015), <http://www.johnlevin.info/legaethics/article/social-media-advising-your-client>.

2. *Id.* (citing Penn. Bar Ass'n Comm'n on Ethics & Prof'l Responsibility, Formal. Op. 2014-300 (2014)).



TAKEAWAYS >>

- While Illinois has yet to publish an official opinion on the subject, the general rule for Illinois lawyers to follow is: when a social media profile is open to the public, there is no ethical violation to search through it, but if the profile is “private,” tread carefully. Avoid contacting witnesses that you know are represented in a matter, as failing to get consent from their attorney to contact their client can lead to an ethical violation.

- Unlike most Americans who can freely share details about their daily lives on social media, lawyers must be cautious, as they are officers of the court who are bound by certain codes of conduct.

- Despite the easy access to information on social media and informal nature of such communications, judges are prohibited from using social media to independently gather information or engage in ex parte communication with attorneys.

the Rules do not prohibit attorneys from advising their clients about handling their social media accounts. In fact, Rule 1.1 implies that “a competent lawyer should advise clients about the content of their social media accounts, including privacy issues....”³

As Comment 6 to Illinois Rule of Professional Conduct 1.1 explains, “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education...to which the lawyer is subject,”⁴ which would include social media evidence given its use in today’s legal proceedings. A lawyer can advise their client to restrict access to the content on their social media by changing the settings to “private,” what content can be removed, as long as there is no violation of any law or ethical rule requiring preservation.⁵

Thus, it is no surprise that the Pennsylvania Opinion concluded: “It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.”⁶

On the other end, there are limits to what an attorney can advise, because lawyers must strike a balance between competent representation and their ethical obligations to preserve evidence. For example, under Illinois Rules 3.3, 3.4, and 4.1, lawyers also have an obligation not to mislead the court, not to conceal or destroy evidence, and not to offer false evidence before the court.

The North Carolina State Bar 2014 Ethics Opinion noted that “a lawyer may advise a client to remove information on social media if it is not spoliation or otherwise illegal.”⁷ In 2013, the Virginia State Bar Disciplinary Board suspended an attorney for five years for advising his client to delete damaging photos from his social media page, withholding the damaging photos from opposing counsel, and withholding email correspondences from the court discussing the plan to delete the damaging photos.⁸ “Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information whether that information is in paper or digital form.”⁹

Another scenario may arise when an attorney posts information about a case, judge, or client on his own social media page. In one example, an assistant public defender in Illinois with 19 years of experience lost her job and had her law license suspended for 60 days when it was revealed she was blogging about confidential details of a case and calling jurors names, and even calling the judge “Judge Clueless.”¹⁰ The assistant public defender referred to some clients by their jail identification

3. Penn. Bar Ass’n Comm’n on Ethics & Prof’l Responsibility, Formal. Op. 2014-300 (2014).

4. Ill. R. Prof’l Conduct 1.1, Comment 6.

5. Penn. Bar Ass’n Comm’n on Ethics & Prof’l Responsibility, Formal. Op. 2014-300 (2014).

6. *Id.*

7. Levin, *supra* note 1.

8. Phila. Bar Ass’n Comm’n on Prof’l Guidance, Op. 2009-02 (2009).

9. Penn. Bar Ass’n Comm’n on Ethics & Prof’l Responsibility, Formal. Op. 2014-300 (2014).

10. John Schwartz, *A Legal Battle: Online Attitude vs Rules of the Bar*, N.Y. TIMES (Sept. 13, 2009), available at http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=3&ref=us.

THE GENERAL RULE FOR ILLINOIS LAWYERS: WHEN THE PROFILE IS OPEN TO THE PUBLIC, THERE IS NO ETHICAL VIOLATION IN SEARCHING THROUGH IT, BUT IF THE PROFILE IS "PRIVATE," TREAD CAREFULLY.

number or first name, writing on one occasion:

Dennis the diabetic whose case I mentioned in Wednesday's blog post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.¹¹

Thus, unlike most Americans who can freely gripe about their daily lives on social media, lawyers must be cautious, as they are officers of the court who are bound by certain codes of conduct.

