

Third Party Comments or Tags on a Lawyer's Social Media

OPINION #1-20

Question

Can a third party's addition to a lawyer's social media pages have ethical implications to the lawyer?

Short Answer

It depends on the actions the lawyer has taken to prevent and/or rectify the situation.

Recommended Rules for Review

[Indiana Rules of Professional Conduct](#): 1.1; 3.6; 3.8; 5.1; 5.3; 7.1

Summary

An excellent rule of thumb for social media is if the attorney cannot do it in person, he/she cannot do it online. When it comes to third party comments, tags and endorsements, the same rule applies. If the rules prohibit the attorney from saying it, tagging it or endorsing it, then a third party, including the lawyer's staff, create ethical problems for the attorney by posting such content on the attorney's social media. Lawyers must prevent or remove content which would violate the professional rules.

The Ethical Problems

Several rules guide lawyers on policing their social media accounts.

- A lawyer must be well-informed of the "benefits and risks associated with technology relevant to the lawyer's practice." **Indiana Professional Conduct Rule 1.1 [Comment 6]**.
- It is professional misconduct to violate the Rules through the acts of others. **Indiana Professional Conduct Rule 8.4(a)**.

These rules require the lawyer to be aware of the risks which use of this type of technology poses for rule violations, and to act proactively to ensure the use of social media accounts do not place the attorney in violation of the rules.

Several minefields in the area of social media create ethical problems for the attorney.

Minefield #1: False or misleading claims.

Social media presents opportunities for third parties to comment on the attorney's page. Though glowing comments or testimonials from former clients may seem harmless, the rules prohibit statements, even truthful, made by third parties that the lawyer cannot make themselves.

Lawyers are constrained from making a "representation, testimonial, or endorsement of a lawyer or other statement that, in light of all of the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person's legal rights". **Indiana Professional Conduct Rule 7.1 [Comment 2(3) and (8)].**

Minefield #2: Claiming a non-authorized specialty.

Lawyers may not claim a specialty with limited exceptions enumerated in the Rule. **Indiana Rule of Professional Conduct 7.4.**

An endorsement on Linked In from a fellow lawyer claiming a non-authorized "specialty" or a comment by a client that the attorney is a specialist in a non-listed field could subject the lawyer who maintains that page to discipline. The lawyer must act proactively to cure violations through clarification or deletion.

Minefield #3: Non-consensual disclosure of client confidences.

Tempting though it may be for legal staff to brag on social media about a court victory or the signing of a famous new client, a lawyer may not reveal attorney confidences without client consent. **Indiana Professional Conduct Rule 1.6.** Lawyers must supervise staff and subordinate attorneys to insure compliance with the rules. **Indiana Professional Conduct Rule 5.1; Indiana Professional Conduct Rule 5.3(c)(2).**

If a lawyer does post about an ongoing case within the parameters of **Indiana Professional Conduct Rule 3.6**, third-party comments to this post must not reference facts or opinions outside of those permitted by Rule 3.6.

Minefield #4: Adoption of a third-party comment.

An attorney who responds to or "likes" a third party's comment that contains prohibited content could be deemed to have adopted the third-party comment. Such action could subject the attorney to a rule violation. The failure by the attorney to delete prohibited content could be considered acquiescence and expose the lawyer to discipline.

A lawyer should also be careful to adjust privacy settings to avoid being "tagged" to improper content which could show up on the lawyer's page and thereby be deemed adopted by the lawyer.

Minefield #5: Prosecutors with social media accounts.

Criminal jury trials “will be most sensitive to extrajudicial speech.” **Indiana Professional Conduct Rule 3.6 [Comment 5]**. Prosecutors have the dual responsibility of keeping the public informed but also to “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused” which could affect the due process rights of criminal defendants. **Indiana Professional Conduct Rule 3.8**.

While a prosecutor can provide valuable information to their constituents via social media post, it must be recognized that these posts will likely have widespread and lasting influence on potential jurors due to the nature of social media. Real care must be taken therefore to limit posts to information permitted by Rules 3.6 and 3.8.

Allowing public comment to these posts adds an additional risk to the reputation and rights of the defendants. Given the risks to the integrity of the system, it is best practice to simply disable comments on posts regarding pending criminal matters all together. Alternatively, strict guidelines regarding commenting should be clearly enumerated and regular monitoring and removal of comments that contain information outside that allowed by Rules 3.6 and 3.8 should be employed. Again, failure to do so could be perceived as adoption of the offending comments and result in discipline.

Conclusion

The above minefields do not form an exhaustive list. As technology evolves, attorneys should continue to review the rules to ensure social media accounts do not violate attorney ethical rules.

A lawyer must act to amend, remove, block or reject additions to their social media pages that violate the Rules, or risk inaction being perceived as an adoption of those comments or endorsements, which in turn may subject the lawyer to discipline.

Lawyers must be aware of the risks of technology and police social media for false or misleading content. Attorneys should consider use of settings disabling third party posting or setting sites to require approval.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.