In another example, an attorney from Florida was reprimanded and fined for questioning a judge's competence and motives on her blog and calling the judge an "evil, unfair witch."¹² As Michael Downey, an active ISBA member and legal ethics professor from Washington University Law School, stated in a *New York Times* interview, "[w]hen you become an officer of the court, you lose the full ability to criticize the court."¹³

Judges and social media

Despite the easy access to information and informal nature of such communications, judges are prohibited from using social media to independently gather information or engage in ex parte communication with attorneys.¹⁴

In one case, a North Carolina judge

was reprimanded "for 'friending' a lawyer in a pending case, posting and reading messages about the litigation, and accessing the website of the opposing party."¹⁵ In that child custody and support case, after looking at one of the parties' Facebook pages, the judge stated he believed one of the parties was not as bitter as he had thought.

Moreover, one of the attorneys, who recently became a Facebook friend of the judge, was believed to have curried favor during the trial through his public Facebook posts praising the judge's decisions, posting on one occasion: "I have a wise Judge."¹⁶ The North Carolina Judicial Standards Commission held that the "ex parte communications and the independent gathering of information indicated a disregard of the principles of judicial conduct."¹⁷

Public v. private information

Does it matter whether a client's or witness's social media profile is "public" or "private"? The short answer is yes. When searching for information on social media, an attorney must be able to decipher whether the content available on a user's profile is deemed to be "public" or "private."¹⁸

Social media sites allow their users to adjust privacy setting on their profile page, which permit users to regulate what content they deem is "public" or "private." "Public" content is considered to be any material viewable to the general public where the user is not limiting access to the content. "Private" content means the user has protected their profile or the content on it from public view. Users may alter the settings, limiting who may or may not view their profile and/or content.

An attorney can access a user's information freely if the information is available to the general public. The issue arises when the user has set their page settings to "private," restricting the general public from viewing or accessing the user's content. The attorney trying to access the user's profile must consider whether an attorney represents the user in the matter.

If an attorney does not represent the user in the matter, the attorney is free to request the user as a "friend" to gain access.¹⁹ Illinois Rule of Professional Conduct 4.3 states:

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.²⁰

However, once the user is represented by another attorney, generally, the attorney cannot request the user as a "friend."²¹ Under Rule 4.2 of the Illinois Rules of Professional Conduct, "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."²²

Even if an attorney does not represent the user, lawyers should be careful in their dealings with the user. Under Rule 4.1 of the Illinois Rules of Professional

11. Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 Ill. B.J. 366, 369 (2010).

12. Schwartz, *supra* note 10.

13. *Id.*

14. Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, ABA Journal.com (June 1, 2009), available at http://www.abajournal.com/news/judge_reprimanded_for_friending_lawyer_and_googling_litigant/.

15. *Id.*

16. *Id.*

17. *Id.*

18. John M. Flannery, *The Discoverability and Admissibility of Social Media in NY Civil Litigation, New Developments in Evidentiary Law in New York*, 2013 Edition (June 1, 2013) (available at 2013 WL 2137253).

19. John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU Sci. & Tech. L. Rev. 465, 471 (2011).

20. Ill. R. Prof'l Conduct 1.1.

21. See *id.*

22. Ill. R. Prof'l Conduct 4.2.

Conduct, a lawyer cannot “make a false statement of material fact or law to a third person,” which can happen quite easily if the attorney is the user’s “friend.”²³ Even a harmless communication between the attorney and an opposing unrepresented user can be considered to be misleading.

Rules imputed to law firm employees

Illinois Rule of Professional Conduct 8.4 states, a lawyer cannot “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”²⁴ This means that a lawyer who cannot ethically access a user’s social media cannot use or induce a third party to gain access on their behalf to avoid an ethical violation.

Attorneys must inform their employees and investigators on what the Rules of Professional Conduct ethically allow when gathering information from social media. Illinois Rule of Professional Conduct 5.3 states,

With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer...²⁵

This means a supervising attorney can be held accountable for a non-lawyer employee’s unethical behavior. Lawyers must take extra precautions in informing their employees and agents on the ethical implications involved with social media.

Limits on gaining access to social media accounts

Three different bar associations have published ethics opinions dealing with

attorneys gaining access to users’ social media profiles. In 2009, the Philadelphia Bar Association Professional Guidance Committee dealt with a hypothetical inquiry from an attorney, whether or not it would be permissible and ethical to have a third party, “someone whose name the witness will not recognize,” friend request a witness if their settings were “private.”²⁶

The attorney wanted to know if a third party could gain access to the witness’ social media account on his behalf to gain information. Also, the attorney would have the third party request the witness as a friend without notifying the witness of the third party’s affiliation to the attorney. The attorney wanted to use the information gathered from the witness’s “private” social media page against the witness at trial.

The Committee found that such behavior would run afoul with various ethical rules. The Committee stated that it would violate Pennsylvania’s equivalent to Illinois Rules of Professional Conduct 4.1 and 8.4. The Committee reasoned that failing to disclose the third party’s affiliation to the attorney would omit “highly material facts.”²⁷ The third party’s relationship to the attorney was considered to be a “highly material fact.” The Committee reasoned that such concealment might induce the witness to allow the friend request, which the witness might not have accepted if they knew of the third party’s affiliation to the attorney. Lastly, the Committee stated the

AVOID CONTACTING WITNESSES YOU KNOW ARE REPRESENTED IN A MATTER, BECAUSE FAILING TO GET CONSENT FROM THEIR ATTORNEY TO CONTACT THEM CAN LEAD TO AN ETHICAL VIOLATION.

lawyer must disclose their connection to litigation.

In 2010, the New York City Bar Association’s Committee of Professional Ethics weighed in on New York’s equivalent to Illinois Rules of Professional Conduct 4.1 and 8.4.²⁸ The Committee addressed issues regarding attorneys creating fake social media accounts to gain access to “private” accounts that were not available to the general public. The Committee stated the rules prohibited “knowingly making a false statement of fact to a third person,” as well as “conduct

23. Ill. R. Prof’l Conduct 4.1.

24. Ill. R. Prof’l Conduct 8.4.

25. Ill. R. Prof’l Conduct 5.3.

26. Phila. Bar Ass’n Comm’n on Prof’l Guidance, Op. 2009-02 (2009).

27. *Id.*

28. N.Y. City Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2010-2 (2010).

ISBA RESOURCES >>

- Richard S. Kling et al., *Admissibility of Social Media Evidence in Illinois*, 105 Ill. B.J. 38 (Jan. 2017), <https://www.isba.org/ibj/2017/01/admissibilityofsocialmediaevidencei>.
- ISBA Free CLE, *Civil Practice Update: Review on E-Discovery* (recorded May 19, 2016), <http://onlinecle.isba.org/store/seminar/seminar.php?seminar=76494>.
- Ed Finkel, *Building Your Case with Social Media Evidence*, 102 Ill. B.J. 276 (June 2014), <https://www.isba.org/ibj/2014/06/buildingyourcasewithsocialmediaevid>.

involving dishonesty, deception, fraud, or misrepresentation.”²⁹ The Committee reasoned that such behavior is misleading and inappropriate.

The Committee stated an attorney may withhold strategic information, such as “disclosing the reasons for making the [friend] request,” when seeking information related to litigation.³⁰ “An attorney or her agent may use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website.”³¹ The Committee made it a point to inform lawyers that there is no ethical prohibition against gathering information from social media that is “public” and available to the general public.

In 2011, the San Diego County Bar Association’s Legal Ethics Committee concluded that the rules of ethics bar an

attorney from making an ex-parte “friend” request of a represented party.³² The attorney wanted to know if it was ethical to send “friend” requests to two employees of the defendant’s company. The attorney was hoping the two employees’ profiles would contain negative remarks about the company.

The Committee reasoned that “represented parties shouldn’t have ‘friends’ like that,” and the committee wanted to get “the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.”³³

That uh-oh feeling

With guidance from various

jurisdictions, Illinois attorneys should use sound judgment and common sense when gathering social media information and/or posting comments on social media.

While Illinois has yet to publish an official opinion on the subject, the general rule for Illinois lawyers to follow is: when the profile is open to the public, there is no ethical violation in searching through it, but if the profile is “private,” tread carefully. Avoid contacting social media users you know are represented in a matter, because failing to get consent from their attorney to contact them can lead to an ethical violation. Ultimately, if it gives you the “uh-oh” feeling, don’t do it. **[E]**

29. *Id.*

30. *Id.*

31. *Id.*

32. San Diego County Bar Ass’n on Legal Ethics, Formal Op. 2011-2 (2011).

33. *Id.*

Reprinted with permission of the *Illinois Bar Journal*,
Vol. 105 #8, August 2017.
Copyright by the Illinois State Bar Association.
www.isba.org